

IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY
AT DAR ES SALAAM
APPEAL CASE NO 48 OF 2014-15

BETWEEN

M/S FLEET TRACK **APPELLANT**

AND

TANZANIA ELECTRIC SUPPLY

COMPANY LTD. **RESPONDENT**

**M/S PERFECT INFOTECH INTERNATIONAL LTD.....INTERESTED
PARTY**

DECISION.

CORAM

- | | | |
|-------------------------------------|---|-----------|
| 1. Hon. Vincent K.D Lyimo, J. (rtd) | - | Chairman |
| 2. Mrs. Rosemary A. Lulabuka | - | Member |
| 3. Mr. Louis P. Accaro | - | Member |
| 4. Eng. Aloys J. Mwamanga | - | Member |
| 5. Ms. Monica P. Otaru | - | Member |
| 6. Mr. Ole-Mbille Kissioki | - | Secretary |

SECRETARIAT

- | | | |
|---------------------------|---|----------------------|
| 1. Ms. Florida R. Mapunda | - | Senior Legal Officer |
| 2. Ms. Violet S. Limilabo | - | Legal Officer |

FOR THE APPELLANT

1. Mr. Imran Morani - General Manager
2. Mr. Azim Hooda - Partner
3. Mr. Taufice Bhanji - Partner
4. Mr. Soba H. Sanglarya - Legal Advisor

FOR THE RESPONDENT.

1. Mr. Kahatano Florence - Senior Legal Officer
2. Mr. Evaristo Winyasi - Principal ICT Innovation Research
3. Mr. Geoffrey Boniface - Procurement Officer

FOR THE INTERESTED PARTY.

1. Mr. Audax Vedasto - Advocate –Audax Company Advocates
2. Mr. Albino M. Simbilla - Head - Administration and Human Resource
3. Amos Oyomba - Director
4. Ebenezer B. Msuya - Director of Business Development

FOR THE OBSERVER.

Ms. Mary Cassia - Sales Administrator- Utrack Africa Ltd

This decision was scheduled for delivery today 21st July 2015 and we proceed to do so.

The appeal at hand was lodged by **M/S FLEET TRACK** (hereinafter referred to as “the Appellant”) against the **TANZANIA ELECTRIC SUPPLY COMPANY LIMITED** commonly known by its acronym TANESCO (hereinafter referred to as “the Respondent”).

The said Appeal is in respect of Tender No. PA/001/14/HQ/N/058 for Provision of Fleet Tracking System to TANESCO (hereinafter referred to as “the tender”).

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

The Respondent vide the Daily News newspaper dated 10th November 2014, invited tenderers to submit tenders for “the tender”.

The deadline for the submission of “the tender” was set for 18th March 2015, whereby eight tenders were received. The read out prices were as follows;

S/NO	NAME OF THE BIDDER	QUOTED PRICE IN TZS (VAT Inclusive)	QUOTED PRICE IN USD (VAT Inclusive)
1.	M/s Fleet Track	1,203,911,325.00	-
2.	M/s Warrior Security	157,580,730.00	-
3.	M/s Perfect Infotech	1,581,790,000.00	-

	International Ltd		
4.	M/s Super Doll Trailer Manufacturer Co. Ltd	5,717,673,500.00	-
5.	M/s Car Track	2,484,338,193.00	-
6.	M/s Web Technologies	-	39,235.00
7.	M/s Utrack Africa	4,135,720,050.00	-
8.	M/s Fleet Monitoring System	1,591,150,667.00	-

The tenders were then subjected to evaluation which was conducted in three stages namely; preliminary, technical, and commercial/financial evaluation.

At the preliminary evaluation stage, four tenders were disqualified for non-compliance with the requirements of the Tender Document. Those were submitted by M/s Warrior Security, M/s Super Doll Trailer Manufacturer Co. Ltd, M/s Car Track and M/s Web Technology. The remaining four tenders namely; M/s Fleet Track, M/s Perfect Infotech International Ltd, M/s Utrack Africa and M/s Fleet Monitoring System were subjected to technical evaluation.

During technical evaluation, the tender submitted by M/s Fleet Track, the Appellant was disqualified for failure to comply with technical requirements as per the Tender Document. The remaining three tenders by M/s Utrack Africa, M/s Perfect Infotech International Ltd and M/s Fleet Monitoring System were found to be responsive to the technical requirements and were thus subjected to commercial evaluation.

Under the commercial/financial evaluation, all the three tenders were checked for arithmetic error, whereby all tenders were found to be free from errors. Thereafter, price comparison was done and the results were as follows: -

S/N	DESCRIPTIONS	M/s Utrack Africa Ltd	M/s Fleet Monitoring System	M/s Perfect Infotech International Ltd
1.	1 st Year	2,130,397,500.00	1,591,150,667.00	1,350,500,000.00
2.	2 nd Year	687,225,000.00	401,450,000.00	456,750,000.00
3.	3 rd Year	687,225,000.00	401,450,000.00	456,750,000.00
	SUB TOTAL	3,504,847,500.00	2,394,050,667.00	2,254,000,000.00
	18% VAT	630,872,550.00	430,929,120.06	405,720,000.00
	GRAND TOTAL	4,135,720,050.00	2,824,979,787.06	2,659,720,000.00

The Evaluation Committee therefore recommended award of the tender to M/s Perfect Infotech International Ltd at a contract price of TZS. 2,659,720,000.00 (VAT inclusive) for three years.

The Respondent's Tender Board, through a Circular Resolution No. 165/04/2015, approved the recommendation of the Evaluation Committee and awarded the tender to M/s Perfect Infotech International Ltd.

On 30th April 2015, the Respondent through its letter Ref. No. SMP/MCC/PMU/15/8/786, informed the Appellant of its intention to award the tender to M/s Perfect Infotech International Ltd. The letter also informed the Appellant that its tender was disqualified due to non compliance with the technical specifications. This notice of intention to award was received by the Appellant on 21st May 2015.

Dissatisfied, the Appellant on 22nd May 2015 wrote a letter formally objecting to the reasons for its disqualification and required the Respondent to conduct re- evaluation of the tenders.

On 3rd June 2015, the Respondent through its letter Ref. No. SMP/MCC/PMU/15/8/979 replied to the Appellant informing him that its bid was not responsive because the Appellant had failed to demonstrate and respond to key issues as per the schedule of requirements in the bidding document. The said letter was received by the Appellant on 17th June 2015.

Aggrieved by the Respondent's replies, the Appellant on 19th June 2015 filed this Appeal containing substantially three grounds as indicated in the following sections of this Decision.

SUBMISSIONS BY THE APPELLANT ON THE GROUNDS OF THE APPEAL

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

1. That the disqualification based on the failure to meet the technical specifications is neither possible nor tenable because the Appellant has been in business for several years and had performed several contracts of similar nature in Tanzania.
2. That M/s Perfect Infotech International Ltd quoted the highest contract price of TZS. 2,659,720,000.00 which is higher than the Appellant's quoted price.
3. That there was suspected major confusion by the Respondent when evaluating Appellant's tender document.

Finally, the Appellant prayed for the re-evaluation of its tender before awarding "the tender" to any tenderer.

THE RESPONDENT'S REPLIES TO THE APPELLANT'S GROUNDS OF APPEAL

The Respondent's replies were very brief and can be stated as follows:

That the Appellant was found to be non responsive for failure to comply with technical specifications. And in elaboration, he stated that the Appellant failed to demonstrate and respond to key issues as per the schedule of requirements. He said that in submitting his tender, the Appellant attached only screenshots with no commitment and no explanation of item to item as required by the Tender Document, while the successful tenderer fully complied with all technical requirements.

Finally the Respondent prayed for dismissal of the Appeal for lack of merits.

SUBMISSIONS BY THE INTERESTED PARTY IN REPLY TO THE APPEAL

The interested party was the tenderer who had been awarded the contract the subject matter of this Appeal. On his part, he submitted that –

1. The Appellant's prayer to re-evaluate the tender should be dismissed because the same had been overtaken by events. The tender process was completed on 8th June 2015 upon entry into force of the procurement contract between the Respondent and the said Party.
2. Although the Appellant had dealt with 12 out of 17 of the technical requirements he had not elaborated which of those items the Respondent had failed to clarify. The interested party asserted to have complied with all 17 functional requirements.

3. The Appellant had raised a new issue on price quotation and that during the appeal the Appellant stated to have quoted TZS 1,420,615,365/= (VAT inclusive) while at the bid opening session his read out price was TZS1,203,911,325/= CIF.
4. The Appellant was properly disqualified for quoting 785 vehicles while the Respondent's requirement was 875 vehicles (partial quotation).

In sum, the Interested Party informed the Appeals Authority that the tender cannot be re-evaluated since the Interested Party had already incurred expenses by engaging its supplier in Israel to produce 800 units of Fleet Tracking Devices for this particular project which is in the final process to be shipped into Tanzania.

ANALYSIS BY THE APPEALS AUTHORITY

In determining this Appeal, the Appeals Authority reviewed tender proceedings, various documents submitted to it as well as oral submission by all parties at the hearing. Having done so, the Appeals Authority is of the view that there are two main issues calling for determination, and these are:-

- 1. Whether the Appellant was fairly disqualified; and**
- 2. To what reliefs, if any, are parties entitled to.**

1. Whether the Appellant was fairly disqualified.

In resolving this issue, the Appeals Authority revisited the documents submitted before it vis-à-vis the applicable law. In the course of doing so, the Appeals Authority noted that, the tender process went through three main stages of evaluation namely; preliminary, technical and commercial/financial evaluation in compliance with Clauses 25, 26 and 29 of the Instructions To Bidders (hereinafter referred to as “the ITB”). For purposes of clarity, the Appeals Authority reproduces the said Clauses as hereunder-

“Clause 25.1 Prior to the detailed evaluation of tenders, the

Procuring Entity will determine whether each tender –

(a) Meets the eligibility criteria defined in ITB Clause 3;

(b) Has been properly signed;

(c) is accompanied by the required securities; and

(d) is substantially responsive to the requirements of the tendering documents.

The Procuring Entity’s determination of a **tender’s responsiveness will be based on the contents of the bid itself.**” (emphasis supplied).

“Clause 26.1 The tenders which pass the preliminary examination shall be evaluated in detail.

26.2 The technical evaluation shall be carried out to determine the adequacy of the proposal submitted in accordance with ITT Clause 12.1.”

“Clause 29.1 The Procuring Entity will evaluate and compare only the tenders determined to be substantially responsive in accordance with ITT Clause 25 and the proposals of which have been determined to be adequate in accordance with ITT Clause 26.2 or 26.3.”

The Appeals Authority revisited the Evaluation Report and observed that the Appellant's tender passed the preliminary evaluation stage and the Appellant was taken to technical evaluation whereby his tender was disqualified for non compliance with the technical requirements provided under SECTION VI of the Tender Document.

To ascertain whether the Appellant's disqualification was justified, the Appeals Authority revisited the Tender Document and observed that tenderers were supposed to comply with all seventeen (17) technical requirements as provided under SECTION VI. The Appeals Authority revisited the Appellant's tender and noted that the Appellant had attached images or pictures of the system without elaborative information on how the system complies with the Respondent's technical requirements. Furthermore, the Appellant did not provide commitment statement on how it would comply with the technical specification provided under SECTION VI of the Tender Document. As put by the Respondent, the Appellant's document did not indicate any commitment of what should be done in the event of system breakdown. The Appeals Authority reproduces some of the items which were not complied with by the Appellant as shown hereunder:-

Item's No.	PE REQUIREMENTS	APPELLANT'S RESPONSE
1	The system must be able to show the position of the vehicle at any time	The system is online web based system
9	The system must be able to output report in the file formats such as cvs, excel word and text;	Attached picture of vehicle root history.
12	The system must be able to provide record on all refueling and location	Attached a picture of real distance covered fuel consumption, monitoring and fuel sniffing.

Responding to questions from the Appeals Authority on whether the Appellant had complied with every criterion provided under SECTION VI of the Tender Document, the Appellant replied that he had complied with some and not all. In addition, the Appellant did not seek clarifications from the Respondent on any of the functional requirements.

It is evident that the Appellant did not comply with some of the requirements of the Tender Document as specified under SECTION VI- Statement of Requirements. The Appeals Authority is of the further settled view that, the Respondent's act to disqualify the Appellant was in conformity with Regulations 202 (5), 205 (a) and 207 (1) of the Public Procurement Regulations GN. No. 446 of 2013 (hereinafter referred to as

“GN No. 446/2013”). For the purpose of clarity, the said Regulations are reproduced hereunder:

Reg. 202 (5) - “for the purpose of this regulation, a tender is considered to be substantially **responsive if it conforms to all the terms, conditions and specifications of the tender document without material deviation or reservations**”.

Reg. 205 “All tenders shall be checked for substantial responsiveness to the technical requirements of the tendering documents and non-conformity to the 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 tender documents and where such failure to do so has been indicated as unacceptable.” (emphasis supplied)

“Reg. 207 (1) A procuring entity may request a tenderer to clarify his tender in order to assist in the examination, evaluation and comparison of tenders **but no advantage shall be sought, offered or permitted to change any matter of substance in the tender**, including changes in price and **changes aimed at making an unresponsive tender responsive**”.(emphasis supplied)

The Appeals Authority next considered the Appellant’s contention that; the tender had been awarded to M/s Perfect Infotech International Ltd at a contract price of TZS. 2,659,720,000.00 (VAT Inclusive) which is higher than the Appellant’s quoted price of TZS. 1,420,615,364.00 (VAT Inclusive). The Appeals Authority revisited the tender submitted by M/s Perfect Infotech International Ltd and noted that it had quoted TZS. 1,581,790,000.00 in the Form of Tender while in the Price Schedule the same price for the 1st year was shown and TZS. 1,077,930,000.00 as the

price for the 2nd year and 3rd year. Furthermore, the Appeals Authority revisited the Tender Document and observed that, Clause 1 of the Tender Data Sheet and Clause 2 of the Invitation for Tenders required tenderers to provide services for Fleet Track over a period of three years. The same reads as follows-

“Clause 1. The subject of procurement is: Procurement of Services for Provision of Fleet Tracking system to TANESCO Vehicles that will assist in Management of Company fleet and Vehicles recovery in case of theft for a period of three (3) years upon successful performance and employer discretion.”

“Clause 2 you will be required to provide the Fleet Tracking system that will assist in Management of Company fleet and Vehicle recovery in case of theft for a period of three (3) years upon successful performance and employer discretion.”

The Appeals Authority furthermore, revisited the Minutes of Tender Opening and the Evaluation Report and observed that the read out price during the tender opening for every tenderer was for one year while for those tenderers who were taken to commercial evaluation, the Evaluation Committee computed the quoted price of the remaining two years in addition to the price quoted for 1st year to get a total of quoted price of every tenderer for three years. As a result the contract price by M/s Perfect Infotech International Ltd came to TZS. 2,659,720,000.00 (VAT inclusive) for three years. Therefore, it's not true that the tender had been awarded at the highest price since the price was shown in the Price Schedule and the Tender Document provided clearly that the service needed was for three years.

Additionally, the Appeals Authority considered the Interested Party's contention that, the Appellant's quoted price was TZS. 1,420,615,365.00 (VAT Inclusive). In the first instance, the Appellant admitted before the Appeals Authority to have quoted for 785 vehicles and not 875 as required. In addition, the Appeals Authority revisited the tender submitted by the Appellant and noted that, in the Form of Tender he had indeed quoted TZS 1,203,911,325.00 CIF and in the Price Schedule 785 as Number of vehicles.

From the above findings, the Appeals Authority is of the view that, the Appellant's quoted price during the tender opening was not VAT inclusive. As a result his price became higher after VAT being included in the original read out price. Thus the Interested Party's contention that the Appellant told lies on his quoted price cannot be supported.

Therefore, from the above findings and observations, the Appeals Authority is of the firm view that the Appellant was fairly disqualified for non-compliance with the Tender Document and the first issue is answered in the affirmative.

2. To what reliefs, if any, are parties entitled to.

Having analyzed the contentious issues in dispute, the Appeals Authority proceeded to consider prayers by the parties. To start with, the Appeals Authority considered the Appellant's prayer for re-evaluation of his tender.

The Appeals Authority observes that, since it has been shown that the Appellant was fairly disqualified, it cannot order for re-evaluation of the tender. The Appellant's prayer is hereby rejected.

The Appeals Authority also considered the Respondent's prayer that the Appeal be dismissed. The Appeals Authority accepts that prayer and hereby dismisses the Appeal for lack of merits and orders each party to bear his own costs.

This Decision is binding upon the parties and may be enforced in any court of competent jurisdiction in terms of Section 97 (8) of the Public Procurement Act of 2011.

Right of Judicial Review as per Section 101 of the Public Procurement Act of 2011 explained to parties.

This Decision is delivered in the presence of all the parties this 21st July, 2015.



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VINCENT K. D. LYIMO (J. Rtd)

MEMBERS:

1. MRS. R. A. LULABUKA 

2. ENG. A. J. MWAMANGA 

3. MR. L. P. ACCARO 

4. MS. M. P. OTARU 