

IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY

AT DAR ES SALAAM

APPEAL NO. 32 OF 2018-19

BETWEEN

M/S S.E.C (EAST AFRICAN) COMPANY LTD.....APPELLANT

AND

THE BANK OF TANZANIA (BOT).....RESPONDENT

DECISION

CORAM

- | | | |
|-------------------------------------|---|-------------|
| 1. Hon. Justice (rtd) Sauda Mjasiri | - | Chairperson |
| 2. CPA Fredrick Rumanyika | - | Member |
| 3. Mr. Rhoben Nkori | - | Member |
| 4. Mr. Ole-Mbille Kissioki | - | Secretary |

SECRETARIAT

- | | | |
|------------------------|---|---------------|
| 1. Ms. Florida Mapunda | - | DST |
| 2. Mr. Hamis Tika | - | Legal Officer |
| 3. Ms. Violet Limilabo | - | Legal Officer |

FOR THE APPELLANT

- | | | |
|--------------------------|---|--------------------|
| 1. Mr. Ntuli Mwakyuse | - | Managing Director |
| 2. Mr. Emilian Kimaro | - | Engineer |
| 3. Mr. Joseph Mcharo | - | Marketing Officer |
| 4. Mr. Fadhili Ibrahim | - | Marketing Officer |
| 5. Mr. Moses Mfalanyombo | - | Engineer |
| 6. Mr. Joseph Muhagule | - | Project Supervisor |

FOR THE RESPONDENT

- | | | |
|----------------------|---|---------------------|
| 1. Mr. Deodath Mushi | - | Legal Officer (Adv) |
| 2. Mr. Charles Mdai | - | Legal Officer |

- | | | |
|---------------------------|---|----------------------------------|
| 3. Mr. Ferdinand Munthali | - | Electrical Engineer |
| 4. Mr. Edward Machimu | - | Manager Procurement |
| 5. Mrs. Delphine Kasembe | - | Assistant Manager
Procurement |

The Appeal was lodged by M/s S.E.C (East African) Company Limited (hereinafter referred to as "the Appellant") against the Bank of Tanzania commonly known by its acronym BOT (hereinafter referred to as "the Respondent"). The Appeal is in respect of Tender No. PA/082/2018-19/MTR/G/268 for Supply, Installation, Testing and Commissioning of Passenger Lift at Bank of Tanzania Mtwara Branch, Shangani Residential Flats Block "B" in Mtwara Municipality (hereinafter referred to as "the Tender").

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

The Tender was conducted through the National Competitive Bidding procedures as provided under the Public Procurement Act 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 "the Regulations").

On 26th November 2018, the Respondent advertised the Tender through the Daily News newspaper whereby eligible tenderers were invited to submit their bids. Four tenderers purchased the Tender Document and all met the deadline for submission of tenders which was set on 14th December 2018.

The tenders were subjected to evaluation which was conducted into three stages namely; Preliminary, Detailed and Post qualification evaluation. During the Preliminary Evaluation tenders were checked for commercial

and technical responsiveness. Among the four submitted tenders, three of them including that of the Appellant were found to have not complied with some of the technical specifications provided for in the Tender Document; thus, the tenders were disqualified. The remaining tender by M/s Derm Elevators Limited was subjected to detailed evaluation and later on Post qualification. The said firm was found to have complied with all Tender requirements; thus, the Evaluation Committee recommended it for award of the Tender. The Tender Board at its meeting held on 4th January 2019 approved the award of the Tender to M/s Derm Elevators Limited at a contract price of TZS 134,076,966/- VAT inclusive.

On 7th January 2019, the Respondent issued a Notice of Intention to Award which informed all the tenderers, the Appellant inclusive, its intention to award the Tender to M/s Derm Elevators Limited. The said letter also informed the Appellant that its Tender was disqualified for two reasons; namely, first, failure to indicate a battery operated Automatic Rescue System and second, they offered to supply the lift with back side round hand rail instead of a hand rail on two sides as was specified in the technical specifications.

Dissatisfied with reasons given for its disqualification, the Appellant filed an application for administrative review to the Respondent on 10th January 2019. On 23rd January 2019, the Respondent informed the Appellant that the Tender process has been suspended and it was still working on its complaint. Having failed to receive the Respondent's decision with respect to the complaint filed, the Appellant on 30th January 2019 lodged an Appeal to this Appeals Authority.

SUBMISSIONS BY THE APPELLANT

The Appellant's submissions may be summarized as follows:-

1. That, the tenderer proposed for award of the tender lacked requisite experience as stipulated in the Tender Document. Clause 14.3(b) of

the Instruction to Bidders (ITB) read together with Clause 11 of the Bid Data Sheet (BDS) clearly stipulates that the tenderer (company) should have experience of not less than 8 years. The proposed tenderer lacked such requisite experience.

2. That, the Appellant disputed the reasons given for its disqualification which was failure to indicate that the Automatic Rescue System is battery operated. The Appellant stated that it specified the Automatic Rescue System in the tender document but the same was termed as "Emergency Landing Device" (ELD). According to the Appellant the ELD performs the same function of landing the lift to the nearest floor and opening the doors for the people to come out when there is an abrupt power cut off or other disorder. The Appellant conceded that it did not state in the specifications that ELD is battery operated. A brochure was attached which had information that the device is battery operated.

The Appellant expounded further that, since its technical specifications did not indicate if the ELD is battery operated, the Respondent ought to have sought for clarification regarding the operations of ELD before concluding that the Appellant had failed to comply with such criterion.

3. That, regarding the hand rail on two sides, the Appellant submitted that it offered to submit a back side round hand rail which would serve the same purpose as a hand rail on both sides.
4. That, the Respondent failed to issue a decision with respect to the Appellant's application for review within the prescribed time, as a result the Appellant lodged this Appeal.
5. Finally, the Appellant prayed for the following orders:-

- a) The tender should not be awarded to the proposed successful tenderer M/s Derm Elevators Limited as the firm lacked requisite experience;
- b) All the tenders be re-evaluated;
- c) The Tender be awarded to a qualified bidder; and
- d) Any other order the Appeals Authority may deem fit and just to grant.

REPLY BY THE RESPONDENT

The Respondent's submissions may be summarized as follows:-

1. That, with regard to the Appellant's argument that the tenderer who is proposed for award of Tender lacked the required experience; the Respondent admitted that it was so and stated further that it was an oversight during Tender evaluation. The focus was made on the experience of technical personnel instead of the Company's experience. According to Clause 11(c) of the BDS the required company's experience was eight (8) years and the proposed tenderer lacked such an experience.
2. That, with regard to the Appellant's failure to comply with some of the technical specifications, the Respondent submitted that the Appellant failed to quote for additional features; namely, Automatic Rescue System battery operated and hand rail on two sides. Regarding the Automatic Rescue System battery operated, the Respondent argued that, the intention of having such a requirement was to have an alternative source of electrical power in case of failure of supply by TANESCO or Standby Generator so that people in the lift could be rescued. The Appellant indicated that it would supply a passenger lift with an "Emergency Landing Device" without mentioning if the device is battery operated. The Automatic Rescue System/Emergency Landing Devices may be operated in different

ways. The Respondent specifically required a device which is battery operated. The Appellant did not specify if the quoted ELD is battery operated, thus its tender was disqualified for being non responsive.

3. That, with regard to the requirement on hand rail on two sides, the Respondent submitted that, the Appellant failed to comply with such criterion as it offered to supply a back side round hand rail instead of a hand rail on two sides. The importance of having a hand rail on both sides is to support the users of elevators. Thus, the Appellant's failure to comply with such a criterion also led their tender to be non-responsive.
4. Finally the Respondent prayed for:-
 - i. Dismissal of the Appeal for lack of merit.

ANALYSIS BY THE APPEALS AUTHORITY

The Appeals Authority would like to point out that the Appellant had raised two main grounds of Appeal that is, 1. M/s Derm Elevators Limited proposed for award of the Tender lacked the requisite experience of eight (8) years and 2. that the Appellant has been unfairly disqualified. The Respondent readily conceded to the anomaly in relation to the first ground of appeal. In its statement of Reply, the Respondent stated that there was an oversight during the tender evaluation process whereby focus was made on the experience of technical personnel in lieu of the Company's experience. The Respondent concluded by stating that the proposed successful tenderer did not qualify for the award of the Tender. It was also stated by the Respondent in the course of hearing of the appeal that the Tender has been suspended and it intends to re- tender.

Given the position by the Respondent, it is evident that the Appellant's first ground of appeal has been overtaken by events, and we need not delve on it. This position was agreeable to both parties given the circumstances.

The Appeals Authority therefore proceeded with the second ground of appeal, that is the appellant was unfairly disqualified. Two issues were agreed upon by the parties which were approved by the Appeals Authority. The said issues are stated as follows:-

- Whether the Appellant was unfairly disqualified; and
- What reliefs, if any, are the parties entitled to.

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

1.0 Whether the Appellant was unfairly disqualified

In resolving this issue the Appeals Authority considered the two reasons that led to the Appellant's disqualification; namely, failure to indicate if ELD is battery operated and quoting to supply a lift with a hand rail on one side instead of two sides. In order to substantiate if the reasons given for the Appellant's disqualification were justified, the Appeals Authority revisited Technical Specifications provided in the Tender Document and observed that under Additional Features, tenderers were required to, amongst others, supply an elevator which has a battery operated Automatic Rescue System and a hand rail on two sides.

The Appeals Authority revisited the Appellant's bid and observed that, it had indicated to supply "Emergency Landing Device" without specifying if the same is battery operated. Furthermore, the Appeals Authority observed that the Appellant had quoted to supply a back side round hand rail (hand rail on one side). During the hearing, the Appellant was asked by the Members of the Appeals Authority to clarify if it complied with the required technical specifications. The Appellant conceded that it had not fully complied with the given specifications, specifically on the requirement of the supply of a Lift with a hand rail on two sides. However, it submitted that the quoted ELD is battery operated though it was not stated in its tender document. According to the appellant the details were available in a

brochure attached to the tender document. Hence, the Appellant was of the view that its bid complied with the requirement of supplying a battery operated emergency landing device. Further, the Appellant argued that, the Respondent before disqualifying its tender ought to have sought for clarification on the items which were unclear.

Having reviewed the appeal record and given the admission by the Appellant during the hearing that the detailed specifications required were not provided in its tender document, it is crystal clear that the Appellant failed to comply with the technical specifications. There was no information that the ELD is battery operated and the hand rail specified had only one side instead of two sides. Given the non-compliance with the required specifications, the Appeals Authority finds Appellant's tender was fairly and properly disqualified in accordance with Regulation 205 of GN. No. 446 of 2013 which provides as follows:-

Reg. 205 "All tenders shall be checked for substantial responsiveness to the technical requirements of the tendering documents and non-conformity to technical requirements which are justifiable grounds for rejection of a tender includes the following:

c) failure to meet major technical requirements such as offering completely different types of equipment or materials from the types specified..."

In relation to the Appellant's argument that the Respondent should have sought clarification from the Appellant on the required specifications before disqualifying its tender, the short answer to that is, it is not a mandatory requirement for a procuring entity to seek clarification. The Appeals Authority observed that, pursuant to Regulation 207(1) of GN. No. 446 of 2013 procuring entities are not mandatorily required to seek for clarification. A procuring entity may decide to seek for clarification but the law prohibits the said process to change any matter or substance of the submitted tenders.

According to Regulation 206 of GN No.446 of 2013 evaluation of tenders have to be conducted based on the information provided for in the submitted tenders vis-à-vis the tender requirements. For purposes of clarity the said Regulation is reproduced as follows:

Reg. 206(1) "The procuring entity's determination of a tender responsiveness shall be based on the contents of the tender itself without recourse to extrinsic evidence.

Reg. 206(2) where a tender is not responsive to the tender document, it shall be rejected by a procuring entity and may not subsequently be made responsive by correction or withdrawal of the deviation or reservation".

From the above analysis the Appeals Authority is of the settled view that the Appellant's tender has been fairly disqualified from the tender process for failure to comply with technical specifications.

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

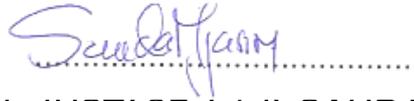
Given our findings on the first issue that the Appellant has been fairly disqualified, we hereby dismiss the Appeal and make no order as to costs.

Order accordingly.

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 parties this 1st March 2019.



HON. JUSTICE (rtd) SAUDA MJASIRI
CHAIRPERSON

MEMBERS:

1. CPA FREDRICK RUMANYIKA



2. MR. RHOBEN NKORI

