

IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY

APPEAL CASE No. 38 OF 2016-17

BETWEEN

M/S ADWEST COMMUNICATIONS (T) LIMITED.....APPELLANT

AND

TANZANIA TELECOMMUNICATIONS COMPANY
LIMITED.....RESPONDENT

DECISION

CORAM

1. Ms. Monica P. Otaru - Ag. Chairperson
2. Mrs. Rosemary A. Lulabuka -Member
3. Mr. Aloys Mwamanga - Member
4. Ms. Florida R. Mapunda - Ag. Secretary

SECRETARIAT

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

FOR THE APPELLANT

1. Mr. Ian Lweramira Almachius -Legal Representative
2. Mr. Projest Shumbuso -General Manager
3. Mr. Richard Muze -Director

FOR THE RESPONDENT

1. Mr. George Magambo -Legal Counsel
2. Mr. Leo Magomba -Ag. Head ND &P
3. Mr. Khamis Madata -Tender Controller
4. Mr. Robert M. Lwamahe -Asst. Tender Controller

This Decision was scheduled for delivery today, on 9th June 2017, and we proceed to deliver it.

The Appeal at hand was lodged by M/s Adwest Communications (T) Limited (hereinafter referred to as "the Appellant") against Tanzania Telecommunications Company Limited commonly known by its acronym TTCL (hereinafter referred to as "the Respondent") in respect of Tender No. PA/032/2016/HQ/G/05 for the Supply of Optical Fiber Cables and Accessories (hereinafter referred to as "the Tender").

According to the documents submitted 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 vide the Mwananchi Newspaper of 16th December 2016 and the East African Newspaper of 17th-23rd December 2016, invited eligible tenderers to submit tenders under the International Competitive Tendering Procedures (ICB) specified in the Public Procurement Act No. 7 of 2011, (hereinafter referred to as "the Act") and the Public Procurement Regulations, G.N. No. 446 of 2013, (hereinafter referred to as G.N. No. 446/2013) both as amended in 2016.

By the deadline, 27th January 2017, twenty three (23) tenders were submitted out of thirty eight (38) tenderers purchased.

The tenders were subjected to six stage evaluation process namely; Preliminary, Technical and Commercial Evaluations; Correction of Arithmetic Errors, Conversion of Single Currency and Financial Determination.

At the end of the process, on 30th March 2017, the Tender Board approved award of contracts to two (2) proposed successful tenderers, M/s Raddy Fiber Solutions and M/s Gridtech, for two (2) years under Framework Agreement.

On 5th April 2017, the Respondent through his letter with Ref. No. DF 5011/G/05/2016, issued Notices of Intention to award the contracts to the Appellant as well as other bidders who participated in the Tender. The Appellant's letter contained a reason that his bid was unsuccessful because his bid price was not financially most responsive.

Dissatisfied with their disqualification, on 11th April 2017, the Appellant requested for administrative review.

Their complaint letter contained the following grounds;

1. That, none of the proposed successful tenderers complied with the requirement to submit duly signed and registered Power of Attorney as required by Clause 1 of Section IX of the Tender Document.
2. That, price figures of the proposed successful bidders appearing in the Notice of Intention to award the contracts did not match with the figures read out at the Tender Opening Ceremony.

3. That, some shortlisted bidders including M/s Raddy Fibber Solutions (T) Limited were silent as to whether their quoted prices are VAT Inclusive or Exclusive. Contending it to be a deliberate move by the Respondent to favour some bidders in an event their prices are ascertained to be either higher or lower.

On 25th April 2017, the Respondent through his letter with Ref. No. DF 5011/G/05/2016, communicated his decision to the Appellant of dismissing the complaint for lack of merits.

Dissatisfied with the Respondent's decision, on 4th May 2017, the Appellant filed this Appeal.

SUBMISSIONS BY THE APPELLANT

The Appellant's grounds of Appeal are as follows;

1. That, none of the proposed successful tenderers complied with the requirement to submit the duly signed and registered Power of Attorney as required by Clause 1 of Section IX of the Tender Document. Arguing that the proposed successful tenderers ought to have been disqualified from the tender process at the Preliminary Evaluation stage as the registered Power of Attorney was a mandatory requirement. In support of this ground the Appellant cited PPAA's Decision in Appeal Case No. 11 of 2016-17 between SGS Tanzania Superintendence Limited and Energy and Water Utilities Regulatory Authority (EWURA) whereby it was ruled that M/s SGS Tanzania was fairly disqualified for none submission of the registered Power of Attorney.

2. That, the Respondent erred in disqualifying their tender and label it as financially non responsive since there was no price ceiling set for the Tender. Arguing that in the absence of the ceiling, the ground that their bid was non responsive and exceeded the proposed budget is unfounded; especially so, as there was room for negotiations as was done with the two proposed successful tenderers whose prices were reduced from the read out prices. Further arguing that, had the two tenderers been disqualified at the Preliminary Evaluation stage, for reason stated in paragraph 1 above, the Appellant would have been the lowest evaluated tenderer deserving the award of the contract.
3. That, some bidders were silent on their VAT status purposely to suit the circumstances.

Finally the Appellant prayed for the following orders;

- i. Nullification of the Notice of Intention to award the contract since the two bidders were non responsive from the outset.
- ii. The contract be awarded to them since they have complied with all requirements of the Tender Document.

SUBMISSIONS BY THE RESPONDENT

The Respondent's written as well as oral replies to the grounds of Appeal are summarized as follows:-

1. That, the Appellant has misconceived, misunderstood, misinterpreted, misstated and mixed up the requirement set under Clause 1 of Section IX of the Tender Document, since there is no

word “must” at the referred page. That the Clause summarises Clause 28 of the Instructions To Bidders (ITB) which amplifies requirements of Clause 11 of the ITB requiring tenderers to submit Bid Securities and Power of Attorney and that both proposed successful tenderers submitted signed Power of Attorney as required.

2. That since the Tender was floated through International Competitive Bidding method; it was not easy for foreign bidders to submit registered Power of Attorney. The same was intended to be submitted at the later stage before contract signing. Distinguishing the PPAA's Appeal Case No. 11 of 2016-17 cited by the Appellant with this case, the Respondent submitted that the cited case involved only local bidders while they were dealing with international bidders.
3. That the representative of the bidders did not comment on validity or the registration of the Power of Attorney at the opening ceremony; meaning that all Power of Attorneys submitted were in order.
4. That the Evaluation criteria under Clause 1 of Section IX of the Tender Document was not aligned properly with the contents of the ITB Clauses mentioned under the Bid Data Sheet (BDS) Clause 33. Considering the mandatory requirement, the provisions in the ITB and the BDS were to prevail. Therefore, the requirement to submit the “dully signed and registered Power of Attorney” was waived to comply with the mandatory requirement stated in the ITB and Tender Data Sheet (TDS). The Respondent submitted further that if the Appellant insists to comply with the requirement, then, he would have attached a Bid Security Declaration (*sic*) as required by the said provision instead of submitting 1% of the total bid as a Bid Security

as provided for under Clause 22 and Clauses 18.1 and 18.10 of the ITB.

5. That the evaluation criteria provided under Clause 1 of Section IX of the Tender Document was erroneously attached since it aimed at assisting the evaluators only in their evaluation process. Tenderers were supposed to refer to BDS Clauses which were self explanatory.
6. That, although the Appellant succeeded in the previous stages of evaluation, he was ranked the 4th, thus could not be awarded the contract.
7. Explaining the difference between the price figures of the proposed successful bidders appearing in the Notice of Intention to award the contracts not matching the figures read out at the Tender Opening Ceremony, the Respondent argued that by virtue of Regulation 225 (1) (g) of G.N. No.446/2013, they conducted negotiations with the proposed successful tenderers and arrived at the prices indicated in the Notices of Intention to award letters. Thus, no breach has been occasioned.
8. That, it is true that most bid forms of various bidders were silent on VAT status. However, the said bidders provided their VAT status in the price schedules; the information which was considered during evaluation of the tenders.

Finally, the Respondent prayed that the Tender process should not be terminated, instead the Appeal be dismissed in its entirety for lack of merits.

ANALYSIS BY THE APPEALS AUTHORITY

In dealing with this Appeal, the Appeals Authority having gone through the Tender proceedings, various documents submitted by the Parties and their submissions, is of the view that the Appeal has been centred on three main issues calling for determination, which are:-

1. Whether the award of the Tender to the proposed successful tenderers was proper in law;
2. Whether the Appellant's disqualification was proper in law; and
3. What reliefs, if any, are Parties entitled to.

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

1. Whether the award of the Tender to the proposed successful tenderers was proper in law

In resolving this issue, the Appeals Authority revisited the Evaluation Report, the Tender Document vis-a-vis the applicable law. In the course of so doing, it was observed that the evaluation criteria for this tender were laid under Part IX of the Tender Document. The part however makes citation of the requirements provided for under Sections II of the ITB as well as Section III, the BDS. The Appeals Authority revisited the said sections and observed that while BDS Clause 26 required bidders to submit "the Power of Attorney" , the criteria provided under Part IX required "duly signed and Registered Power of Attorney".

When asked about these glaring conflicting provisions of the Tender Document, the Respondent replied that the Evaluation Criteria provided under Part IX were not meant for tenderers' consideration. Rather, for the Evaluation Committee's use. When further asked how the same were used by the Evaluation Committee while they conflicted with the BDS, the Respondent failed to respond.

The law in Section 72(1) of the Act read together with Regulation 184(1) (d) of G.N. No.446/2013, provides crystal clear that the basis for tender evaluation and selection of successful tenderer should be clearly specified in the Tender Document.

The Appeals Authority observed that Part IX of the Tender Document amplified the evaluation criteria under the BDS, specifically on the Power of Attorney. It is the view of this Appeals Authority that evaluation criteria provided were not decorative as the Respondent intends this Appeals Authority to believe but indeed intended for bidders to be assessed basing thereon. If the Respondent did not intend to use such criteria, the Appeals Authority asks why were the same included in the Tender Document?.

Upon perusal of the Evaluation Report, the Appeals Authority observed that some of the criteria provided under Part IX such as the Registered Power of Attorney were not taken into account during evaluation process. Thus, some bidders including the proposed successful tenderers were given advantage by assessing the duly signed but not registered Power of Attorney. It is on record that the requirement to submit a Registered Power of Attorney was waived since only one bidder, to wit; the Appellant complied with the requirement. It is also observed that the waiver made by the Evaluation Committee was not approved by the Tender Board. The

Evaluation Committee assumed the role of the Tender Board by waiving the requirement. As such, the evaluation was in contravention of Regulations 203 (1) and 206 (2) of G.N. No.446/2013, which require the tender evaluation to be consistent with the terms and conditions prescribed in the Tender Documents and such evaluation to be carried out using the criteria explicitly stated in the Tender Documents; and where a Tender is not responsive to the Tender Document, it is to be rejected.

The Appeals Authority observed that the Respondent wilfully neglected to use the criteria under Part IX; instead he used those provided in the BDS alone; ultimately disqualifying bidders who complied with the evaluation criteria such as the submission of a bid securing declaration.

On the Respondent's argument that Appeal Case No. 11 of 2016-17 between M/s SGS Superintendence and EWURA is not applicable under the circumstances, the Appeals Authority observes that the Respondent's argument is weak. It is so because the requirements of the Tender Document are not set in a segregate manner, but the law requires all bidders to comply with what has been stated in the Tender Document without reservation, unless the contrary is unequivocally stated.

In view of the above analysis and findings, the Appeals Authority's conclusion regarding the first issue is that the award of the Tender to the proposed successful tenderers was not proper in law.

2. Whether the Appellant's disqualification was proper in law

In resolving this issue, the Appeals Authority took cognizance of its findings on the first issue above and observed that since the award of the Tender to the proposed successful tenderers was not proper, accordingly, it is

equally not proper to conclude that the Appellant's bid price was not financially most responsive. Additionally, since some bidders were disqualified UNFAIRLY at the Preliminary Evaluation stage for submitting a Bid Securing Declaration, it is not possible to substantiate the Respondent's arguments that the Appellant's bid price was higher compared to others.

Last but not least, the Appeals Authority observes with utter dismay that the Respondent disqualified some bidders on the ground that their bid prices were higher than the Respondent's set budget. However, this Tender was conducted through International Competitive Bidding Procedures specified in the Act and Regulations. Under the said method, the lowest evaluated bidder is awarded the contract after due evaluation process including ranking. Therefore, since the Respondent did not reveal his budget to the bidders, it was not proper for the Evaluation Committee to disqualify the said bidders. Additionally, the Appeals Authority observed bitterly that while the Respondent disqualified the said bidders on that assertion, he awarded this Tender to two different bidders to provide for the same services, the same quantity and quality at different prices hence exceeding the alleged budget.

The Appeals Authority wonders how a single Tender not divided into any Lots could be awarded to two distinct firms for the similar services with different prices. This is an indication of poor preparation and processing of the Tender. Where works/services need to be done by separate contractors, then there should either be separate Tenders or separate Lots. The Respondent should consider this in future tenders.

As such the second issue is answered in the negative, that the Appellant's disqualification was not proper in law.

3. What reliefs, if any, are parties entitled to

In resolving this issue, the Appeals Authority took cognizance of its findings on the first and second issues above and observed that since the award of the contracts to the proposed successful tenders was not justified, it goes without saying that the Appeal has merits.

As established above that some of the requirements of the Tender Document were not used in the evaluation process, the prayers by the Appellant that the award be made to him cannot issue since the tender evaluation was marred by serious irregularities in which case it was not easy to determine who won the Tender.

With regard to the prayers by the Respondent that the Appeals Authority dismisses the Appeal, as established, the Appeal has merits, therefore, his prayers are dismissed forthwith.

On the basis of the aforesaid conclusions, the Appeals Authority allows the Appeal and orders the Respondent to re-tender in observance of the law.

It is so ordered.

Each Party to bear own costs.

This Decision is binding and may 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 9th June, 2017.

M. Otaru

MS. MONICA P.OTARU
Ag. CHAIRPERSON

MEMBERS:

1. MRS. ROSEMARY A. LULABUKA *R. Lulabuka*

2. ENG. ALOYS MWAMANGA *A. Mwamanga*