

IN THE  
PUBLIC PROCUREMENT APPEALS AUTHORITY  
AT DAR ES SALAAM

APPEAL CASE NO. 3 OF 2016-17

BETWEEN

M/S ENGINEERING PLUS LIMITED.....APPELLANT

AND

MBULU DISTRICT COUNCIL .....RESPONDENT

DECISION

CORAM

- |                            |               |
|----------------------------|---------------|
| 1. Ms. Monica P. Otaru     | - Chairperson |
| 2. Mr. Louis P. Accaro     | -Member       |
| 3. Eng. Aloys J. Mwamanga  | - Member      |
| 4. Mr. Ole-Mbille Kissioki | - Secretary   |

SECRETARIAT

- |                           |                        |
|---------------------------|------------------------|
| 1. Ms. Florida R. Mapunda | - Senior Legal Officer |
| 2. Ms. Violet S. Limilabo | - Legal Officer        |
| 3. Mr. Hamisi O. Tika     | - Legal Officer        |

FOR THE APPELLANT

- |                       |                     |
|-----------------------|---------------------|
| 1. Mr. Silas Paul     | - Managing Director |
| 2. Mr. Hamza Ngonyani | - Member of Staff   |

FOR THE RESPONDENT

- |                             |                                    |
|-----------------------------|------------------------------------|
| 1. Mr. Prosper S. Adam      | - District Legal Officer           |
| 2. Mr. George E. Mwakajinga | - Ag. District Procurement Officer |

This Decision was scheduled for delivery today, 12<sup>th</sup> October 2016 and we proceed to do so.

The Appeal was lodged by M/s Engineering Plus Limited (hereinafter referred to as "the Appellant") against Mbulu District Council (hereinafter referred to as "the Respondent").

The said Appeal is in respect of Tender No. LGA/061/2016/WSDP/NC/01 for the Construction of Gravity Water Scheme for Mongahay and Tumati Villages (hereinafter referred to as "the Tender").

After going through the records of the Tender proceedings submitted by the parties to the Public Procurement Appeals Authority (hereinafter referred to as "the Appeals Authority"), the facts of the Appeal may be summarized as follows:

The Respondent through their Notice Boards and the Daily News, News Paper dated 8<sup>th</sup> April 2016 invited Class Five Registered Contractors to submit bids for the Tender which was conducted through National Competitive Tendering procedures specified in the Public Procurement Regulations, Government Notice No. 446 of 2013) (hereinafter referred to as "G.N. 446 of 2013"). The deadline for submission of tenders was 29<sup>th</sup> April 2016, whereby five tenders were received from the following firms;

1. M/s Engineering Plus (T) Limited;
2. M/s Fast Construction Company Limited;
3. M/s UNEE Tanzania Investment Company Limited;
4. M/s Medes Company Limited and

5. M/s Nyangera Construction and General Enterprises Company Limited in Joint Venture (JV) with VIBE International Company Limited.

The tenders were subjected to evaluation which was conducted in the following stages; Preliminary Examination, Detailed Bid Examination and Price Comparison and Post Qualification Evaluation. During Preliminary Evaluation, bids by M/s UNEE Tanzania Investment Company Limited and M/s Medes Company Limited were found to be non responsive to the Tender Document and were therefore disqualified. During Detailed Evaluation stage the remaining three tenders were found to be substantially responsive, thus were subjected to Price Comparison. In that process, the tender by M/s Nyangera Construction and General Enterprises Company Limited in JV with VIBE International Company Limited was ranked first and considered to be the lowest evaluated tender. The tender was therefore subjected to Post Qualification. In that process, the Evaluation Committee observed the tender to be substantially responsive, hence proposed for award of the contract. The Tender Board, at its meeting held on 11<sup>th</sup> August 2016 deliberated on the recommendations by the Evaluation Committee and approved the award.

On 24<sup>th</sup> August, 2016, the Respondent through a letter with Ref. No. MDC/DED/E2/1G/VIII/115 issued a Notice of Intention to award the contract to M/s Nyangera Construction and General Enterprises Company Limited to all bidders. On 29<sup>th</sup> August 2016, the Appellant through letter with Ref. No. EPLUS/MBL/APL/01/2016, disputed the proposal made and requested the Respondent's Accounting Officer to award the bid to another deserved bidder. The Appellant's grounds for dispute were as follows;-

- That, M/s Nyangera Construction and General Enterprises Company Limited is a Class Seven registered contractor under CRB, while the awarded contract sum exceeds the threshold of TZS. 150,000,000/- for Class Seven contractors.
- That, the proposed bidder lacks experience and is incapable to execute the awarded contract in terms of equipment and personnel.

Having received the Appellant's letter referred above, the Respondent through his letter with Ref. No. MDC/DED/E2/1G/VIII/116 dated 13<sup>th</sup> September 2016, apologized to the Appellant and again informed all tenderers that the tender has been proposed to be awarded to M/s Nyangera Construction and General Enterprises Company Limited in JV with VIBE International Company Limited and not to M/s Nyangera Construction and General Enterprises Company Limited as earlier communicated.

Aggrieved by the Respondent's decision, on 19<sup>th</sup> September 2016, the Appellant lodged this Appeal to the t Appeals Authority.

#### SUBMISSIONS BY THE APPELLANT

The Appellant's arguments as deduced from the documents availed to the Appeals Authority as well as oral submissions during the hearing may be summarized as follows;

1. That, the JV referred to by the Respondent never existed during the tender opening ceremony held on 29<sup>th</sup> April 2016, and that, the Respondent had doctored the attendance register to include the JV with M/s Vibe International Company Limited, after the Appellant had lodged the complaint.

2. That, since, a Joint Venture is a temporary registered Company (*sic*), the name of the said JV ought to have appeared at the tender opening ceremony, evaluation process and in the letter of Notice of Intention to award the contract.
3. That, basing on the Respondent's earlier Notice of Intention to Award the contract in which the JV was not mentioned, the plugged in JV was not evaluated, since, the same was not present during the tender opening ceremony.
4. That, the purported JV tender document contains the rubber stamp of only one firm M/s Nyangera Construction and General Enterprises Company Limited. If at all the bid was in JV, it ought to have stamps and signatures of both companies.
5. That, the Respondent violated Regulation 231(4) of GN No.446 of 2013 as the Appellant was not given the reasons for his tender to be unsuccessful.

Finally, the Appellant prays for the following;

- i. Nullification of award of contract to M/s Nyangera Construction and General Enterprises Company Limited.
- ii. Nullification of award of contract to M/s Nyangera Construction and General Enterprises Company Limited in JV with Vibe International Company Limited.
- iii. Re-evaluation of the Tender.
- iv. Award of the contract to a qualified bidder.
- v. Any other order the Appeals Authority may deem fit and just to grant.

## SUBMISSIONS BY THE RESPONDENT

The Respondent's response as deduced from the documents as well as the oral submissions during the hearing may be summarized as follows;

1. That, representatives of four bidders including the Joint Venture attended the opening ceremony; and were all recorded in the attendance sheet.
2. That, even the tender purchase receipt was issued in the name of M/s Nyangera Construction and General Enterprises Company Limited in JV with Vibe International Company Limited.
3. That, the JV was dully existing and their document passed in all procurement process including the evaluation. As such, the assertion by the Appellant that the JV was neither present at the opening ceremony nor evaluated is unfounded.
4. That, it was a human error that caused omission of the JV in the Respondent's first letter of intention to award addressed to all bidders. However, the Respondent rectified the said anomaly through the second letter dated 13<sup>th</sup> August, 2016.

Finally, the Respondent prays for dismissal of the Appeal for lack of merits.

## ANALYSIS BY THE APPEALS AUTHORITY

Having gone through the tender proceedings including various documents submitted by both parties and oral submissions during the hearing, the Appeals Authority is of the view that the Appeal has been centred on two main issues calling for determination; and these are:-

1. Whether the proposed award of the tender to the proposed successful tenderer was proper at law.

2. To what relief(s), if any, are parties entitled to.

Having framed the above issues, the Appeals Authority proceeded to resolve them as follows;

1. Whether the proposed award of the tender to the proposed successful tenderer was proper at law

In resolving this issue, the Appeals Authority took cognisance of the Appellant's main contentions, that the purported JV did not exist and; their tender was not evaluated. In doing so, the Appeals Authority deemed it necessary to frame the following sub issues for ease of deliberations;

- i. Whether a JV existed within the proposed tenderer for award; and

- ii. Whether the JV was evaluated by the Respondent.

- i. Whether a JV existed within the proposed tenderer for award;

In resolving this sub-issue, the Appeals Authority revisited the bid by the contended JV and observed that it contained the following documents;-

1. The MDC. Receipt No. 300500000143 for purchase of the tender document dated 25<sup>th</sup> April 2016.

2. The Joint Venture Agreement dated 26<sup>th</sup> April 2016 indicating that M/s Nyangera Construction and General Enterprises Company Limited is the leading partner by 55%.
3. A Letter with Ref. No. CW0218JV dated 28<sup>th</sup> April, 2016, from Contractors Registration Board (CRB) confirming to register the JV as Class four contractors if awarded the contract.
4. The Power of Attorney authorizing the Managing Director of the Leading Partner, M/s Nyangera Construction and General Enterprises Company Limited, one Alexander Massay to represent the JV.
5. The detailed information of both companies, including staff, financial statements as well as experience in various projects each company had performed.

During the hearing, the Appeals Authority availed the bid of the contended JV to the Appellant to satisfy himself as to the existence of the JV at the time of the tender opening ceremony. Upon perusal, the Appellant claimed to see the JV Agreement and other related documents for the first time but unalterably insisted doubting their authenticity based on the circumstances that gravitated in the tender process and the short time within which the JV was formed and approved by the CRB.

The Appeals Authority does not apprehend the Appellant's doubts since all documents which were the centre of his suspicions suspicious were adequately contained in the JV tender. The Appeals Authority observed that during the opening ceremony, the Appellant's representative one Hamza Ngonyani, was present and signed all bids including that of the

JV as bidders' witness. Under the circumstances, the Appeals Authority observes that the Appellant was dully represented at the opening ceremony acknowledging the JV bid, as thus denying this, at this point in time is a mere afterthought. In case of any doubt, the Appellant should have verified this information then.

Further, the Appeals Authority revisited the Respondent's attendance register which has been condemned to have been doctored and observed that, the JV partners appeared in the attendance register in different hand writings, on the face of it. When asked about this glaring observation, the Respondent conceded that at the opening ceremony, the said JV was neither read nor recorded; rather, it was read and recorded in the name of the partner M/s Nyangera Construction and General Enterprises Company Limited, the lead partner. That the name of the JV partner M/s Vibe International was added in the attendance register later on.

When further asked about the legality of the action, the Respondent conceded to have made a mistake rectifying the records but insisted that the JV existed regardless of the submission of reading only one company's name.

From the above, it is the Appeals Authority's considered view that despite the anomaly observed in the attendance register all other documents by the proposed bidder as listed above were in order as a result it would have sufficed for the Respondent to leave the name of M/s Nyangera Construction and General Enterprises Company Limited alone in the attendance register to represent the JV since the same was the lead partner and have been legally authorized to represent the JV.

Notwithstanding the observed anomaly in the attendance register the Appeals Authority's conclusion regarding this sub issue is that there was a JV existing within the companies proposed for award.

ii. Whether the JV was evaluated by the Respondent

In resolving this sub-issue, the Appeals Authority revisited the Evaluation Report and observed the reference to the JV during the whole evaluation process. Thus, evidently the JV was evaluated before it was proposed for award. It is unfortunate that Appellant's assertions were based on the initial letter of intention to award the contract which omitted to mention the JV.

In view of the above, the Appeals Authority observes that the Appellant's assertion regarding this sub- issue is baseless since there is ample evidence proving that JV existed and was evaluated by the Respondent.

Accordingly, the Appeals Authority's conclusion regarding the proposed award of the tender to the proposed successful tenderer is that the same was legally proper.

Last but not least, the Appeals Authority agrees with the Appellant that the Respondent was bound by the law to avail reasons for the Appellant's disqualification while issuing the Notice of Intention to award the contract as per Regulation 231(4) of GN.No. 446 of 2013. The failure to do so contravened the law. However, it is the Appeals Authority's view that the failure did not prejudice the Appellant.

2. To what relief(s), if any, are the parties entitled to

The Appeals Authority took cognizance of its findings in the first issue above that the proposed award of the tender to M/s Nyangera

Construction and General Enterprises Company Limited in JV with Vibe International Company Limited was legally proper, as such; the Appeal is dismissed in its entirety for lack of merits.

On the basis of the aforesaid conclusion, the Respondent is ordered to proceed with other necessary steps to award the tender to the proposed successful tenderer in compliance with the law.

It is so ordered.

Each party to bear own costs.

The Right of Judicial Review under Section 101 of the Public Procurement Act, Act No. 7 of 2011 as amended by the Public Procurement (Amendment) Act, Act No.5 of 2016 is explained.

This Decision is delivered in the presence of the Appellant and absence of the Respondent, this 12<sup>th</sup> October, 2016.

  
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MONICA P. OTARU  
CHAIRPERSON

MEMBERS:

1. ENG. ALOYS MWAMANGA  .....
2. MR. LOUIS ACCARO  .....