

**IN THE PUBLIC PROCUREMENT APPEALS AUTHORITY
AT DAR ES SALAAM
APPEAL CASE NO. 20 OF 2019-20**

**BETWEEN
M/S. S. E. C (EAST AFRICAN) COMPANY LIMITED.....APPELLANT**

AND

PUBLIC SERVICE SOCIAL SECURITY FUND.....RESPONDENT

DECISION

CORAM

- | | |
|-------------------------------------|-----------------|
| 1. Hon. Justice (rtd) Sauda Mjasiri | - Chairperson |
| 2. Adv. Rosan Mbwambo | - Member |
| 4. Mr. Rhoben Nkori | - Member |
| 5. Ms. Florida Mapunda | - Ag. Secretary |

SECRETARIAT

Ms. Violet Limilabo - Legal Officer

The Appeal was lodged by M/s S. E. C (East African) Company Limited (hereinafter referred to as "**the Appellant**") against the Public Service Social Security Fund commonly known by its acronym PSSSF (hereinafter referred to as "**the Respondent**").

The Appeal is in respect of Tender No.PA155/2019-2020/HQ/W/03 for Renovation of Quality Plaza Building in Dar es Salaam – Lot 1 for Lift works (hereinafter referred to as "**the Tender**").



The Tender was conducted using the National Competitive Tendering procedures 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**").

On 22nd January 2020, the Respondent through Tanzania National Electronic Procurement System (TANePS), invited eligible tenderers to participate in the Tender. The deadline for submission was set for 6th February 2020, whereby two (2) tenders were received in respect of Lot 1.

Tenders were then subjected to evaluation which was conducted into three stages, namely; preliminary, technical and financial evaluation. During preliminary evaluation both tenders were found to be compliant hence were subjected to technical evaluation. At this stage the Appellant's tender was disqualified for failure to attach Certificates and Curriculum Vitae (CV's) of Full Technician Certificate (FTC) in Mechanical Engineering as required under Form of Qualification Information Item 1.5(2). The Appellant instead attached Artisan Certificates from VETA. The remaining tender by M/s Derm Elevators Ltd qualified for financial evaluation whereby it was found to be substantially responsive to the requirements of the Tender Document. The Evaluation Committee recommended award of the Tender to it at a contract price of TZS. 362,282,659.00 VAT inclusive.

The Tender Board through Circular Resolution No. 53/2019/2020 approved the award as recommended by the Evaluation Committee.



On 5th March 2020, the Respondent issued the Notice of Intention to award the Tender to all tenderers who participated in the Tender. The Notice informed the Appellant that its tender was not successful for its failure to attach copies of Certificates and CV's of FTC in Mechanical Engineering; instead it attached artisan certificates from VETA.

Dissatisfied, on 9th March 2020, the Appellant applied for administrative review to the Respondent. On 13th March 2020, the Respondent issued a decision by dismissing the Appellant's Application for review. The said letter was received by the Appellant on 23rd March 2020. Aggrieved further by the Respondent's decision, on 31st March 2020, the Appellant filed this Appeal.

This Appeal proceeded by way of Written Submissions.

SUBMISSIONS BY THE APPELLANT

The Appellant disputes its disqualification on the ground that it had not submitted Certificates and CV's of FTC in Mechanical Engineering. The Appellant argued that, it had explained to the Respondent that the works to be performed by Full Technicians were to be performed by Engineers who are technically more qualified. It further argued that lift work needed brain work which was to be provided by Engineers and muscle work which was to be done by qualified turners and fitters from Vocational Education and Training Authority (VETA). The Appellant's conduct of engaging technical personnel from Technical School and VETA supports the country's



initiative to attain middle level economy provided in the National Development Vision 2025.

In its written submissions the Appellant stated that there is no Education Institution in the United Republic of Tanzania which issues FTC since 2007; as confirmed by Dar es Salaam Institute of Technology (DIT). Therefore it opted to submit copies of Certificates and CVs indicating a Bachelor Degree in Mechanical Engineering.

The Appellant added that, holders of FTC are not available in the market that is why it decided to employ technical personnel with a Bachelor degree in Mechanical Engineering. The Appellant has been in the business from 2006 and had supplied more than 1200 units in Tanzania and abroad. This indicates that the Appellant has never failed to deliver due to lack of FTC personnel. Therefore, the Appellant insisted that it complied with the requirements of the Tender Document, the Act and its Regulations.

Finally, the Appellant prayed for the following orders:-

- i. Fair treatment to both tenderers;
- ii. The Respondent to re-evaluate tenders effectively;
- iii. The Respondent to make mandatory action according to the Public Procurement Act of 2011 and the Public Procurement Regulations or any other law regarding the matter.

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REPLY BY THE RESPONDENT

The Respondent's reply to the Appellant's ground of Appeal as well as its written submissions can be summarised as follows:-

That, the Appellant was disqualified for its failure to submit copies of Certificates and CV's of FTC in Mechanical Engineering contrary to the requirements of Section V and IX of the Tender Document. In support of its argument the Respondent submitted that, the Appellant conceded that it did not submit CV's and Certificates of FTC in Mechanical Engineering as required by the Tender Document. However, the Appellant submitted copies of Certificates and CV's of personnel with a Bachelor Degree which was not in compliance with the requirements provided in the Tender Document.

The Respondent argued that according to Clause 7(i) of the Special Conditions of Contract (SCC) and Item 1.5 (1) and (2) of the Form of Qualification Information two criteria regarding Qualification of key Personnel were to be complied with by the tenderers. The first criterion was to attach copies of Certificates and CV's of professional Mechanical Engineer registered by Engineers Registration Board (ERB). The second criterion was to attach Certificates and CV's of FTC in Mechanical Engineering.

The Appellant complied with the requirement provided under Item 1.5 (1) of the Form of Qualification Information by submitting ERB Certificates and CV's of the following Personnel; Gabriel P. Makundi, Emilian Kimaro, Moses H.U. Mfalanyombo and Nelson J. Gilson. The Appellant also attached a



Certificate of Albert B. Rwegasira who holds an Ordinary Diploma. However, the Appellant failed to comply with Item 1.5(2) of the Form of Qualification Information as it attached VETA Certificates in Fitter Mechanics of Gabriel B. Mwakilema, Edson M. Temba and Ahmed H. Ombeni instead of Certificates and CV's of FTC in Mechanical Engineering as required by the Tender Document.

The Respondent submitted further that, the documents submitted by the Appellant in the second criterion contravened the requirements of Regulations 203(1) and 206(1) of the Regulations. The provisions state in clear terms that tender evaluation must be based on terms and conditions prescribed in the Tender Documents and determination of responsiveness must be based on the contents of the tender itself without recourse to extrinsic evidence. Hence, the Appellant's disqualification in this regard was justified.

With regard to the Appellant's letter from DIT, the Respondent submitted that the said letter was never submitted before, although the Respondent agrees that FTC has now been changed to Ordinary Diploma Programs. This was considered during evaluation of tenderers to determine compliance of Item 1.5(2) of the Form of Qualification Information.

Finally the Respondent prayed for the following orders:-

- i. The treatment of evaluation was fair to both tenders for it considered the laid criteria found in the bid document;
- ii. The Tender was effectively evaluated and does not qualify for re-evaluation as claimed;

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- iii. The Respondent adhered to all requirements of the law in the disputed tender process, specifically; it acted according to Regulations 206(1) and (2) of the Regulations; and
- iv. Dismissal of the Appeal with costs.

ANALYSIS BY THE APPEALS AUTHORITY

After going through pleadings and written submissions by the parties, the Appeals Authority is of the view that, there are two issues for determination and these are:-

1.0 Whether the disqualification of the Appellant's Tender was justified; and

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

Having identified the issues in dispute the Appeals Authority proceeded to resolve them as follows:-

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

In resolving this issue the Appeals Authority revisited Clauses 11(1)(h) of the ITB, 8(f) of the BDS, 7(i) of the SCC and Item 1.5(1) and (2) of the Form of Qualification Information and observed that one of the requirement was attachment of Certificates and CV's of the Key Personnel.

The said Clauses provide as follows:-

ITB 11(1) "The Tender prepared by the Tenderer shall constitute the following components:



(h) Any other document required in the BDS."

BDS 8 "Other information or materials required to be completed and submitted by tenderers:

(f) Certificate and CV's of Key Personnel."

SCC 7 "Include the Schedule of Key Personnel

The Key Personnel to be fulltime at site should be

- i. For lift works, professional mechanical engineer registered by ERB and Full Technician Certificate (FTC) in mechanical engineering.*

For evaluation purposes, Certificates and Curriculum Vitae (CV's) for the key personnel must be submitted."

Item 1.5 "Qualification and experience of key personnel proposed for administration and execution of the contract. (CV's and Certificates of all key proposed key personnel shall be attached)

- (1) Professional Mechanical Engineer registered by ERB.*
- (2) Full Technician Certificate (FTC) in mechanical engineering."*

From the above quoted provisions it is crystal clear that tenderers were required to submit copies of Certificates and CV's of the proposed Key Personnel who were in two categories, namely; Professional Mechanical Engineers registered by ERB and FTC in Mechanical Engineering.

The Appeals Authority revisited the Appellant's tender and observed that, in compliance with the requirement of Item 1.5 (1) of the Form of Qualification Information and Clause 7(i) of the SCC, the Appellant

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attached CV's and Certificates of Gabriel P. Makundi who is registered by ERB as a professional Engineer in Mechanical Engineering, Emilian Kimaro who is registered by ERB as Engineering Technician Level II in Electronics and Communication Engineering, Moses H. U. Mfalanyombo who is registered by ERB as a Graduate Engineer in Electronics and Communication Engineering, Nelson J. Gilson who is registered as a graduate engineer in Mechanical Engineering and Albert Rwegasira who holds an Ordinary Diploma in Electrical and Electronics Engineering. In compliance with the requirement of Item 1.5(2) of the Form of Qualification Information read together with Clause 7(i) of the SCC the Appellant attached Vocational Certificates Level One in Fitter Mechanics of two personnel, namely; Gabriel B. Mwakilema and Edson M. Morice. There was also a Vocational Certificate Level Two in Fitter Mechanics of a person named Ahmed Ombeni. No CV's were attached.

Therefore, the Appeals Authority is of the firm view that the Appellant complied with requirements of Item 1.5(1) of the Form of Qualification Information read together with Clause 7(i) of the SCC as it submitted a Certificate and CV of one Gabriel P.Makundi, Professional Mechanical Engineer registered by ERB.

Having reviewed the information submitted by the Appellant on the TANePS, the Appeals Authority observed that, the Appellant failed to comply with the requirements of Item 1.5(2) of the Form of Qualification Information, as it did not attach to its tender, CV's and certificates of FTC in Mechanical Engineering as required. The Appellant attached instead certificates in fitter Mechanics from VETA contrary to the requirement.

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From the above facts, the Appeals Authority is of the settled view that, the Appellant's disqualification was justified and in accordance with Regulations 203(1), 206(1) and (2) of the Regulations. These Regulations read as follows:-

Reg. 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."

Reg. 206(1) "The procuring entity's determination of a tender's responsiveness shall be based on the contents of the tender itself without recourse to extrinsic evidence."

(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."

Regarding the Appellant's argument that FTC personnel are not available in the market since 2007, the Appeals Authority is of the view that the Appellant ought to have sought for clarification pursuant to Clause 8.1 of the ITT modified by Clause 6 of the BDS and Regulation 13(1) of the Regulations.

From the above findings the Appeals Authority concludes the first issue in the affirmative.



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

Based on the above findings and conclusion, the Appeals Authority hereby dismiss the Appeal for lack of merits. We make no order as to costs.

It is so ordered.

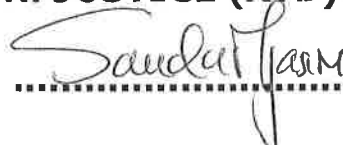
This Decision is binding and can be enforced in accordance with Section 97(8) of the Act.

The parties have a right of Judicial Review as per Section 101 of the Act.

This Decision is made this 30th day of April 2020.

Parties to be notified accordingly.

HON. JUSTICE (RTD) SAUDA MJASIRI


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CHAIRPERSON

MEMBERS:

1. MR. RHOBEN NKORI.....

2. ADV. ROSAN MBWAMBO.....