

IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY
AT DAR ES SALAAM
APPEAL CASE NO. 42 OF 2018-19
BETWEEN
M/S SALEM CONSTRUCTION LIMITEDAPPELLANT
AND
DAR ES SALAAM WATER AND SEWERAGE
AUTHORITY.....RESPONDENT

RULING

CORAM

- | | | |
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| 1. Hon. Justice (rtd) Sauda Mjasiri | - | Chairperson |
| 2. CPA. Fredrick Rumanyika | - | Member |
| 3. Adv. Rosan Mbwambo | - | 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. Mr. Erick Bitarohize | - | Legal Officer, KM One law expert |
| 2. Mr. Charles Casmir | - | Project Quantity Surveyor |
| 3. Eng. Charles Madushi | - | Project Engineer, Electrical |

FOR THE RESPONDENT

1. Mr. Alex Mpambije -Principal Procurement Officer
2. Ms. Neema N. Mugassa - Legal Officer
3. Mr. Shinyenze Bunyese - Principal Civil Engineer

This Appeal was lodged by M/s Salem Construction Limited (hereinafter referred to as "the Appellant") against Dar es Salaam Water and Sewerage Authority commonly known by its acronym "DAWASA" (hereinafter referred to as "the Respondent").

The Appeal is in respect of Tender No. AE/033/2018-19/W/40 for the Construction of Booster Pumping Station, for Water Supply Systems at Msoga and Chamakweza Villages in Chalinze District Council (hereinafter referred to as "the Tender").

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

On 6th February 2019, the Respondent through the Daily News Newspaper invited eligible Civil Contractors registered as Class III and above to bid for the above mentioned Tender.

The Tender was conducted through the International Tendering Procedures specified in the Public Procurement Act, 2011 and Public Procurement (Amendment) Act, 2016 (hereinafter referred to as "the Act") and the Public Procurement Regulations, GN.No. 446 of 2013 and GN.No. 333 of 2016 (hereinafter referred to as "the Regulations").

The deadline for the submission of tenders was initially set for 21st February 2019 but was later on extended to 28th February 2019. Two (2) firms submitted their tenders by the deadline. These were M/s Shanxi Construction Engineering Corporation and Mineral Company and the Appellant. The tenders were then subjected to evaluation which was conducted in three stages, namely; Preliminary, Detailed and Post Qualification. At the Preliminary evaluation stage both tenders were found to be responsive. Therefore they were subjected to detailed evaluation stage in which tenders were checked for arithmetic correction of errors and ranking. Both tenders were found to be substantially responsive to the requirements of the Tender Document. The Tender by the Appellant was ranked first and was therefore subjected to Post Qualification. In that process, the following weaknesses were observed in the Appellant's Tender.

- i. Lack of experience in works of similar nature and complexity;
- ii. Lack of current work load;
- iii. Lack of key personnel proposed for administration and execution of the contract; and
- iv. Lack of requisite Annual Turnover of TZS. 1.2 Billion Per annum or 3. 6 Billion for 3 years.

Based on the above weaknesses, the Appellant's tender was disqualified. Thereafter, the Evaluation Committee proceeded to conduct Post Qualification to the tender by the second ranked bidder. It was found to be responsive and was therefore recommended for

award of the Tender at the contract price of TZS. 4,089,130,700.00 VAT inclusive.

The Tender Board at its extra ordinary meeting held on 15th March 2019, approved the award recommendations. On 27th March 2019, the Respondent vide a letter Ref. No. DAWASA/PU/MSOGA/W/02 issued a Notice of Intention to Award the Tender to both tenderers. The Appellant received the said Notice on 11th April 2019. The Notice informed the Appellant that the Respondent intended to award the Tender to M/s Shanxi Construction Engineering Corporation and Mineral Company at the contract price of TZS. 4,089,130,700.00 VAT inclusive. However, it did not state the reasons for the Appellant's disqualification. The Appellant was dissatisfied and on 12th April 2019 it applied for administrative review to the Respondent's Accounting Officer challenging the proposed award of the Tender and the Respondent's failure to issue reasons for its disqualification.

On 25th April 2019, the Respondent delivered its decision by dismissing the complaint. It also availed the reasons for disqualification of the Appellant's bid. Dissatisfied further, on 30th April 2019, the Appellant lodged this Appeal.

SUBMISSIONS BY THE APPELLANT

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

1. That, the scope of the works under the contract is mostly related to construction of reinforced concrete structures. Approximately 30% of the required work relates to the supply and installation of the centrifugal pumps on the project, which

is a specialized work. It was its intention to sublet this specialized work to a local company.

2. That, in its bid it has demonstrated adequate experience in the construction of reinforced concrete structures in different conditions. It has also demonstrated experience in installation of Low, Medium and High voltage electrical power and that it has been approved as a contractor to work on Rural Electrification Projects in Tanzania under Rural Energy Agency (REA). Therefore, disqualification of its bid based on this requirement was not proper.
3. That, it has provided adequate information with regard to key staff in its bid. Its bid included the Project Manager and the Site Engineer. It also provided information with regard to other three key staff required in the Tender Document, the Land Surveyor, the Environmental Expert and the Health and Safety Expert used to disqualify its bid. The Respondent could have sought clarification from the Appellant during evaluation process rather than awarding the tender to the bidder with higher bid price.
4. The project is funded by the Tanzanian Tax Payers and that its value is less than TZS. Five Billion. Therefore, priority should have been given to a local bidder. It is of the opinion that its bid has not been properly evaluated since its bid price is lower than the offer made by the proposed successful bidder who is a foreigner. The Respondent disregarded and ignored the Value for Money and treated other issues as priority. The Respondent's act is in contravention of Section 4A (3) (c) of

the Act, which calls for need to obtain the value for money in terms of price, quality and delivery.

5. That, by denying the award of the contract whose value is low to the local bidder, the Respondent contravened Section 55A (3) (a) of the Act, and equally denied capacity building to local bidders.

Finally, the Appellant prayed for the following orders:-

- i. Review of the offer in accordance with Clause 49(1) of the Instruction to Tenderers and the Tender Data Sheet given that in its capacity and competency it is able to undertake the project and deliver it on the quality and time required in the contract;
- ii. Compensation of all legal expenses involved in the Appeal;
- iii. Transport costs during appeal; and
- iv. Award of the contract to it in event the appeal succeeds.

REPLY THE RESPONDENT

The Respondent's reply to the grounds of Appeal can be summarized as follows:-

1. That, the Tender was to be awarded subject to compliance with Clauses 27.5 up to 35 of the Instructions To Tenderers (ITT), which the Appellant was aware of.
2. That, the local bidder could have been given the margin of preference subject to compliance with Regulation 30 of GN. NO.446 of 2013 and Section 54 (3) (a), (i), (ii) and (iii) of the Act.

3. That, the Appellant's bid was found to be responsive in both Preliminary and Detailed evaluation stages. However, it was found to be non-responsive during post qualification stage for lack of requisite experience in relation to the works of similar nature and failure to meet requirements provided under Clause 4 of the Special Conditions of the Tender Document.
4. That, following non-compliance by the Appellant, it was not entitled to a margin of preference as well as award of the Tender.
5. That, the argument that preference was to be given to it based on its price is unjustifiable because the tender is not awarded basing on quoted prices, rather the evaluated price and post qualification.
6. That, awarding the Tender to the bidder with higher price does not imply that there is no value for money. Consideration of value for money is well stipulated under the Act.

Finally, the Respondent prayed for the following remedies:-

- i. The dismissal of the Appeal for lack of merits;
- ii. Payment of TZS. 10,000,000/- being special damages for delaying the procurement and execution of the contract;
- iii. Costs of the Appeal; and
- iv. Any other relief, the Appeals Authority may deem appropriate to grant in the circumstances.

The Appeals Authority observed in the course of reviewing the tender proceedings that there is a point of law for determination before embarking into the merits of the Appeal. It observed that the value of the Tender as well as the proposed contract price to the proposed bidder is within the threshold for exclusive preference which is Ten Billion Shillings for Works Projects. It observed further that instead of restricting this Tender to the local firms, the Respondent employed International tendering procedures in soliciting this tender. It therefore asked the parties to address it on the legality of the tender process by the Respondent.

SUBMISSIONS BY THE RESPONDENT ON THE PO

The counsel for the Respondent submitted that she has perused the relevant provisions of the law and observed specifically at Clause C in the Ninth Schedule to the Regulations requires Works the value of which does not exceed ten billion shillings to be reserved exclusively to local firms or persons. However, such requirement of the law was not complied with by the Respondent in this Tender Process. The counsel submitted that the Respondent's engineering estimates for the Tender was TZS. 3,000,000,000/- (Three billion Shillings). Therefore, only local firms were to be invited to the Tender. She conceded that the Tender process and the subsequent award were not proper in law. She prayed for nullification of the Tender process for the Respondent to re-start the process in compliance with the law.

SUBMISSIONS BY THE APPELLANT

On his part, the Counsel for the Appellant supported the submissions by the Counsel for the Respondent and added that the Respondent was bound to re-commence the Tender process by inviting local bidders prior to using International competitive bidding. He thus prayed for nullification of the whole process.

ANALYSIS BY THE APPEALS AUTHORITY

Having heard the arguments by the parties, the Appeals Authority is of the view that the PO is centered on one main issue calling for determination. That is: Whether the Respondent was justified in floating this Tender Internationally.

In resolving this issue, the Appeals Authority revisited Section 55 of the Act and Regulation 39 of GN.No.446 of 2013 both as amended. It was observed that the law provides in no uncertain terms that where the financial resources are exclusively provided by a Tanzanian public body and where the value of such tender does not exceed the amount specified in the Ninth and Thirteenth Schedules to the Regulations, such a procurement shall be reserved exclusively for local persons or firms meeting eligibility requirements. The Appeals Authority observed further that the Ninth Schedule provides the threshold for the exclusive preference for Works projects to local firms the value of which does not exceed 10,000,000,000/- (Ten Billion Shillings). We revisited the bid prices by the bidders and observed that none exceeded Five Billion Shillings. Furthermore, the Respondent admitted during its submissions on the PO that the value

of the Tender according to engineering estimates was TZS. 3,000,000,000/- (Three Billion Shillings). The Appeals Authority is of the considered view that based on the estimates; this Tender should have been restricted to local firms only. To the contrary, the Respondent did not do so. It invited bids under International bidding procedures. The Appeals Authority is of the firm view that the Respondent should have invoked that method upon failure by the local firms to meet the requirements of the Tender. This was not the case.

For purposes of clarity the said provisions are reproduced hereunder;

"Sec. 55(1) Where financial resources are exclusively provided by a Tanzanian public body, each procurement of works, goods or services that has a value not exceeding a threshold specified in the Regulations shall be reserved exclusively for local persons or firms.

(2) Where the procuring entity does not proceed with the local persons or firm set-aside under subsection (1), and procures on unrestricted basis, the procuring entity shall include in the procurement file the reason or reasons for unrestricted procurement.

(3) N/A

(4) Where the procuring entity receives no acceptable offers from responsible local persons

or firms, the set-aside procurement shall be withdrawn and if the requirements are still valid, new offers shall be resolicited on unrestrictive basis.

Reg. 39 (1) The procurement of works, goods, consultancy or non consultancy services with a value not exceeding the amount prescribed in the Ninth and Thirteenth Schedules to these Regulations, shall be reserved exclusively for local persons or firms who meet requirements of Section 51 of the Act.

(Emphasis Added)

In view of the above provisions, the Appeals Authority is of the considered view that the Tender process was not conducted in compliance with the set principles of the law. In addition, the Respondent failed to justify the modality it had used in floating this Tender using International Bidding Procedure. The Appeals Authority therefore is of the firm view that the whole Tender process was a nullity and the subsequent award of the Tender to a foreign firm lacks legal justification.

Based on our findings above, the Appeals Authority hereby nullifies the whole Tender process and order the Respondent to re-start the tender process in accordance with the law.

Order accordingly.

Since the Point of law was raised *suo motu* by the Appeals Authority each party shall bear its own costs.

The Right to Judicial Review as per Section 101 of the Act is explained to the parties.


This Ruling is delivered in the presence of the Appellant and the Respondent this 14th day of June 2019.



JUSTICE (RTD) SAUDA MJASIRI

CHAIRPERSON

MEMBERS:

1. CPA. FREDRICK RUMANYIKA 
2. ADV. ROSAN MBWAMBO 