

IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY
AT DAR ES SALAAM

APPEAL NO. 18 OF 2017-18

BETWEEN

M/S KWADU MIKOMA ENTERPRISESAPPELLANT

AND

TANZANIA ELECTRIC SUPPLY COMPANY
LIMITED (TANESCO).....RESPONDENT

DECISION

CORAM

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

SECRETARIAT

1. Ms. Florida Mapunda - Senior Legal Officer
2. Mr. Hamisi Tika - Legal Officer

FOR THE APPELLANT

1. Mr. Ambokile Mwakaje - Advocate, KAI & Co. Advocates
2. Mr. Abdurahman Kwadu - Managing Director

FOR THE RESPONDENT

1. Mrs. Elimamba R. Tenga - Zonal Procurement Specialist- Central
2. Ms. Nancy Mapunda - Advocate, Head Quarters
3. Mr. John L. Skauki - Plant Manager, Mtera

The Appeal was lodged by M/s Kwadu Mikoma Enterprises (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 to Tender No.

PA/001/2016-2017/CZN/G/007 for the Supply, Installation, Testing and Commissioning of Generator Air Coolers to Unit 2 at MTERA Hydropower Plant (hereinafter referred to as "the Tender").

According to the records 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 the Daily News newspaper dated 15th February 2017 invited tenderers to participate in the Tender. The deadline for submission of tenders was set for 17th March 2017 whereby five firms, the Appellant inclusive submitted their tenders.

The tenders were subjected to evaluation which was conducted in two stages, namely; Preliminary and Detailed Evaluations. During Preliminary Evaluation, two tenders were disqualified for failure to comply with eligibility criteria provided in the Tender Document. The remaining three tenders were subjected to detailed evaluation whereby a tender by one M/s Pan African Trading Company Limited was disqualified for failure to comply with technical requirements. The remaining two tenders were subjected to correction of errors and price comparison. The Appellant's tender was found to be the lowest evaluated and was recommended for award at a contract price of TZS 836,235,495.16 VAT inclusive.

The recommendations of the Evaluation Committee were approved by the Tender Board at its meeting held on 10th May 2017 and on 15th May 2017 the Respondent issued a Notice of Intention to Award to all tenderers who participated in the Tender. The said notice informed each unsuccessful tenderer reason for its disqualification. M/s Pan African Trading Company Limited was dissatisfied with the reason given, therefore filed an application for administrative review on 19th May 2017. On 24th May 2017, the Respondent issued its decision which dismissed the application for review for lack of merits.

Dissatisfied further with the Respondent's decision, on 30th May 2017 M/s Pan African Trading Company Limited submitted another application for administrative review with detailed clarification on the technical reason that led to their disqualification.

After receipt of the second application for review, the Respondent constituted an "independent review panel" consisting of experts in hydro-power plant for purposes of reviewing technical aspects of all the tenders. After completion of the review process, the independent review panel found three tenders to be responsive and subjected them to price comparison. M/s Pan African Trading Company Limited emerged to be the lowest evaluated tenderer and was recommended for award at a contract price of TZS 353,298,852.40 VAT inclusive. The said recommendations were approved by the Tender Board at its meeting held on 11th September 2017.

On 12th September 2017, the Respondent issued another Notice of Intention to Award which informed all bidders that following the application for review lodged by M/s Pan African Trading Company Limited, all tenders were reviewed and the findings thereof led them intending to award the tender to M/s Pan African Trading Company Limited at a contract price of TZS 353,298,852.40 VAT inclusive.

The Appellant was dissatisfied with the said notice and lodged an application for administrative review on 16th September 2017. The Appellant challenged the Respondent's procedures which led the award to be proposed to M/s Pan African Trading Company Limited. On 19th September 2017 the Respondent issued its decision which dismissed the Appellant's application for review. Aggrieved by the Respondent's decision, on 3rd October 2017 the Appellant lodged this Appeal.

SUBMISSIONS BY THE APPELLANT

The Appellant raised three grounds of Appeal which may be summarized as follows;

- i) That the Respondent wrongly entertained the complaint/objection from M/s Pan African Trading Company Limited which was submitted hopelessly out of statutory time;
- ii) That the Respondent unlawfully issued its purported decision in violation of Section 96(6) of the Public Procurement Act of 2011, as amended, (hereinafter referred to as "the Act"); and
- iii) That the Respondent's purported decision is not proper in law as it violates Section 96(6)(a) and(b) of the Act.

Expounding on the first and second grounds of Appeal the Appellant submitted that, Section 96(4) of the Act prohibits accounting officers from entertaining complaints filed beyond seven working days from the date a tenderer becomes aware of the circumstances giving rise to a dispute. In this case M/s Pan African Trading Company Limited became aware of the circumstances on 15th May 2017.

The Appellant insisted that the application for review lodged on 30th May 2017 by M/s Pan African Trading Company Limited, was out of time and the same should not have been entertained by the Respondent. Therefore, the Respondent's act of entertaining the same and its outcome thereafter contravenes the law.

The Appellant further submitted that in any case, even the decision by the Respondent, which by virtue of Section 96(6) of the Act should have been delivered within seven working days from the 30th May 2017, was issued on 12th September 2017; that being completely out of the stipulated statutory time. Thus, the Appellant submitted that the Respondent's act in this regard violates the law; hence there is no decision in the eyes of the law.

Regarding the third ground of Appeal the Appellant submitted that, the Respondent's purported intention to award the Tender to M/s Pan African

Trading Company Limited is not proper in law as it violates the provision of Section 96(6)(a) and (b) of the Act. The said provision requires the Accounting Officer to state reason for the decision reached, however, the Respondent failed to provide reasons on how M/s Pan African Trading Company Limited who was initially declared to be non-responsive has now become responsive and recommended for award of the Tender. The Appellant doubts the validity of the proposed award in this Tender.

Finally, the Appellant prayed for the following orders;

- i) Nullification of a procurement process from 30th May 2017 when the second application for review was lodged by M/s Pan African Trading Company Limited.
- ii) A declaration that the Notice of Intention to Award issued by the Respondent on 15th May 2017 is intact.
- iii) Alternative to (i) and (ii) above, order payment of compensation at 30% of the contract price.
- iv) Costs of the Appeal as per the following break down;
 - a) Appeal filing fees – TZS 200,000.00
 - b) Legal Fees - TZS 10,000,000.00

REPLY BY THE RESPONDENT

The Respondent's submissions in response to the grounds of the Appeal are summarized as follows;

On the first ground, it is not disputed that, M/s Pan African Trading Company Limited filed a complaint on 19th May 2017 and the Respondent issued his decision on 24th May 2017. The Respondent argued however that the communication that followed thereafter was within the time and pursuant to Section 96 (4) and (6) of the Act.

Responding on the second ground of Appeal, the Respondent submitted that, the letter of 30th May 2017 by M/s Pan African Trading Company Limited provided detailed clarification on the technical requirements causing the Respondent to constitute an "independent review panel" to

review the technical specifications pursuant to Section 96(2) of the Act. After the review, the tender by M/s Pan African Trading Company Limited was found to be substantially responsive and was recommended for award. The Respondent's decision was issued on 12th September 2017 because there were several processes to be followed.

With regard to the third ground of Appeal, the Respondent submitted that, the delay in issuing its decision was caused by the nature of the complaint itself which necessitated the formation of an "independent review panel" for purposes of ensuring fairness. The review process and subsequent approvals took time to be completed as a result the Respondent issued his decision on 12th September 2017.

Furthermore, the Respondent argued that the review process had ensured that the substantially responsive tender complies with the requirement of the Tender Document and has value for money. M/s Pan African Trading Company Limited qualified for the award as they complied with the requirements of the Tender Document and it has value for money. Therefore, the review process was conducted in observance of the law.

Finally, the Respondent prayed for dismissal of the Appeal for lack of merits and costs.

ANALYSIS BY THE APPEALS AUTHORITY

From the above submissions, the Appeals Authority is of the view that there are two (2) triable issues to be determined. These are:-

- Whether the award proposed to the successful tenderer is proper at law; and
- What reliefs if any are the parties entitled to

Having identified the issues, we proceed to determine them as hereunder:-

1.0 Whether the award proposed to the successful tenderer is proper at law

In substantiating if the procurement review process by the Respondent complied with the law, we revisited Section 96(4) of the Act. As narrated

by the Appellant, the said provision requires procuring entity (the Respondent) to entertain procurement complaints that have been lodged within seven working days of a tenderer becoming aware of the circumstances giving rise to a complaint. Furthermore, Section 96(6) of the Act requires the accounting officer of the procuring entity to issue its written decision within seven working days from the date the complaint is lodged.

From the facts of this Appeal it is undisputed that M/s Pan African Trading Company Limited lodged his complaint on 19th May 2017 and the Respondent issued his decision on 24th May 2017. Based on these facts the Appeals Authority is of the firm view that this was an application for administrative review by M/s Pan African Trading Company Limited and the decision thereon was in compliance to the law.

The Appeals Authority finds the purported application for review by M/s Pan African Trading Company Limited that followed thereafter and the Respondent's decision of 12th September 2017 to have contravened the law. It is so because Section 97(1) and (2)(b) of the Act provides a remedy for a bidder who is not satisfied with the decision of the accounting officer. The Section reads;

- S.97 (1) "A tenderer who is aggrieved by the decision of the accounting officer may refer the matter to the Appeals Authority for review and administrative decision.
- (2) Where-
- (a) N/A
- (b) the tenderer is not satisfied with the decision of the accounting officer, the tenderer may make a complaint to the Appeals Authority within seven working days from the date of communication of the decision by the accounting officer". (Emphasis supplied)

M/s Pan African Trading Company Limited ought to have lodged his appeal to this Appeals Authority within seven working days after receipt of the Respondent's decision dated 24th May 2017. Thus, it goes without saying

that, the Respondent should not have entertained the purported application for review of 30th May 2017 since he was already *functus officio*. Therefore, the Appeals Authority finds the Respondent's act of proceeding to entertain the complaint of 30th May 2017 to be in contravention of the law no matter the circumstances. Therefore, the decision that followed is null and void.

The above notwithstanding, the Appeals Authority observed in passing that, had the second application for review been lawful, the Respondent should have formed an independent review panel, instead of constituting a new evaluation committee which re-evaluated all the tenders and recommended award to be made to M/s Pan African Trading Company Limited as this is contrary to Section 96(2) of the Act read together with Regulation 106(3) of the Public Procurement Regulations, G.N. No. 446 of 2013 (as amended) (hereinafter referred to as "G.N. No. 446 of 2013").

Additionally, the Appeals Authority observes that the proposed tenderer M/s Pan African Trading Company Limited cannot qualify for the award of the Tender as its bid was not responsive from the very outset, contrary to what has been contended by the Respondent. We revisited the evaluation report of April 2017 and observed that M/s Pan African Trading Company Limited was found to be non-responsive for offering to supply "single tube coil type" different from "finned tubes of total No. 273" stipulated in the Tender Document.

Furthermore, the Re-evaluation Report dated June 2017 indicates that M/s Pan African Trading Company Limited was recommended for award of the Tender subject to negotiations on the following technical specifications;

- i) Clarification on the overall dimensions of the air coolers to be supplied for easy fitting on the existing stator housing bracket and existing water pipes;
- ii) Provision of the efficiency curve for coolers in order to ensure the cooling efficiency of the air coolers to be supplied

- iii) Provision of specific technical drawings for the air coolers showing cross-section views of the equipment to be provided

The record of Appeal indicates that the above listed points were considered during negotiation while the same were part of the technical specifications which were to be complied with by the tenderers. The negotiation minutes dated 24th August 2017 clearly show that the above listed points were negotiated and M/s Pan African Trading Company Limited was found to have quoted air coolers with completely different dimension from those specified in the Tender Document. For purposes of clarity item three of the said minutes of negotiation is reproduced hereunder;

3. "Clarification on the overall dimension of the air coolers to be supplied

The drawings provided by the bidder M/s Pan African Trading Company Limited during negotiation were found to have some deviations. Bidder says that the physical dimension taken during their last visit at Mtera HPP are different to those specified in the technical specifications. Hence the dimensions were confirmed on site and M/s Pan African Company Limited agreed to supply the coolers of the same dimensions as specified in the tender document". (Emphasis added)

The above clearly indicates that the tender by M/s Pan African Trading Company Limited had deviations on dimension of coolers; as a result both parties to the negotiations agreed that coolers to be supplied should be of the same dimensions as specified in the Tender Document.

The Appeals Authority finds the Respondent's act in this regard to have contravened Regulation 206(2) of GN No. 446 of 2013 which prohibits a non-responsive tenderer to be made responsive by correction, withdrawal of the deviations or reservations.

Further, the Respondent negotiated on technical specifications while the same were to be complied with by the tenderers when submitting their tenders as such, the Respondent has contravened Regulation 225(2) of

GN. No. 446 of 2013 which prohibits negotiations to be conducted on anything which is a crucial or deciding factor in evaluation of tenders.

In view of the above, the assertion by the Respondent that fairness and value for money have been realized by awarding the tender to M/s Pan African Trading Company Limited is vitiated.

Accordingly, the Appeals Authority's conclusion on the first issue is that the award to the proposed successful tenderer was not proper in law as the same had resulted from the Respondent's act conducted in contravention of the law.

2.0 What reliefs if any are the parties entitled to

Taking cognizance of the findings above, the Appeal is hereby upheld and the Respondent is ordered to proceed with the Tender process from the stage it was, after issuing his administrative decision on 24th May 2017. The Respondent's acts following the complaint of 30th May 2017 are hereby quashed and declared null and void.

The Respondent is also ordered to compensate the Appellant a reasonable amount of TZS 5,200,000.00 as per following breakdown;

- i) TZS 5,000,000.00 - Legal fees
- ii) TZS 200,000.00 – Appeal filing fees

It is so ordered.

This Decision is binding on the parties 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 2nd November 2017.


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MONICA P. OTARU
Ag. CHAIRPERSON

MEMBERS:

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