

IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY
AT DAR ES SALAAM
CONSOLIDATED APPEALS Nos. 43 & 44 of 2017-18

BETWEEN

M/S PETROGAS FIELD
SERVICES LIMITEDAPPELLANT

AND

THE TANZANIA PORTS AUTHORITY..... RESPONDENT

DECISION

CORAM

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

SECRETARIAT

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

FOR THE APPELLANT

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|---------------------------|---|----------------------------------|
| 1. Mr. Irfan Dinani | - | Advocate, ADCA Veritas Law Group |
| 2. Mr. Adronicus Byamungu | - | Advocate, ADCA Veritas Law Group |
| 3. Mr. David Mc Grath | - | Central Manager |
| 4. Mr. Greyson Kiondo | - | Chief Executive Officer |

FOR THE RESPONDENT

- | | | |
|--------------------------|---|-------------------------|
| 1. Mr. Christian Chiduga | - | Principal Legal Officer |
| 2. Mr. Augustine Philip | - | Head of Procurement |
| 3. Mr. James Gwagula | - | Procurement Manager |
| 4. Mr. Mohamed Bakari | - | Engineering Manager |

These are two Appeals which were consolidated and heard together as one. They were lodged by M/s Petrogas Field Services Limited (hereinafter referred to as "the Appellant") against Tanzania Ports Authority (hereinafter referred to as "the Respondent"), in respect of Tenders No. AE/016/2016-17/CTB/G/35 and No. AE/016/2016-17/CTB/G/36 for Design, Supply, Installation and Commissioning of New Flow Meters for Refined Fuel Products at Kurasini Oil Jetty (KOJ) Dar es Salaam and Tanga Ports, respectively (hereinafter referred to as "the Tenders").

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

The Respondent through the Daily News and Mwananchi newspapers dated 13th and 15th March 2017 advertised the Tenders pursuant to the Public Procurement Act of 2011, as amended, (hereinafter referred to as "the Act") and the Public Procurement Regulations, Government Notice No. 446 of 2013, as amended (hereinafter referred to as "G.N. No. 446 of 2013"). The deadline for submission of tenders was initially set for 12th May 2017; however, due to significant queries from potential tenderers the Tender Documents for both Tenders were revised and re-issued on 4th September 2017. Five tenders were submitted for each Tender by the opening date of 26th September 2017.

After the opening ceremony the tenders were subjected to evaluation which was conducted in three stages, namely; Preliminary, Technical and Financial Evaluations, at the end of which, the Appellant was found to be the only responsive tenderer, thus they were recommended for the award. The recommendations of the Evaluation Committee were submitted to the Tender Board at its meeting held on 13th October 2017 which was approved, subject to successful negotiations.

Negotiation meetings were held on 26th October 2017 and 3rd November 2017, respectively. After completion of negotiations due diligence was conducted on sites in South Africa where the Appellant had executed some projects and in United Arab Emirates (UAE) where Emerson Process Management is based. Due diligence reports were submitted to the Tender Board on 8th May 2018. The Tender Board deliberated on the reports and was satisfied that the Appellant did not qualify for the award of the Tenders. Since all other tenders were disqualified, the Tender Board approved rejection of all tenders.

On 10th May 2018, the Respondent informed the Appellant that all tenders were rejected for non-compliance with the requirements of the Tender Documents. Specifically, the Appellant was informed that, their firm lacked the requisite experience to handle the projects, that the Business License submitted was for consultancy services and not relating to the Tenders and failure to meet the minimum average annual turnover.

Dissatisfied, the Appellant applied for administrative review on 17th May 2018. On 24th May 2018, the Respondent issued his decision which rejected the Appellant's application for review in its entirety. Aggrieved further, on 4th June 2018 the Appellant lodged this Appeal.

SUBMISSIONS BY THE APPELLANT

Before starting his submissions the Appellant raised his concern regarding Section 73(5) of the Act and Regulation 200(1) of GN. No. 446 of 2013. The Appellant submitted that, the said provisions denied them their constitutional right of accessing all the documents relating to these Appeals which were in the Respondent's custody. He proposed that the said provisions be considered for amendment.

Without Prejudice to the above, the Appellant proceeded to submit as summarized hereunder;

1. The Appellant dispute their disqualification believing that they qualified for the award of the Tenders since they were invited for pre-contractual negotiations. Had they not qualified, they would not have been called for negotiations in the first place.

Substantiating his argument on this point, the Appellant relied on Clause 29.5 of the Instructions to Tenderers (ITB) which requires a non responsive bid to be rejected at the preliminary stages.

2. The Appellant argued further that, the Respondent was aware that the Appellant was a sole representative and distributor of Emerson Process Management firm, the manufacturer of the products to be supplied in these Tenders. The Appellant submitted that, it was not proper for the Respondent to disqualify the Appellant's tenders while they were fully aware of that relationship.

The Appellant further claimed that evidence proving the relationship between the two firms including; a distributors agreement and authorization to submit the tenders, negotiate and sign contracts with the Respondent with full guarantee and warranty in execution of the project; were attached to the bids.

3. The Appellant disagreed with the Respondent's reasons for their disqualification on the lack of the requisite experience, unrelated Business License and failure to meet the minimum average annual turnover arguing that they were unsubstantiated. In support of this point the Appellant argued that they had attached to their bids sufficient evidence proving their relevant qualifications for the Tenders. They contended to have listed various projects executed by themselves and by Emerson Process Management. Further, that they had attached to their bid Audited Accounts and Financial Statements of Emerson Process Management which in their totality meet the required annual turnover.

Regarding the Business License, the Appellant did not dispute that, they had attached the same relating to consultancy services contrary to the

Tenders requirements. They, however, claimed that it is not necessary to have the Business License that relates directly to the Tender, as long as the objectives of the Company cover the Tenders at issue. Thus, lack of the relevant Business License cannot lead to disqualification.

4. Their argument that they were successful were emphasized by the statement of the Hon. Minister for Works, Transport and Communication issued to the Parliament, that for these projects, successful tenderers had already been identified, only awaiting for due diligence to be completed.
5. In the alternative, the Appellant persisted that, if the reasons that led to their disqualification are acceptable in the eyes of the law, then the Respondent's conduct of inviting them to pre-contract negotiations and subsequent due diligence contravened the law.
6. That, the Tender Document lacked provisions alerting Tenderers about due diligence outside the country which would have prepared them better in terms of permits and costs. Lack of the said provisions in the Tender Document caused the Appellant to incur significant losses of time, finances and other resources in respect of the due diligence conducted. Also lack of such information led the due diligence team to be denied access to some sites which were to be visited.

The Appellant expounded further that, among the sites to be visited were government offices in which the process of entering their premises needed special permits that could not be obtained within the short time frame.

That, the Respondent's act of conducting due diligence led the government to incur unnecessary costs which would not have been incurred if the Appellant was declared unsuccessful from the earliest stages.

7. The Appellant concluded their arguments by submitting that, the Respondent's conducts in this regard are unjustifiable and raised legitimate concerns on legality.

Finally, the Appellant prayed for the following orders, that;

- a) The Respondent be required to reinstate the Tenders;
- b) The Respondent be ordered to act in accordance with the law and issue the letters of award to the Appellant as the successful tenderer;
- c) The Respondent be required to negotiate, finalize and execute with the Appellant in good faith the contracts for flow meters arising in these Tenders;
- d) Specific performance of the contracts under the terms of the revised bidding documents as amended by the Pre-contractual negotiations;
- e) General damages;
- f) Legal fees in the amount of US\$ 10,000 (or its equivalent) plus VAT and disbursement in the amount of TZS 300,000/- relating to filing fees at the PPAA; and
- g) Any other reliefs consistent with violations of the procurement laws and the regulations promulgated there under.

REPLY BY THE RESPONDENT

The Respondent's submissions in response to the grounds of Appeals are as follows;

1. That, the evaluation of tenders and determination of responsiveness was done in accordance with the law. The Respondent averred that the Tenders processes were conducted in the highest degree of confidentiality to avoid unwarranted expectations.
2. That, the Appellant was rightly disqualified from the Tenders for lack of the requisite experience, submitting Business License not relating to the Tender and failure to meet the required annual turnover. The Respondent submitted further, that the Appellant's argument that they were successful since they were invited for negotiations holds

no water, since being invited for pre-contract negotiation does not guarantee award of contract.

3. That, the Appellant was found to be non-responsive during due diligence process which was conducted pursuant to Clause 36 of the ITB and Clause 25 of the Bid Data Sheet (BDS). Further, the Respondent averred that the Tenders processes were conducted through International Competitive Bidding method, therefore due diligence outside the United Republic of Tanzania was inevitable and should have been expected as the Appellant mentioned sites outside the country.

The Respondent submitted further that, the rationale of conducting due diligence is to disclose the invisible facts of a company by conducting an investigation of business before signing of contracts. The due diligence process of these Tenders was conducted in order to ensure the Appellant's capability to perform the contracts.

The Respondent submitted further that, the due diligence process conducted, resulted in rejection of the Appellant's tenders.

4. That, regarding the Appellant's argument that the Hon. Minister for Works, Transport and Communication had reported to the Parliament that successful bidders for the Tenders had already been identified; the Respondent submitted that the Minister and the procurement process are mutually exclusive as the Minister is not involved in the procurement process.

Finally, the Respondent prayed for the following;

- a) The Appeal be dismissed with costs for lack of merits; and
- b) Costs relating to the Tenders processes be incurred by the Appellant pursuant to Clause 6.1 of the ITB.

ANALYSIS BY THE APPEALS AUTHORITY

The Appeals Authority having gone through the Tenders proceedings including various documents and oral submissions by the parties, is of the view that the Appeal is centred on two main issues, which were agreed by the parties, as follows:-

- Whether the rejection of the Appellant's tenders is justified
- What reliefs, if any, are the parties entitled to.

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

1.0 Whether the rejection of the Appellant's tenders is justified

In order to substantiate the legality of the Appellant's disqualifications, the Appeals Authority revisited reasons that were adduced by the Respondent and analysed each of them as hereunder;

a) Failure to meet minimum experience on similar assignments.

Clause 11 of BDS which modified Clause 14.3 of the ITB guides on the experience requirements. The said provision reads;

“Five years of experience for supplier but should have supplied similar type of goods for which this Invitation for Tenders is issued” (emphasis added).

Further, Qualification Information Form clearly stipulates that tenderers were required to show their experience in works of similar nature and volume. However, none of the previous listed performed works by the Appellant resembled the Tender neither in nature nor volume. The Appellant's previous performed works related to; amongst others, supply of Sealweld lubricants for pipeline valves, calibration of flow meters, supply of fisher level transmitter and calibration of fuel dispensing pumps.

The Appellant in his oral and written submissions argued that experience should have been assessed together with that of Emerson Process Management. We observed that the receipt for purchase of Tender

Documents, Form of Tenders, Forms of qualification information, Powers of Attorney and Bid securities, just to mention a few, indicate that the Appellant tendered as a sole tenderer. Emerson Process Management was the Manufacturer and its Manufacturer's Authorization was attached to the Appellant's tenders.

From the facts, the Appeals Authority is of the settled view that, in terms of Clause 3.1 and 3.9 of the ITB, the Appellant being the sole tenderer ought to have complied with experience requirement as provided for in the Tender Document. It was not proper for the Appellant to depend on the experience of the manufacturer while he participated in the Tender as a sole tenderer and not a joint venture, association or consortium.

Therefore, the Appeals Authority is satisfied that the Appellant lacked the requisite experience.

b) The Business License submitted was for business consultancy not relating to the Tender.

Clause 3.9 of the ITB required tenderers to submit evidence of their eligibility, proof of compliance with necessary legal, technical and financial requirements, their capability and adequacy of resources to carry out the contracts effectively. Furthermore, Item 1.1 of Qualification Information specifically requires tenderers to attach current Business Licenses relating to the Tenders.

In justifying his act of attaching the Business License that did not relate to the Tender, the Appellant averred that Business License is not among the crucial documents to substantiate tenderer's ability to perform the contracts. They argued that, much as the projects fall within the objectives of the Appellant's company as listed in the Memorandum and Articles of Association, lack of the relevant Business License could not lead to disqualification.

The Appeals Authority rejects the Appellant's argument in this regard on the reason that, a Business License is one of the documents which proves

that a tenderer is legally authorized to transact on particular nature of the business.

Therefore, the Appeals Authority is of the firm view that the Appellant's disqualification on this point is justified.

c) Failure to meet minimum average annual turnover
Clause 12 of the BDS which modified Clause 14.4(a) of the ITB states specifically that the required "Average Annual Turnover is USD 3Million". The requirement of Clause 12 of the BDS has also been insisted under Item 1.2 of Qualification Information.

The Appellant insisted that their Audited Accounts were supplemented by Emerson Process Management's Financial Statements, thus, they exceeded the threshold specified in the Tender Documents.

The Appeals Authority revisited the tenders by the Appellant and observed that they lacked the requisite annual turnover. Since it had already been established under item (a) above that the tenderer in these Tenders is the Appellant alone, thus Emerson's documents could not be considered in substantiating the Appellant's capacity. Therefore, assessing the Appellant's documents on their own clearly showed that they did not possess the required annual turnover. Thus, it goes without saying that they failed on this requirement too.

Based on the above analysis the Appeals Authority is of the settled view that the three grounds that led to the Appellant's disqualification from the Tenders are justified.

The above notwithstanding, the Appeals Authority noted with concern the Respondent's conduct in processing these Tenders. According to Clause 29 of the ITB, tenderers were to be checked during preliminary evaluation if they had complied with eligibility criteria before proceeding to other stages of evaluation.

The Evaluation Report indicates that during preliminary evaluation tenderers were checked; amongst others, if they submitted powers of attorney, current business licences, average annual turnovers and proofs of required experience. While the Appellant's tenders clearly show that they lacked minimum experience, the relevant Business Licence and average annual turnover; the Evaluation Committees qualified the Appellant to the Technical Evaluation stage. Evidently, the Evaluation Committee ought to have disqualified them pursuant to Clause 29.5 of the ITB, which states categorically that, if the tender is not responsive, the same should be rejected. Astonishingly enough, the Evaluation Report indicates that the Appellants' tenders were the only ones successful and recommended for award.

The Appeals Authority fails to comprehend the Respondent's conducts towards the Appellant in these Tenders, as the firm ought to have been disqualified at the preliminary evaluation for being substantially non responsive. To the contrary, the Respondent qualified the Appellant up to the stage of inviting them for negotiations and conducting due diligence.

The Appeals Authority finds the Respondent's act to have contravened Regulation 206(2) of GN No. 446 of 2013 which state as follows;

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

The shortfalls of the Appellant's tenders were obvious and could easily be detected by a competent evaluator; however, according to the Respondent the same were noted after due diligence processes. It is crystal clear that the Appellant's tenders although non responsive were not rejected during preliminary evaluation. As such, the Appeals Authority doubts the competence of evaluators in these Tenders.

The Appeals Authority further considered the Appellant's argument regarding due diligence. That the Tender Documents did not disclose to

tenderers if the process would be carried out. Clause 25 of the BDS which modified Clause 36.1 of the ITB states in clear terms that "Post-qualification would be undertaken. Going further, under Section 3 of the Act, the word Post-qualification is defined to mean due diligence procedure applied after tenders have been evaluated prior to award of contract to determine if the lowest tenderer possessed the required experience, capability and resources to carry out the contract effectively. Much as this requirement was clearly provided for in the Tender Document, the Appellant did not qualify for this process.

The Appeals Authority therefore, agrees with the Appellant's submission that since their tenders were non responsive, they ought to have been disqualified at the preliminary evaluation stage, hence avoid incurring unnecessary costs.

Therefore, based on the above, the Appeals Authority is of the firm view that, rejection of the Appellant's tenders is justified.

Accordingly, the Appeals Authority answers the first issue in the affirmative.

2.0 What reliefs, if any, are the parties entitled to
Taking cognizance of the findings above, the Appeals Authority hereby partly dismisses the Appeal as the Appellant's Tenders were fairly rejected and upholds the Respondent's Tender Board decision to reject all the Tenders.

However, as pointed out earlier that the Respondent ought to have disqualified the Appellant's tenders at the preliminary evaluation stage, their failure to do so is condemned and the Respondent is ordered to compensate the Appellant a reasonable amount of TZS 5,300,000.00 as per the following break down;

- (a) Legal fees TZS 5,000,000.00
- (b) Appeal filing fees 300,000.00

This Decision is binding on the parties and can be enforced in accordance with Section 97(8) of the Act.


The Parties have the Right to Judicial Review as per Section 101 of the Act.

This Decision is delivered on 16th July 2018.


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Ms. MONICA P. OTARU
Ag. CHAIRPERSON

MEMBERS:

1. ENG. FRANCIS MARMO


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2. MR. LOUIS ACCARO


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