

**IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY
AT DAR ES SALAAM**

APPEAL CASE NO. 01 OF 2019-2020

BETWEEN

M/S WASION GROUP (TANZANIA) LIMITED.....APPELLANT

AND

TANZANIA ELECTRIC SUPPLY COMPANY LIMITED.....RESPONDENT

DECISION

CORAM

- | | |
|------------------------------------|----------------|
| 1. Hon. Justice (rtd) Suda Mjasiri | - Chairperson |
| 2. Mr. Rhoben Nkori | - Member |
| 3. Adv. Rosan Mbwambo | - Member |
| 4. Ms. Florida Mapunda | - Ag.Secretary |

SECRETARIAT

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

FOR THE APPELLANT

- | | |
|-----------------------------|---------------------------------|
| 1. Ms. Carol Wang | -Deputy Managing Director |
| 2. Ms. Victoria Simon Ngowi | -Advocate, KKB Attorneys |
| 3. Mr. Nasri A. Hassan | - Advocate, KKB Attorneys |
| 4. Ms. Lisa Luoga | -Human Resources, KKB Attorneys |



THE RESPONDENT

1. Mr. Norbert Bedder - Principal Zonal Legal Officer
2. Mr. Mapesa Idaso - Principal Procurement Specialist

This Appeal was lodged by M/s Wasion Group (Tanzania) Limited (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 Appeal is in respect of Tender No. PA/001/2018-19/LZN/G/28 for the Supply of Meters for Lake Zone under framework Contract arrangement – Single Phase and Three Phase Meters (hereinafter referred to as "**the Tender**").

The Tender was conducted through Restrictive National Competitive Bidding method specified under the Public Procurement Act, No. 7 of 2011 as amended (hereinafter referred to as "**the Act**") and the Public Procurement Regulations GN. No. 446 of 2013 and GN.No.333 of 2016 (hereinafter referred to as "**the Regulations**").

After going through the record of Appeal submitted to the Public Procurement Appeals Authority (hereinafter referred to as "**the Appeals Authority**"), the background of the Appeal may be summarized as follows:

The Respondent through the Daily News newspaper dated 4th October 2018, invited eligible registered local manufacturers to participate in the Tender. The Tender had five Lots, namely; Mwanza Lot 1, Mara Lot 2, Geita Lot 3, Kagera Lot 4 and Simiyu Lot 5. The deadline for the submission of tenders was set for 18th October 2018. Three tenders



including the Appellant's were received in respect of all Lots and for both single-phase and three Phase Meters.

Tenders were then subjected to evaluation which was conducted into three stages namely; preliminary, technical and detailed evaluation. All three tenders were found to be responsive during preliminary and technical evaluation. The tenders were then subjected to detailed evaluation whereby the Appellant's tender was disqualified on the ground that its factory was incomplete as it was still under construction. The remaining two tenders were subjected to price comparison and ranking. After completion of this process, award was recommended to M/s Inhemeter (T) Limited for Lots 1, 2 and 4 while M/s Baobab Energy Systems Limited was recommended for award of Lot 3 and Lot 5. The Tender Board at its meeting held on 18th April 2019 approved the award as recommended by the evaluation committee.

On 14th June 2019, the Respondent informed all tenderers, its intention to award the Tender to M/s Inhemeter (T) Limited for Lot 1, Lot 2 and Lot 4 at a unit price of TZS 135,334.78 for Single Phase Meters and TZS 442,907.82 for Three Phase Meters and M/s Baobab Energy Systems Limited for Lot 3 and Lot 5 at a unit price of TZS 135,341.92 for Single Phase Meters. The letter also informed the Appellant that its tender was unsuccessful because its factory was incomplete and that it had not started production.

Dissatisfied with the given reason on 18th June 2019, the Appellant submitted its application for administrative review to the Respondent's Accounting Officer. On 25th June 2019, the Respondent issued its decision

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rejecting the application. Aggrieved further, on 4th July 2019, the Appellant filed this Appeal.

SUBMISSIONS BY THE APPELLANT

The Appellant's grounds of Appeal may be summarised as follows: -

1. That, it was amongst the tenderers who participated in this Tender and it had quoted the lowest price of all. Pursuant to procurement laws it was entitled to be awarded the Tender. To the contrary, the Tender was awarded to other firms.
2. That, the reasons provided by the Respondent for its disqualification is baseless and unjustifiable. The Act and its Regulations requires each tender to be treated separately and independently. To the contrary, the Respondent disqualified its tender by using a report conducted in a different Tender. It added further that, it understands that the Respondent is one and the same procuring entity; however, each tender is to be treated independently.
3. That, the Appellant is a local manufacturer incorporated and licensed in mainland Tanzania since June 2018. The firm is capable of producing and is eligible in terms of legal, technical and financial capabilities. In terms of the tender requirement, the firm met all the required criteria. It submitted further that, on 18th February 2019, the Respondent through a letter with reference No. DMD/SMSM/MLPU/PME/1 verified the capabilities of its factory as at that particular time it had already started production.

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4. That, the Appellant has been a supplier of the Respondent for a long time as a result it decided to establish a factory for electric meters in Tanzania. Currently the firm has been losing bids on the Respondent's floated tenders without any valid reasons. The Respondent's act has caused loss to the factory since the Appellant had been its main client; and the main reason for investment in Tanzania.

Finally, the Appellant prayed for the following orders: -

- i. A declaration that that there was unfairness in the process of awarding the Tender as the Appellant was the lowest bidder;
- ii. Award made to M/s Baobab Energy Systems Limited be nullified;
- iii. A declaration that each Tender be treated separately to the extent that due diligence report of one zone not be used in all the tenders;
- iv. The Appellant be re-instated in the Tender process;
- v. The Respondent be ordered to re-evaluate all the tenders and re-negotiate reasonably;
- vi. Compensation to the tune of TZS 6,000,000,000/-;
- vii. Interest at the commercial rate of 22% from March 2019 until the date of the award;
- viii. Legal fees to the tune of TZS 10,000,000/-;
- ix. Filing fees and other costs amounting to TZS 500,000/-; and
- x. Any other reliefs the Appeals Authority may deem fit and fair to grant.



REPLY BY THE RESPONDENT

The Respondent's reply to the grounds of Appeal may be summarised as follows: -

1. That, the award has been preferred to the tenderer who had been found to be the lowest evaluated and not the lowest quoted. The Appellant quoted the lowest price but its tender was not the lowest evaluated.
2. That, the Appellant was disqualified based on findings of the post-qualification process conducted at its factory by the Respondent's Dar es salaam and Coast zone team. The Post-qualification Report indicated that the Appellant's factory was incomplete and was yet to start production of Meters. It added that, though the Tender was different from the one floated by the Dar es Salaam and Coast zone yet the procuring entity is the same as well as the intended products. All products were to be procured from the same factory.
3. That, on 15th January 2019, two weeks after post-qualification by Dar salaam Zone, the Appellant invited the Respondent's Head Office to visit its factory for inspection. It is the Respondent's view that the Appellant's act is sufficient proof that at the time of bid submission and during post qualification its factory was not ready for production. It fails to comprehend the Appellant's act of inviting the Respondent's Head Office for inspection of its factory while the same had not advertised any Tender. The Appellant's act also entails that it recognizes that the Respondent (TANESCO) is one and the same procuring entity. Thus, one report on the same matter can be used for rejection of a tender as it is on the same data base. It emphasised its argument by indicating that Post-qualification

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was conducted to the Appellant's factory to substantiate that it possessed the required capabilities for manufacturing the required Meters. During that process it was discovered that some tests were not completed including insulation test, electrostatic discharges, surge immunity test, climatic influence test, glowing wire test, spring hummer test and overload test. Thus, the Appellant factory was still in the process of completion.

4. That, much as the Tender process was conducted by the Respondent's Lake Zone office, award of the said Tender was approved by the Respondent's main tender board at the Head Office. Therefore, zone offices cannot be treated separately from the Head Office. Thus, the Tender process was conducted in accordance with the law.
5. That, the Respondent letter dated 18th February 2019 cannot be relied upon by the Appellant as the Inspection Report referred therein, emanates from the exercise which was not part and parcel of the tendering process.
6. That, the Appellant had not supplied meters to the Respondent as claimed since it was incorporated in June 2018; and it participated in this Tender for the first time in October 2018.
7. In relation to Appellant's reliefs sought, the Respondent submitted as follows:-
 - i. Since the Appellant lacked the requisite qualification at the time of bidding and it confirmed that it was still doing some preparation until January 2019, while tenders were submitted in October 2018, the Respondent could not have waited for a bidder to qualify for award. Doing so would have caused injustice to those who were eligible at the time of bidding and would have resulted in unnecessary delay.



- ii. The Tender awarded to M/s Baobab Energy Systems Limited be maintained as the bidder was the lowest evaluated.
- iii. The Appeals Authority should declare that available reports used for decision in award or rejection of tenders for items of similar nature with the same description be valid so as to avoid losing government money for conducting duplicate Post-qualification on the same firm producing similar items.
- iv. The Appeals Authority should not re-instate the Appellant in the Tender process as the firm was ineligible as a local manufacturer at the time of bidding. The qualification possessed at this moment may merit them for award in future tenders.
- v. That, if re-evaluation of tenders would be ordered by this Appeals Authority, the Respondent would conduct the same based on Clause 13 of the Tender Data Sheet (TDS) which required bidders to have one year experience. At the time of bidding the Appellant had experience of only four months. Thus, its bid would automatically be disqualified.
- vi. The Respondent requests the Appeals Authority not to order compensation as the Appellant had not suffered any damage as the same was not eligible as a local manufacturer. Also the general damages and interest claimed be dismissed for lack of justification. Legal costs for handling this Appeal should be borne by the Appellant itself as it was aware that its disqualification was fair and just.

Finally, the Respondent prayed for dismissal of the Appeal with costs.

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In its brief rejoinder the Appellant submitted that with regard to experience of the firms, no one met the one year experience since all firms were incorporated in 2018. Thus, the Respondent waived such a requirement.

With regard to the Reports, the Appellant argued that if the Report by the Head Office dated 18th February 2019 is not applicable for this Tender, equally, the Report by the Dar es salaam Zone dated 2nd January 2019 should not be relied by the Appeals Authority since it emanates from a different Zone in respect of a different Tender.

ANALYSIS BY THE APPEALS AUTHORITY

The Appeals Authority having gone through the Appeal record, Tender proceedings including various documents and the oral submissions by the parties, is of the view that the Appeal is centred on two main issues agreed upon by the parties. These are:-

1. Whether the disqualification of the Appellant's tender was justified; and

2. What reliefs, if any, are the parties entitled to?

In resolving issue Number 1 on the *disqualification of the Appellant's tender*, the Appeals Authority revisited the Tender Document, the Evaluation Report *vis-a-vis* the applicable law. In the course of doing so, the Appeals Authority observed that the Lake Zone delegated Tender Board approved the award of the Tender for Lots 1, 2 and 5 to the Appellant. This proposal was submitted to the main PMU at the Head Office for submission to the Main Tender Board for approval. In its deliberations, the PMU observed from the Due Diligence Report conducted by the Dar es Salaam and Coast zone team in Tender No. PA/001/2018-19/DZN/G/34 for



the Supply of meters that the Appellant's factory was not ready for production since it was at the completion stage and some items were yet to be installed. It thus recommended for disapproval of the award to the Appellant. The Main Tender Board after its deliberations disapproved the award to the Appellant as recommended by the PMU and ordered re-evaluation, the outcome of which the Appellant's bid was not considered during price comparison on the ground that its factory was not ready for production.

The Appeals Authority revisited the Tender proceedings and observed that the Tender which is the subject of this Appeal and the Tender floated by the Dar es Salaam and Coast Zone were different and was deliberated by different delegated Zonal tender boards, though the procured materials were the same and the same factory was to be used for production. The Appeals Authority is of the firm view that even if Regulation 48(4) of GN.No.446 of 2013 empowers the Main Tender Board to oversee procurement functions of its delegated tender boards; such powers must conform to the requirement under the law. We observed that under Clause 35.1 of the Instruction to Tenderers (ITT), the proposed successful bidder(s) were to undergo post qualification process if it is considered to be the lowest evaluated using the criteria specified in the Tender Data Sheet (TDS). However, no Clause in the TDS corresponds with Clause 35.1 of the ITT. That is to say, the Post Qualification criteria were not provided in the TDS. Instead, Post Qualification criteria were provided under Clause 4.6 of the ITT under Clause 6 of the TDS. The same required the Respondent to verify authorization of the bidders to supply the desired goods from the Manufacturers. According to it, the Post Qualification was restricted to the



submission of the Manufacturer's Authorization Certificate and confirmation of the Certificate of Registration as a local manufacturer only. It is the Appeals Authority's view that by virtue of Section 53(2) of the Act read together with Regulation 224(2) of GN.No. 446 of 2013 the Respondent's Post Qualification ought to have complied with the criteria explicitly stated in the TDS and not otherwise.

For purposes of clarity, Section 53(2) of the Act and Regulation 224(2) of GN.No.446 as well as Clauses 35 of the ITT and 6 of the TDS are reproduced hereunder:-

Sect 53(2)The criteria to be met shall be set out in the Tendering Documents and if the tenderer does not meet any of these criteria, the tender shall be rejected and the procuring entity shall make a similar determination for the next lowest evaluated tender, in the case of procurement or the next highest evaluated tender, in the case of disposal of public assets by tender.

Reg 224(2) The criteria for Post Qualification shall be set out in the solicitation documents and shall include-

- a) Experience and past performance of similar contracts;*
- b) Knowledge of local working conditions;*
- c) Capabilities with respect to personnel;*
- d) Equipment and construction and construction or manufacturing facilities where applicable;*
- e) Financial capability to perform the contract;*



- f) *Current commitments;*
- g) *Legal capacity to make binding decisions on its rights, duties and obligations;*
- h) *Compliance with health and safety laws, tax and employment laws where applicable;*
- i) *Litigation record; or*
- j) *Any other relevant criteria.***

*Clause 35. After determining the lowest-evaluated tender, the Procuring Entity shall carry out the post qualification of the Tenderer **using only the requirements specified in the Tender Data Sheet.***

Clause 6 Demonstration of authorization by manufacturer:
*Bidders shall submit **manufacturer authorization certificate in Original form.** Bids submitted without original certificate will be treated as non-responsive.*
Bidders will be required to submit Certificate of Registration as local manufacturer of Meters. During Post Qualification, Purchaser may enquire confirmation from the manufacturers"

(Emphasis Added)

In view of the above mentioned provisions, the Appeals Authority is of the considered view that the use of the Due Diligence Report conducted by Dar es salaam and Coast Zone to this Tender was an alien criterion and



defeated the requirements under Regulation 206(1) of GN. No. 446 of 2013 which prohibit evaluation of Tenders based on extrinsic evidence.

The Appeals Authority considered arguments by the parties regarding validity of the Due Diligence Reports by the Dar es salaam and Coast Zone used by the Respondent to disqualify the Appellant and the Report by the Head Office used by the Appellant as the basis for its factory determination of compliance and observed that none of them is relevant to the Tender or Appeal at hand. The Appeals Authority observed that despite the fact that the Respondent's Zonal offices are under the same Institution (TANESCO), each tender was required to be evaluated independently.

With regard to the Report cited by the Appellant, that is the Head Office Report, the Appeals Authority is of the view that it has no relevance to the Tender under dispute. The factory visit as well as the Report findings resulted from the invitation by the Appellant. The same was not in relation to the Tender under dispute. The Report was released after the Tender had been advertised, opened and the Evaluation Process had been finalized save for approvals. Therefore it cannot be used as a basis for determination of tenderers qualifications and award.

In view of the above findings, the Appeals Authority's conclusion with regard to the first issue is that disqualification of the Appellant's tender was not justified.

What reliefs, if any, are the parties entitled to

Having answered the first issue in the affirmative, the Appeals Authority hereby nullifies the proposed award of the Tender to the proposed successful tenderer and orders the Respondent to re-instate the Appellant



in the Tender proceedings and post qualify it in accordance with the criteria set in the Tender Document.

The appeal is hereby allowed to that extent. Each party is to bear its own costs. Order accordingly.

This Decision is binding on the Parties and may be executed in terms of 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 Appellant and the Respondent this 6th day of August 2019.



HON. JUSTICE (RTD) SAUDA MJASIRI

MEMBERS:

1. MR. RHOBEN NKORI.....
2. ADV. ROSAN MBWAMBO.....