

IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY
AT DAR ES SALAAM

APPEAL CASE NO. 7 OF 2015-16

BETWEEN

MAJENGO ESTATES DEVELOPERS LTD..... APPELLANT

AND

TANZANIA ELECTRIC SUPPLY COMPANY LTD

(TANESCO) RESPONDENT

AND

LAND MASTERS COMBINE LTD. INTERESTED PARTY

DECISION

CORAM

1. Hon. Vincent K.D Lyimo, J. (rtd) - Chairman
2. Mrs. Rosemary A. Lulabuka - Member
3. Ms. Monica P. Otaru - Member
4. Mr. Ole-Mbille Kissioki - Secretary

SECRETARIAT

1. Mrs. Toni S. Mbillinyi - Principal Legal Officer
2. Ms. Violet S. Limilabo - Legal Officer

FOR THE APPELLANT

1. Mr. Felician Komu - Managing Director
2. Mr. Macloud Lyimo - Director
3. Mr. Reginald Moshia - Valuer
4. Charles M. Nderingo - Valuer

FOR THE RESPONDENT

1. Ms. Cecilia Mpamila - Procurement Manager
2. Mr. Geoffrey Boniface - Procurement Officer
3. Mr. Epafra Njau - Legal Officer

FOR THE INTERESTED PARTY

- Mr. Amon Mukangara - Managing Director

This Decision was scheduled for delivery today 3rd November 2015 and we proceed to do so.

This Appeal was lodged by M/S MAJENGO ESTATES DEVELOPERS LTD (hereinafter referred to as "the Appellant") against TANZANIA ELECTRIC SUPPLY COMPANY LTD (TANESCO) (hereinafter called "the Respondent").

The said Appeal is in respect of Tender No. PA/001/14/HQ/C/033 for Provision of Consultancy Services for Valuation of TANESCO Assets (hereinafter referred to as “the Tender”).

After going through the record of proceedings submitted to the Public Procurement Appeals Authority (hereinafter called “the Appeals Authority”) and respective oral submissions of the parties during the hearing, the facts of the Appeal may be summarized as follows:

On 26th August 2014, the Respondent through publication in the Daily News newspaper, invited several consultants to submit “Expression of Interest” for the above Tender. As a result ten (10) consultancy firms were shortlisted to submit their respective proposals. The deadline for the submission of the proposals was 9th January 2015, whereby sets of technical and financial proposals were received from the following eight (8) firms: -

| S/NO | NAME OF THE BIDDER |
|------|---|
| 1. | M/s African Property Limited |
| 2. | M/s Trace Associates Ltd |
| 3. | M/s PSC Limited |
| 4. | M/s TKA Joint Venture with Agency Ltd NPK Technology |

| | |
|----|---|
| 5. | M/s J & B Property Management Consultancy |
| 6. | M/s Majengo Estates Development Ltd |
| 7. | M/s Land Masters Combine Ltd |
| 8. | M/s Joronsa Property Consult (T) Ltd |

During the opening of the technical proposals, both technical and financial proposals submitted by M/s Joronsa Property Consult (T) Ltd. were found to be in one envelope, contrary to the Request for Proposal herein after called ("the RFP"). The above observation was duly noted but the bidder was not disqualified.

Thereafter the technical proposals were subjected to evaluation basing on the criteria set in the RFP. Five firms out of the seven namely M/s Joronsa Property Consult (T) Ltd, M/s Land Masters Combine Ltd, M/s Majengo Estates Development Ltd, M/s Trace Associates Ltd and M/s J & B Property Management Consultancy qualified and were recommended for the opening of their financial proposals. The Respondent's Tender Board, through Circular Resolution No.056/02/2015 which was not dated approved the recommendation of the Evaluation Committee for the opening of the financial proposals.

On 11th February 2015, before the financial opening ceremony the Appellant and M/s Land Masters Combine Ltd. objected both to the qualification of M/s Joronsa Property Consult (T) Ltd at the technical evaluation stage and its invitation for the opening of its financial proposal for the reasons that during the submission of proposals it had combined its technical and financial proposals in one envelope, contrary to the requirements of the RFP. As a result of the said objections, the ceremony for the opening of the financial proposals was postponed and the technical proposals re-evaluated. Upon such re-evaluation, the Evaluation Committee waived provisions of the RFP upon which the complaints were founded and recommended that the Technical Proposal by M/s Joronsa Property Consult (T) Ltd be qualified, thus making it eligible for the opening of its financial proposal.

The Procurement Management Unit ("PMU") rejected the above recommendations by the Evaluation Committee and thereafter forwarded the matter to the Respondent's Tender Board which in turn upheld PMU views and disqualified M/s Joronsa Property Consult (T) Ltd. Subsequently, only four firms were approved for opening of their financial proposals which was then conducted on 29th April 2015.

On the date of the opening of the financial proposals, one unnamed proposal was opened and upon checking inside, it was found to be a proposal submitted by M/s TKA Joint Venture with

Agency Ltd NPK Technology. It was noted that the said firm had been disqualified during the technical evaluation stage and that it was erroneously brought for opening. It was then removed. Thereafter, it became apparent that the proposal by M/s Majengo Estates Development Co. Ltd. was missing and one of the officers was sent to go in search for it.

After the said financial proposal had been traced and brought, it was noted that it had been opened allegedly at another tender opening ceremony the previous day. The proposal had been stapled and endorsed by the other tender opening committee.

Notwithstanding the said discrepancies, the financial proposal by the Appellant was admitted and upon its opening, there was discrepancy between the amount in figures and the one in words. The Appellant's representative confirmed that the amount in words was the correct amount.

The following day, that is the 30th April 2015, the Interested Party applied for administrative review challenging the admission of the Appellant's financial proposal for evaluation. The Respondent delayed to respond to the complaint, neither did it communicate the existence of the said application to other bidders.

On 9th June 2015, the Respondent delivered its decision on the said complaint. Dissatisfied with the same, the Interested Party

lodged before the Appeals Authority, Appeal Case No. 50 of 2014-15. The Appeal was filed on 25th June 2015. On 1st July 2015 the Appeals Authority notified the Respondent on the existence of the Appeal so filed. Before the said Appeal could be heard and determined, it was withdrawn on 23rd July 2015.

While the administrative review which led to Appeal Case No 50 was in progress, the Respondent's Evaluation Committee continued with evaluation of the financial proposals whereby upon combining the technical and the financial scores, the ranking of the tenderers were as follows: -

| S/N | Name of the Bidder | Technical Scores | Financial Scores | Combined Scores | Ranking |
|-----|---|------------------|------------------|-----------------|---------|
| 1. | M/S J & B Property Management Consultancy | 75.6 | 49.82 | 70.44 | 4 |
| 2. | M/S Trace Associates Ltd | 77 | 68.98 | 75.26 | 3 |
| 3. | M/S Land Masters Combine Ltd | 84.92 | 53.59 | 78.55 | 2 |
| 4. | M/S Majengo Estate Developers Ltd | 79 | 100 | 83.2 | 1 |

The Evaluation Committee recommended the Appellant for award of the Tender. The recommendation was approved by the Respondent's Tender Board through Circular Resolution No. 225/05/2015 which was not dated.

Subsequently, the Respondent's Accounting Officer issued a notice of intention to award the Tender to M/s Majengo Estate Development Co. Ltd. The said notice was dated 26th June 2015.

Aggrieved, the Interested Party in this Appeal applied for another administrative review challenging the proposed award based on the fact that the proposed successful tenderer's financial proposal had been opened a day before the official opening ceremony thereby raising inferences of tempering with the bids. The Respondent without notifying the rest of the bidders in this Tender, conducted administrative review, rescinded his intention to award the Tender to the Appellant and instead decided to disqualify the Appellant from the tender process. The Appellant was notified accordingly.

Aggrieved by the said decision, the Appellant applied for administrative review to the Respondent's Accounting Officer challenging the reasons given. The Accounting Officer dismissed the application through its decision dated 12th August 2015, delivered through email on 23rd September 2015.

Aggrieved by the Respondent's decision, the Appellant appealed to this Appeals Authority on 23rd September, 2015.

SUBMISSIONS BY THE APPELLANT ON THE GROUNDS OF THE APPEAL

The Appellant's grounds of appeal can be conveniently be grouped into four (4) main grounds as follows: -

1. That, the Appellant was unfairly disqualified;
2. That, the Appellant's technical and financial proposals were properly marked and sealed in line with the RFP;
- 3 That, the discrepancies between the amounts stated in figures and that in words were minor and of no consequence;
- 4 That, the Respondent had no mandate to admit the Interested Party's application for administrative review after it had issued Notice of intention to award the contract to the Appellant.

The Appellant challenged as unacceptable, its disqualification which was founded on allegations that its financial proposal was unnamed and thus mistakenly opened a day before the official financial opening day. The Appellant insisted that during the opening of proposals, that is on 9th January 2015, his proposal

was clearly marked and properly sealed thus it could not have been mistakenly opened on 28th April 2015 as claimed by the Respondent. Had it not been marked and sealed, it would have been noted during the opening ceremony and consequently disqualified that same day. In addition, the Appellant argued that the Respondent had failed to produce the respective minutes of the tender meeting held the previous day, a matter which suggests that the Appellant's proposal had been tempered with in order to assist the other prospective bidders.

Secondly, he argued that the discrepancies between the amount in words and that of figures could not have formed the basis for disqualification because such errors could be corrected as provided for under Regulation 303(2) of the Public Procurement Regulations, 2013 (GN 446/2013). In any event, the bidders present at the opening agreed to the corrections/clarification given by Appellant's representatives.

Third and most important, following the completion of the evaluation process, the Appellant and the Respondent had successfully engaged in negotiating the salient terms of the contract and had been told to await the approval of the same by the Attorney General's Chambers. The Appellant was at no time informed of any complaint nor had knowledge that there was any matter pending in the Appeals Authority. The Appellant asserted that the Respondent's non-disclosure of the alleged application

by the Interested Party and Respondent's failure to notify respective bidders was inconsistent with diligence and devoid of impartiality. The Appellant insisted that he was unfairly disqualified since the facts point to the Respondent as having lacked due care and had acted contrary to Regulations 7(2), 15 and 302 of GN 446/2013. Further, that the Respondent contravened Section 47 of the Public Procurement Act, 2011 ("the Act") and Regulation 4(2) of GN 446/2013 for showing bias towards the Interested Party. He contended that the opening of Appellant's financial proposal by the Respondent before the official opening date was contrary to Regulation 295(7) of GN 446/2013 and the Respondent had failed to discharge his duties. In no way should the Appellant be held responsible for misplacement of a financial proposal which was in Respondent's custody and which was submitted intact and accepted at both opening ceremonies.

The Appellant pointed out that when the Respondent received the Application for administrative review by the Interested Party on 30th April 2015, he did not inform the other tenderers. Above all, the Respondent did not notify the other bidders contrary to Regulation 106(1)(b) nor issue his decision within 14 days contrary to Regulation 106(6) of GN 446/2013.

The Appellant concluded his submissions that the Respondent had acted contrary to the law, had practised unfair treatment and had unfairly disqualified it.

The Appellant therefore prays for the following orders;

- i. The Appeals Authority to instruct the Respondent to rescind its administrative decision that disqualified the Appellant on wrong grounds;
- ii. The Respondent be instructed to resume contract formalities with the Appellant without further delay;
- iii. A declaration that the Respondent has breached the provisions of the law;
- iv. The disqualification of M/s Landmasters Combine Limited from the bid proposal processing on the basis of meddling with the Bid Evaluation Process;
- v. Alternative to prayers (i) and (ii) above, the Respondent to compensate for the costs incurred during contract negotiation and mobilisation of human resources that had been on hold awaiting clearance of the negotiated contract with TANESCO. Compensation package includes all man hours expended during and after negotiation, action planning meetings with the Associated Firms namely Valuator Group of South Africa and Geared Engineering

Limited of Dar es Salaam and all attendant legal fees. The total compensation is 25% of the financial proposal;

- vi. Costs of this application and;
- vii. Any other relief that the Authority may deem appropriate.

RESPONDENT'S SUBMISSION IN REPLY TO THE GROUNDS OF APPEAL

The Respondent's replies can be summed up as follows: -

- 1 That the Appellant was fairly disqualified. He submitted that during the opening of financial proposals on 29th April 2015, one proposal was unnamed and unmarked, and as far as the Appellant's proposal is concerned, his proposal was not named. That led the opening committee to erroneously open it a day before, that is 28th April 2015 at another tender opening ceremony;
- 2 That, the premature opening of the Appellant's financial proposal on 28th April 2015 was entirely the Appellant's fault for non compliance with Clause 27.3 of Instruction to Consultants ("ITC");
3. During the opening of Appellant's financial proposal there was discrepancy between the amount in figures and the amount in words.

The Respondent stated that following the discrepancies as noted in the financial opening ceremony, the Interested Party complained and requested for administrative review on 30th April 2015.

The Respondent strongly denied to have committed any irregularities as it acted in line with the provisions of the law and that all the bidders were treated fairly.

Touching on the reliefs sought by the Appellant, the Respondent denied it had any obligation for any costs incurred by the Appellant since it never awarded the Tender to the Appellant or its Associates namely Valuator Group of South Africa and Geared Engineering Limited.

The Respondent prayed for the Appeal to be dismissed in its entirety for lack of merits.

SUBMISSIONS BY THE INTERESTED PARTY

The Interested Party's submissions can be summarised as follows-

That, during the opening of the financial proposals, four envelopes were brought, one of them was unnamed. Upon opening, it turned out that it had been submitted by M/s TKA Company Ltd which had earlier on been disqualified at the

technical evaluation stage. It was thus erroneously brought into the financial opening ceremony.

That, indeed the Appellant's financial proposal was noted missing and had to be looked for. Upon being traced, it was brought and the representatives present were informed that the same had allegedly been erroneously opened on 28th April 2015 by another tender opening committee. At the time it was brought it was pinned without seal. The said Party stated that the Appellant never raised any complaint and did not seek administrative review.

He concluded his submissions supporting the disqualification of the Appellant's proposal on the following facts that :-

- Its financial proposal was unnamed contrary to Clause 27.3 of the RFP;
- it was unsealed contrary to Regulation 295(7) of GN 446/2013;
- Having been informed that its proposal was unnamed, the Appellant did not complain in terms of Regulation 105(1) of GN 446/2013.

The Interested Party therefore prays for the following orders:

- i. The Appeal be rejected and dismissed;
- ii. The Appellant be disqualified from the intended award;

- iii. Consideration for award be left to three other consultancy firms other than the Appellant;
- iv. Costs of the suit;
- v. Any other award which the Appeals Authority deems fit to grant.

ANALYSIS BY THE APPEALS AUTHORITY

The Appeals Authority, having gone through the tender proceedings and the oral submissions by the parties hereto, is of the view that there are three main issues calling for determination; and these are whether: -

1. The Respondent complied with the law;
2. Appellant was fairly disqualified; and
3. To what reliefs are the parties entitled to.

Having identified the issues in dispute as above, the Appeals Authority now proceeds to resolve them as hereunder-

1. Whether the Respondent complied with the law

Basing on the contentions surrounding this issue, the Appeals Authority formulated two sub issues as follows, whether; -

- there were irregularities in the Respondent's dealing with the Appellant's financial proposals;

- there were irregularities in the Respondent's decision making process.

Whether there were irregularities in the Respondent's dealing with the Appellant's financial proposals

This sub issue is based on the contentions that the Appellant's financial proposal was neither sealed nor named, and whether it is true the same was opened before the official opening ceremony and was kept separate from the three others contrary to the law.

It is a fact that on 9th January 2015 the Appellant submitted its proposals to the Respondent. It is also a fact that on 29th April 2015 during the opening of the financial proposals, the Appellant's financial proposal was noted missing and after sometime it was brought into the meeting room. At that stage, it is said that the proposal was not sealed but stapled and an explanation was given that the same was erroneously opened on 28th April 2015 in another tender opening ceremony. What remains is whether the handling of the said proposal complied with the law.

Regulation 295(7) of GN 446/2013 stipulates that the submitted financial proposal has to remain sealed and kept in safe custody until the opening date. For ease of reference, the said provision runs as follows:

“The financial proposals shall remain sealed and shall be deposited with the secretary of the tender board until they are opened publicly”.

The Respondent has admitted that the said proposal was opened a day before. The proposals by the four bidders ought to have been kept together under safe custody. The fact that the Appellant’s financial proposal was not only available but had also been opened previously, depicts careless handling of the Tender Documents and makes it difficult to dispute any allegation that the contents were tampered with.

In order to satisfy itself on the true position, the Appeals Authority retrieved the minutes of the tender opening ceremony held on 28th April 2015. The said minutes do not depict anything related to premature opening of an unnamed or unmarked financial proposal. Thus, it is not certain at what time the Appellant's proposal was opened.

It is pertinent to note that Regulation 7(1) and (2) of GN 446/2013 require all procuring entities to act with the highest degree of probity in all procurement proceedings. This duty extends to handling with due care the tenderers' documents in a manner which ensures across the board the trust and integrity of the Procuring entities. In that regard, the Respondent failed to exercise due care to safeguard the Appellant’s financial proposal.

It follows therefore that the first sub issue is answered in affirmative that, indeed there were irregularities in the Respondent's dealing with the Appellant's financial proposal.

Whether there were irregularities in the Respondent's decision making process

From the documentary evidence submitted by the parties, it is evident that on 29th April 2015 during the opening of the financial proposals in this Tender, the Appellant's proposal was missing and after being traced, it was not sealed but stappled and initialed allegedly for having been erroneously opened the previous day.

As already noted above, the Appeals Authority had the opportunity to view the minutes of the Tender opened on 28th April 2015 which should have indicated that the Appellant's financial proposal was mistakenly opened. The said minutes are silent on the same and is thus difficult to state with certainty what could have transpired.

Having observed the said irregularity the Interested Party on 30th April 2015 applied for an administrative review to the Respondent. The Respondent's Accounting Officer delivered its decision on 9th June 2015. It will be noted here that in dealing with the said administrative review, the Respondent did not notify

any of the bidders and when he responded to the same, he also did not inform them of his decision.

In the opinion of the Appeals Authority, the Interested Party had exercised its rights provided under Regulation 104 and also complied with Regulation 105 of GN 446/2013. However, the said Party failed to comply with the provisions of Regulation 106(9) which allows him to institute proceedings against the Respondent for failure to decide and to issue a written decision.

It will be observed that the Respondent's decision of 9th June 2015 was contrary to Regulation 106(6) because it was issued out of the prescribed period, which requires the issuing of such a decision to be within 14 days after receipt of the complaint. The decision was given out of time by 24 days and therefore *ultra vires*.

The fact that the Interested Party did not take any action after the lapse of 14 days since the lodging of an application for administrative review, had the effect that the Interested Party condoned the Respondent's actions. In effect, the Interested Party was estopped from complaining over the same issues after the Respondent's notice of intention to award the tender to the Appellant.

The Respondent further contravened the law by not informing other tenderers about the Interested Party's lodging of an

application for administrative review on 30th April 2015. Regulation 106(1) of GN 446/2013 requires the Accounting Officer, upon receiving an application for administrative review to suspend the procurement process and to notify other tenderers who participated in the tender within three days so that one may join if he so wishes.

The essence of the procedures and timelines set in the Procurement laws is to enhance transparency, effectiveness and avoiding wastage of time in tender processing. Procuring Entities should adhere to the laid down procedures otherwise it will be contravening the essence of the law.

In practice, negotiating with a prospective bidder is an exercise conducted before the issue of notice of intention to award the tender. In the event that the negotiations fail, the Procuring Entity would engage the second ranked bidder in terms of Regulation 308 (9) of GN 446/2013. The notice of intention to award is then given when the parties have already concluded negotiations. In the instant case, the Appellant asserted that he had concluded the negotiations and was awaiting the fiat from the Attorney-General's Chambers. What defeats common sense is the fact that while the Respondent was negotiating with the Appellant, the Respondent was at the same time dealing with the Interested Party in resolving the second administrative application after the withdrawal of Appeal No. 50 of 2014-15 and

without the knowledge of any of the bidders. During the hearing of this Appeal, the Respondent could not inform the Members of the Authority which law allowed him to do what he did. The procedure adopted by the Respondent under the circumstances is very alien to the Act and its Regulations and is evidence of the Respondent's double dealing with the bidders.

There is yet another aspect of this Appeal. The bid validity period has been provided to be 120 days which expired on 9th May 2015. In terms of provisions of Section 71 of the Act read together with Regulation 191(3) of GN 446/2013. the bid validity period of this tender expired on 9th May 2015. The Respondent did not extend the said period therefore whatever was transacted beyond the stated period was void.

Basing on the above explanation, the second sub issue is also answered in the affirmative.

The Appeals Authority's conclusion with regard to the first issue is therefore that the Respondent did not comply with the law in this Tender, to the extent explained.

2. Whether the Appellant was fairly disqualified

The first reason for Appellant's disqualification for the tender was that its financial proposal was unnamed. The Appellant on the other hand refutes this ground and reiterate that its financial proposal was clearly marked during the opening ceremony held

on 9th January 2015 in which technical and financial proposals were both received, and technical proposals were opened. The Appeals Authority is also sceptical since procedurally, during the recording of the proposals at the very first opening, they were to be numbered in line with Regulation 295(6) of GN 446/2013 so that the Tender Board Secretariat to have a record of everything received.

If the said proposal was neither disqualified at the very beginning, and if the tender opening minutes of 28th and 29th April 2015 do not support that the proposal was unnamed, the Appeals Authority can not hold the view that the same was unnamed. As amply explained herein above, the Respondent's allegations that the same was unnamed and not properly marked are unsubstantiated and the same is hereby rejected.

The Appellant did state and was not contradicted by any of the parties that after the evaluation process, he was called to go for negotiations before the issuance of the notice of intention to award. He further submitted that the said negotiations were concluded only to be informed that the decision to award the contract to him had been rescinded. It was further shown that the Respondent, at the time of disqualifying the Appellant from the tender process, it had concluded the negotiations with the Appellant. This procedure is very strange and can be explained only on the basis of the Respondent having been compromised.

The Appeals Authority also wishes to comment on the suspicion raised by Respondent and the Interested Party on the discrepancy in the Appellant's financial proposal in that the amount in figures differed with the amount in words. This suspicion should also fail since discrepancies of the Tender amount in words and figures is a common phenomenon that is why it is taken care in standard bidding documents (including Requests for Proposals) issued by the Public Procurement Regulatory Authority. Clause 39.1(c) of the RFP for this Tender provides thus:-

“ if there is a discrepancy between words and figures, the amount in words shall prevail...”

In view of that, the discrepancy in itself could not warrant tenderer's disqualification, rather correction of errors during evaluation.

Therefore the Appeals Authority's conclusion with regard to the second issue is that the Appellant was unfairly disqualified.

3.To what reliefs,if any, are the parties entitled

Basing on the findings on the first and second issues, this appeal is hereby allowed.

Reverting to the Appellant's prayers, the Appeals Authority considers them as follows:-

The first prayer is partly granted to the extent that this Appeals Authority hereby quashes the Respondent's decision to disqualify the Appellant and the Respondent is hereby ordered to re-tender.

The second prayer that the Respondent be ordered to resume contract formalities with the Respondent without delay can not issue since it is it has been overtaken by the first prayer.

The third prayer is the substance of the Appeals Authority analysis of the appeal. However, paragraph (d) of the prayer cannot be granted since it was the Appeals Authority's duty to inform the parties of the existence of the appeal, a duty duly fulfilled.

The fourth prayer that the Interested Party be disqualified from the tender process cannot issue since it has not been proved that the said Party meddled with the bid evaluation process.

The fifth prayer can not issue since the costs incurred during the negotiation period have not been proved.

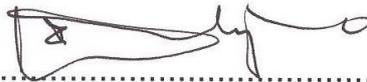
Sixth, the Appeals Authority has powers to issue compensation at its discretion. The Appeals Authority hereby orders the Respondent to pay the Appellant TZS 200,000/= compensation of Appeal filing fees. Save as indicated herein above, all prayers by both the Respondent and the Interested Party have no legs to stand on, they have all failed and can not be upheld.

It is so Ordered.

The Decision is binding upon the parties and may be executed in any court of competent jurisdiction in terms of Section 97(8) of the Act.

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

This Decision is delivered in the presence of the Appellant and the Respondent and in the absence of the Interested Party this 3rd November, 2015.



.....
JUDGE (Rtd) V.K.D LYIMO

CHAIRMAN

MEMBERS

1. ROSEMARY A. LULABUKA



2. MONICA P. OTARU

