

IN THE PUBLIC PROCUREMENT APPEALS AUTHORITY

APPEAL CASE NO. 24 OF 2023-24

BETWEEN

M/S CHINA NATIONAL ELECTRIC ENGINEERING

COMPANY LTDAPPELLANT

AND

TANZANIA ELECTRIC SUPPLY COMPANY LTD.....RESPONDENT

DECISION

CORAM

- | | |
|-------------------------------------|---------------|
| 1. Hon. Justice (rtd) Sauda Mjasiri | - Chairperson |
| 2. Mr. Pius Mponzi | - Member |
| 3. Dr. William Kazungu | - Member |
| 4. Mr. James Sando | - Secretary |

SECRETARIAT

- | | |
|-------------------------|------------------------|
| 1. Ms. Agnes Sayi | - Senior Legal Officer |
| 2. Ms. Violet Limilabo | - Senior Legal Officer |
| 3. Mr. Venance Mkonongo | - Legal Officer |

FOR THE APPELLANT

1. Mr. David Peter Kasanga - Advocate
2. Mr. Ming Zhang - General Manager
3. Mr. Ma Yebing - Electrical Engineer

FOR THE RESPONDENT

1. Mr. Elias Mkumbo - State Attorney - TANESCO
2. Mr. Bakari Kingazi - Procurement Officer - TANESCO

The Appeal was lodged by **M/S China National Electric Engineering Company Ltd** (hereinafter referred to as "**the Appellant**") against **Tanzania Electric Supply Company Ltd** commonly known by its acronym as "**TANESCO**" (hereinafter referred to as "**the Respondent**"). The Appeal is in respect of Tender No. PA/001/2022-23/HQ/W/66B for Engineering, Design, Supply, Installation, Testing and Commissioning of 220/33Kv Transmission Line from Pugu to Dundani (hereinafter referred to as "**the Tender**").

The background of this Appeal may be summarized from the documents submitted to the Public Procurement Appeals Authority (hereinafter referred to as "**the Appeals Authority**") as follows: -

On 27th July 2023, the Respondent using the Restrictive Tendering method as specified under the Public Procurement Act of 2011, as amended (hereinafter referred to as "**the Act**") and the Public Procurement Regulations of 2013, as amended (hereinafter referred to as "**the Regulations**") invited five tenderers by issuing the Request For Proposal

(RFP) through Tanzania National electronic Procurement System (TANePS). The deadline for submission of the tenders was set on 10th August 2023.

The Respondent extended the deadline for submission of the tenders from 10th August 2023 to 25th August 2023 and then to 4th September 2023 for the purpose of increasing competition. The Respondent added five tenderers by issuing them with the RFP. On the deadline, only four tenderers namely; M/S Kalpataru Power Transmission Ltd, M/S China National Electric Engineering Co Ltd, M/S Central Electricals International Ltd and M/S Steg International Services submitted their tenders as required.

The received tenders were subjected to evaluation which was conducted into three stages namely; preliminary, technical and financial evaluation. During preliminary evaluation, one (1) tender was found to be non-responsive and was disqualified from the Tender process. The remaining three (3) tenders were subjected to technical evaluation. At the technical evaluation stage, two (2) tenders including that of the Appellant were disqualified for being found non-responsive to the requirements of the Tender Document. This meant that M/S Steg International Services tender was solely found to be responsive and subjected to financial evaluation.

After completion of the evaluation process, the Evaluation Committee recommended award of the Tender to M/S Steg International Services. The recommended contract prices were United States Dollars (USD) Ten Million Nine Hundred Sixty Four Thousand Forty Nine only (USD 10,964,049.00) and Tanzania Shillings Twenty Billion Five Hundred Three

Million Five Hundred Ninety Five Thousand Three Hundred only (TZS 20,503,595,300.00) inclusive of all taxes and other charges.

On 8th November 2023, the Respondent issued the Notice of Intention to award which informed tenderers that it intends to award the Tender to M/S Steg International Services. Furthermore, the proposed contract prices were USD Ten Million Nine Hundred Sixty Four Thousand Forty Nine only (USD 10,964,049.00) and Tanzania Shillings Twenty Billion Five Hundred Three Million Five Hundred Ninety Five Thousand Three Hundred only (TZS 20,503,595,300.00) inclusive of all taxes and other charges. The Notice also informed the Appellant that its tender was disqualified for offering max working stress of 95.1 N/mm² and EDS 25° C, still air of 148.6 N/mm² which were contrary to technical specifications of 182 N/mm² and 823 N/mm² respectively as provided in the Tender Document.

Dissatisfied with the reasons given for its disqualification, the Appellant applied for administrative review to the Respondent on 22nd November 2023. On 24th November 2023, the Respondent issued its decision which rejected the Appellant's application for administrative review. Aggrieved with the Respondent's decision, the Appellant filed this Appeal on 8th December 2023 to the Appeals Authority.

When the matter was called on for hearing, the following issues were framed, namely: -

- 1.0 Whether the disqualification of the Appellant's tender was justified; and**
- 2.0 What reliefs, if any, are the parties entitled to?**

SUBMISSIONS BY THE APPELLANT

The Appellant's submissions were made by Mr. David Peter Kasanga, learned advocate. He commenced his submissions on the first issue by stating that the Appellant has been dissatisfied with its disqualification for the reason that it offered max working stress of 95.1 N/mm² and EDS 25° C, still air of 148.6 N/mm² which were contrary to technical specifications of 182 N/mm² and 823 N/mm² respectively as provided in the Tender Document.

The learned counsel submitted that the Appellant did not comply with the Respondent's technical specifications as they were not correct. In addition, such technical specifications were contrary to the International Standards. The learned counsel contended that the Respondent ought to have complied with the clauses under the Instructions To Tenderers (ITT) on the issue of minor and major deviations. The said clauses could have supported the Respondent in determining substantial responsiveness to the requirements of the Tender document. Thus, the Respondent should have treated the Appellant's failure to comply with the technical specifications as a minor deviation.

Mr. Ma Yebing, an Electrical Engineer from the Appellant's office was invited by the learned counsel to clarify on the technical specifications presented in tender document. He stated that they could not knowingly comply with the incorrect technical specifications provided by the Respondent. Hence, the Appellant decided to submit the correct specifications with its Tender Document. He expounded further that, the Appellant did not seek for clarifications because it found the requirement as

a minor and not a major deviation. Thus, the Appellant's tender was unfairly treated during the evaluation process.

The learned counsel submitted that the Tender Document did not indicate the fill-in-spaces for the Appellant to specify the technical particulars with the associated accessories. Furthermore, the learned counsel stated that the technical specifications were unrealistic and inappropriate. The Appellant therefore failed to submit the technical requirements to the Respondent.

The learned counsel also contended that the Tender had been awarded to a tenderer with the highest evaluated price. This is contrary to the requirements of the law which requires an award to be made to the lowest evaluated cost pursuant to Section 72(1) and (2) of the Act read together with Regulation 203(1) and (2) of the Regulations.

Finally, the learned counsel prayed for the following orders: -

- i. A declaration that there was unfairness in awarding the Tender to the proposed tenderer who had quoted a higher price compared to the price quoted by the Appellant with the difference of TZS 5,000,000,000.00;
- ii. Nullification of the award made to M/S Steg International Services;
- iii. Reinstatement of the Appellant in the Tender process;
- iv. Re- evaluation of the Tender and re-negotiation reasonably;
- v. Compensation costs to the tune of TZS 10,000,000,000.00;

- vi. Payment of interest at the commercial rate of 18% from December 2023 until the date of the award;
- vii. Payment of legal fees to the tune of TZS 12,000,000.00;
- viii. Payment of Appeal filing fee and other costs amounting to TZS 800,000.00; and
- ix. Any other relief(s) as this Honorable Appeals Authority may deem just and fit to grant.

REPLY BY THE RESPONDENT

The Respondent's submissions were made by Mr. Elias Mkumbo, learned State Attorney, from the Respondent's Office. He commenced his submissions by adopting the Respondent's Statement of reply and went on stating that in conducting this Tender the Respondent complied with Regulation 205(a) and (c) of the Regulations.

The learned State Attorney submitted that the Appellant was disqualified for offering max working stress of 95.1 N/mm² and EDS 25° C, still air of 148.6 N/mm² which were contrary to the technical specifications of 182 N/mm² and 823 N/mm² respectively as provided in the Tender Document.

The learned State Attorney stated further that, the Appellant in its application for administrative review to the Respondent at paragraph 3 conceded to have not complied with the technical specifications. On the contrary, it requested such anomaly to be treated as a minor deviation from the Tender Document. The Appellant also stated that such anomaly

could not have rendered its disqualification since it could have been discussed and resolved during negotiations prior to award of the contract.

The learned State Attorney elaborated that the Appellant's non-compliance with the technical specifications could not be considered as a minor deviation. He further contended that compliance with the technical requirements was a key factor that was to be assessed during the evaluation of tenders. Hence, the Appellant's non-compliance with the requirements goes to the root of the implementation of the project. Therefore, the Appellant was fairly disqualified for failure to comply with the requirements provided in the Tender Document.

In supporting his submissions, the learned State Attorney relied on Regulation 205(a) and (c) of the Regulations. This requires that all tenders should be checked for substantial responsiveness to the technical requirements of the tender documents. Thus, non-conformity to the technical requirements is a justifiable ground for rejection of the tender. Furthermore, the rejection of the tender includes failure by a tenderer to meet the required scope of works provided in the Tender Document.

The learned State Attorney submitted that in relation to the technical specifications being unrealistic and inappropriate, the Appellant was allowed to seek for clarification from the Respondent if the requirements provided in the Tender Document were not clear. However, the Appellant never sought for clarification. Thus, it can be implied that the Appellant was satisfied with all the criteria set in the Tender Document.

Regarding the Appellant's contention on awarding the Tender to the tenderer who had the highest price, the learned State Attorney submitted that a tenderer would be considered to be the lowest evaluated at the financial evaluation stage which is preceded by complying with the requirements at the preliminary and technical evaluation stages. The Appellant's tender was disqualified at the technical evaluation stage. Thus, its quoted price was not considered at the financial evaluation stage where its price could have been compared with other tenderers.

Finally, the learned State Attorney prayed for the dismissal of the Appeal in its entirety with costs.

ANALYSIS BY THE APPEALS AUTHORITY

1.0 Whether the disqualification of the Appellant's tender was justified.

In resolving this issue, the Appeals Authority reviewed the record of Appeal and observed that the Appellant was disqualified for offering max working stress of 95.1 N/mm² and EDS 25° C, still air of 148.6 N/mm² which were contrary to the technical specifications of 182 N/mm² and 823 N/mm² respectively as provided in the Tender Document.

To ascertain if the disqualification of the Appellant's tender for the above reasons was justified, the Appeals Authority reviewed the Tender Document and observed that Section VIIA - Technical Specifications and Employer's

Requirements for Transmission Line (Technical Specifications and Drawings) provides as follows: -

	Unit	Data required	Data offered
max.working stress	N/mm ²	182	
EDS (25° C, still air)	N/mm ²	823	

In substantiating if the Appellant complied with the above requirements, the Appeals Authority reviewed the Appellant's Tender submitted on TANePS. The Appeals Authority observed that in complying with Section VII – Technical Specifications and Drawings, the Appellant offered max working stress of 95.1 N/mm² and also offered EDS 25° C, still air of 148.6 N/mm².

The evaluation of tenders is required to be based on the terms and conditions stipulated in the Tender Document as provided under Regulation 203 (1) of the Regulations which reads as follows: -

"203.-(1) The tender evaluation shall be consistent with the terms and conditions prescribed in the tender documents and such evaluation shall be carried out using the criteria explicitly stated in the tender documents".

Under the circumstances, the Appeals Authority find the Respondent's act of disqualifying the Appellant to have complied with Regulations 205(a) and (c) and 206 (2) of the Regulations which read as follows: -

"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:-

(a) failure to tender for the required scope of work as instructed in the tendering documents and where failure to do so has been indicated as unacceptable;

(b)

(c) failure to meet major technical requirements, such as offering completely different types of equipment or materials from the types specified, plant capacity well below the minimum specified, equipment not able to perform the basic functions for which it is intended;

206.- **(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 above quoted provisions demonstrate clearly that a tender that fails to comply with major technical requirements of the Tender Document should be rejected. In addition, such a tender should not subsequently be made responsive by correction or withdrawal.

The Appellant also conceded in its application for administrative review dated 22nd November, 2023 to the Respondent at paragraph 3 that it did not comply with the requirements. Furthermore, the Appellant stated that the said requirements should have not been treated as a material deviation from the Tender Document. Hence, it contended that, such anomaly should have been treated as a minor deviation that could not have rendered disqualification of its tender.

Based on the requirements of the Regulations 203, 205(a) and (c) and 206 (2) of the Regulations and the Appellant's admission, the Appeals Authority is of the settled view that the disqualification of Appellant's tender by the Respondent was justified.

The Appeals Authority further considered the Appellant's argument that the technical specifications were unrealistic and inappropriate for this Tender. The Appeals Authority is of the view that, the Appellant could have sought for clarification pursuant to Clause 8.1 of the ITT and Regulation 13 of the Regulations. Since the Appellant did not seek for clarification, this meant that, it was ready to comply with the terms and conditions of the Tender Document. Therefore, the issue of being unrealistic and inappropriate could not be raised at this juncture.

Regarding the Appellant's contention that it had quoted a lower price compared to the price of the proposed successful tenderer, the Appeals Authority reviewed the evaluation report and observed that the Appellant was disqualified at the technical evaluation stage for failure to comply with the requirements of the Tender Document. Thus, the Appellant did not reach the financial evaluation stage where its quoted price could have been

compared with other tenders. Regulation 212(a) of the Regulations provides that a tender would only be awarded to the lowest evaluated tenderer at the financial comparison stage. Regulation 212 (a) of the Regulations reads as follows: -

"212. The successful tender shall be-

(a) the tender with the lowest evaluated tender price in case of goods, works or services, or the highest evaluated tender price in case of revenue collection, but not necessarily the lowest or highest submitted price, subject to any margin of preference applied."

(Emphasis added)

From the above observations, the Appeals Authority concludes the first issue in the affirmative that the disqualification of the Appellant was justified.

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

Taking cognizance of the findings made hereinabove, the Appeals Authority hereby dismiss the Appeal for lack of merit. The Respondent is ordered to proceed with the Tender process in observance of the law. We make no order as to costs.

It is so ordered.

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 11th day of January 2024.

HON. JUSTICE (rtd) SAUDA MJASIRI



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CHAIRPERSON

MEMBERS: -

1. MR. PIUS MPONZI

2. DR. WILLIAM KAZUNGU