

IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY
AT DAR ES SALAAM

CONSOLIDATED APPEAL CASES NO. 24 AND 25 OF 2016-17
BETWEEN

M/S LOW'S CREEK TREATED TIMBER (Pty) LTD....1ST APPELLANT
M/S MAQHILIKA TIMBER (Pty) LTD2ND APPELLANT
AND

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

RULING

CORAM

- | | |
|------------------------------------|------------|
| 1. Hon. Vincent K.D.Lyimo, J (rtd) | -Chairman |
| 2. Eng. Francis T. Marmo | -Member |
| 3. Ms. Monica P. Otaru | -Member |
| 4. Mr. Ole-Mbille Kissioki | -Secretary |

SECRETARIAT

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

FOR THE 1ST APPELLANTS

- | | |
|----------------------|-------------------------------------|
| 1. Mr. Rosan Mbwambo | -Advocate, Law Associates Advocates |
| 2. Mr. Gary Wessels | -Director |

FOR THE 2ND APPELLANT

1. Mr. Rosan Mbwambo -Advocate, Law Associates Advocates
2. Mr. Howard Holley -Director

FOR THE RESPONDENT

1. Mr. Florence A. Kahalano -Senior Legal Officer
2. Mr. Hubert Priver -Procurement Officer
3. Mr. D.T. Polycap -Procurement Officer

This Ruling was scheduled for delivery today, 28th April 2017 and we proceed to do so.

The Appeals at hand were lodged by M/s Low's Creek Treated Timber (Pty) Limited and M/s Maqhilika Treated Timber (Pty) Limited respectively, (hereinafter referred to as "the 1st and 2nd Appellants"), against the Tanzania Electric Supply Company Limited commonly known by its acronym, TANESCO (hereinafter referred to as "the Respondent").

The said Appeals are in respect of Tender No. PA/110/2015/HQ/G/001 (hereinafter referred to as "the Tender") for Supply of Wooden Poles for the Year 2015 under Framework Contract- Lots 6 and 5 for West and North zones, respectively.

After going through the record of proceedings 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 Daily News newspaper dated 8th June, 2015, invited tenderers to submit their bids for seven (7) Lots in the Tender

through International Competitive Bidding procedures specified in the Public Procurement Regulations, Government Notice No. 446 of 2013 (hereinafter referred to as "G.N. No. 446/2013"). The deadline for the submission of the tenders was 10th July 2015; whereby a total of twenty-three (23) tenders were received from various tenderers; the Appellants' inclusive. It may be of importance to mention that although in 2016, the said Act and Regulations were amended in some respects that took effect in July 2016; the Tender proceedings in respect to these Appeals had been concluded under the old law.

During the evaluation of the tenders on the aspect of general responsiveness, seventeen tenders were disqualified for being non-responsive to the Tender Document. The remaining six tenders including those of the two Appellants qualified for the Technical Evaluation. At this stage, one tender by M/s Vuka Timbers PTY Limited was disqualified for failure to comply with the specifications for poles sizes. Thereafter, the remaining five tenders qualified for financial analysis following which the Evaluation Committee recommended award of the Tender for Lot No. 5 to the 2nd Appellant and Lot No. 6 to the 1st Appellant.

Having received the recommendations by the Evaluation Committee, the Respondent's Procurement Management Unit (PMU) reviewed the report and noted that there were discrepancies which had not been addressed by the Evaluation Committee. For instance, some bidders had the word "comply" in the spaces for technical specifications while others were marked "Not indicated", and yet the tenderer was regarded as having qualified in the technical analysis. Further, the PMU observed that three amongst the lowest evaluated bidders submitted different dimensions of

the Poles contrary to the requirement of the Tender Document. Thus, the PMU referred the report to the Evaluation Committee for reassessment of the noted anomalies. On 28th August 2015, the Evaluation Committee having re-evaluated the tenders submitted its report to the PMU and recommended for post qualification of the tenderers to be conducted before award to verify manufacturing capability and treatment of the poles as per technical specifications. In addition, the Evaluation Committee recommended negotiations with the proposed bidders on the delivery schedules.

On 31st August 2015, the PMU submitted its report to the Tender Board for approval and award. Upon deliberations, the Tender Board deferred the proposals to award the tenders after it had observed that Clause 13 of the Instruction to Tenderers (ITT) had not been taken on board by the Evaluation Committee. The Clause requires tenderers who do not do business in Tanzania to be represented by Agents in the country, who are equipped and able to carry out the Supplier's maintenance, repair and spare parts stocking obligations as prescribed in the General Conditions of Contract (GCC). It therefore, ordered for re-evaluation of the Tender taking account of that provision. At its Meeting held on 23rd October 2015, the Respondent's Tender Board deliberated and awarded the Tender to the proposed tenderers including the Appellants.

On 8th January, 2016, the Respondent issued the relevant Notices of Intention to award to the proposed successful bidders as follows:-

M/s Sao Hill Limited for Lot 1, M/s Vuka Timbers PTY LTD for Lot 2, M/s Treated Timber Product for Lot 3, M/s Rousant International

Ltd for Lot 4, M/s Maqhilika Timbers (Pty) Ltd for Lot 5, M/s Low's Creek Timber Ltd for Lot 6 and M/s Sao Hill Limited for Lot 7.

M/s Muwa Trading (TZ) Ltd. which had contested for Lot No. 2 being dissatisfied applied for administrative review of the Respondent's decision and thereafter, filed an appeal – vide PPAA Appeal Case No. 29 of 2015-16 challenging the proposed award to M/s Vuka Timbers PTY Ltd. In the said Appeal, there were also issues in respect of award of tenders in Lots Nos. 5 and 6. The 1st Appellant herein attended the proceedings of that Appeal as an observer. It is important to note here that the above Appeal was filed on 11th April 2016, and the Appeals Authority rendered its decision on 6th May 2016, well before the amendments to the Act and its Regulations.

It means that after the said Decision, the Respondent was required to finalise on the procedures leading to signing of the respective contracts as required under Section 60 (5) and (7) of the Act read together with Regulation 233 (1) of G.N.NO.446 of 2013. The Appeals Authority has observed that following the Decision referred to above, the Respondent negotiated with M/s Vuka and signed the contract. He did not do so in respect to the two Appellants herein.

The record indicates that following the Decision, the Respondent and the Appellants went on to re-negotiate not only on the scope of the Tender but also the price; and issued subsequent Notices of Intention to Award. On 28th February, 2017, without further ado the Respondent re-advertised the Tender prompting the Appellants to file these Appeals.

Reverting to the basic issue – the Bid Validity Period raised by the Appeals Authority, it will be noted that according to Instructions to

Bidders, Clause 40 (1), the Bid Validity Period was one hundred and twenty days (120) from the date of Tender opening, i.e. it was to expire on 7th November 2015, and the respective Bid Securities to have expired on 6th December 2015. Since the parties were engaged in the proceedings of the Appeal referred to above, it is only logical to hold that the period necessary for the determination of the said Appeal be excluded in determining the validity period of the Tender. Thus, immediately after the said Decision, the Respondent was to finalize on the procedures for signing of the contracts as highlighted above but to the contrary he did not do so.

At the hearing of this Appeal during the drawing up of the issues, Appeals Authority *suo motu* raised the issue of legality - whether there was in place a Tender properly so called, capable of any appeal. Specifically, the Appeals Authority noted that the Bid Validity period and the Bid Securities had long expired. In that respect, Members of the Authority called on the learned counsels to first address that issue before embarking on the other issues raised by the Appellants. Mr. Rosan Mbwambo, learned counsel for the Appellants sought for an adjournment of the Appeals to enable him make some research before making any submissions. However, the Members of the Appeals Authority being cognizant of other appeals pending hearing, called on the counsels to consider whether the Appellants would prefer to have the matter disposed of by way of written submissions, a matter with which the parties agreed. Consequently, the Appeals Authority issued a time line as follows:

- i. The Appellants to file written submissions not later than Friday 21st April 2017, 2.00 pm;

- ii. The Respondent to file replies thereto on 24th April 2017, and
- iii. Ruling on 28th April 2017.

While the learned counsel for the Appellants filed on time, the Respondent failed to do so and has not applied for extension of time to file replies if any. Consequently, the Appeals Authority proceeds to determine the matter ex-parte the Respondent.

THE APPELLANTS' JOINT SUBMISSIONS

The Appellants do not dispute the fact that Bid Validity Period had expired and that it was never extended. They however argue that irrespective of the expiry of this period, the Tender and consequently the Appeals are still valid in law. Their submissions are summarized as follows;-

Citing the case of *European Dynamics Luxembourg and Evropaiki Dynamiki Vs European Joint Undertaking for ITER and Developing of Fusion Energy*, the Appellants submitted that the purpose of specifying the Bid Validity period in the Tender Document is to enable a Procuring Entity to complete evaluation of tenders and approve the contract as well as obtaining necessary clearances and approvals while the tender is still valid. That exceeding this time limit cannot render the procedure unlawful, nor can it constitute a ground for cancellation of the evaluation of tenders.

In addition to the above, the Appellants, cited the case of *Evropaiki Dynamiki- Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE Vs European Commission*, and argued that compliance with the period of Bid Validity is not a condition *sine qua non* for the signature of the contracts at the end of the award procedure.

Thus, exceeding that limit does not render the procedure unlawful and the same cannot constitute a ground for cancellation of tenders. They claimed that the two quoted cases cited European law that is in *pari-materia* with Section 71 of the Act and Regulation 191(3) of G.N.No.446 of 2013 and therefore good law that should be considered by the Appeals Authority.

The Appellants submitted further, that the law permits extension of the Bid Validity Period. Claiming that, since such mandate is vested on the Procuring Entity and not tenderers, the only consequence that may arise is that the procuring entity could not oblige a tenderer whose tender has expired to sign and perform a contract based on the conditions set out in the Tender.

The Appellant went on to argue that, none of the provisions in the procurement laws in Tanzania provide that an Appeal cannot lie against a decision or act of the Procuring Entity made after expiry of the Tender Validity Period. That if the Parliament intended so, then the law would have specifically provided for it. That the principle of statutory interpretation "*expressio unius est exclusio alterios*" should apply in these circumstances. That is, to express or include one thing implies the exclusion of the other or of the alternative.

The Appellants submitted further that, to hold that these Appeals are incompetent would mean that the procurement proceedings after 8th November, 2015 are invalid and would certainly go against the jurisprudence governing determination of the matters before the Appeals Authority, since the Appeals Authority is required by law to conduct its

proceedings with as little formality and technicality as possible and not to be bound by strict rules of evidence or court procedures.

That, the Appeals Authority had previously dealt with Appeal case No. 29 of 2015-16 M/s Muwa Trading (T) Limited against Tanesco while its bid validity had lapsed. Thus, dismissing these Appeals would be disproportionate. Acknowledging that Appeals Authority might not be bound by its previous position, the Appellants, argued that changing its position this soon and on the same tender would not be healthy in the administration of justice generally and development of the procurement industry specifically.

The Appellants requested the Appeals Authority to consider that all acts or decisions made by the parties after expiry of the Tender Validity Period as lawful and that an Appeal against those decisions and or acts be equally lawful and competent to be tried by the Appeals Authority.

ANALYSIS BY THE APPEALS AUTHORITY

The Appeals Authority framed the following issues in determining the matter at hand;

1. Whether there exists a valid tender for consideration after the lapse of bid validity period.
2. What relief(s), if any, are parties entitled to.

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

1. Whether there exists a valid tender for consideration after the lapse of bid validity period

The Appellants in their written submissions concede on two major aspects regarding the Bid validity Period of Tender. Firstly, that the Tender validity period was 120 days, which expired on 8th November, 2015. Secondly, that the Respondent did not extend the bid validity period after its expiry.

As the Appellants do not dispute the fact that the Tender is outside the Bid Validity Period, we shall not dwell further on it. The question before this Appeals Authority is on the consequences that follow. The Appellants are claiming that lapse of the tender validity period does not counteract the subsequent actions of the parties. In support of this preposition, the Appellants referred the Appeals Authority to two European cases cited above. In resolving this issue, the Appeals Authority revisited the above cited cases vis-a-vis the applicable law.

Paragraph 21 of the European Dynamics Luxembourg, case reads;

21. *“As a preliminary point, it should be noted that, Article 130(2) (c) of Commission Regulation (EC, Euratom) No. 2342/2002 of December 2002 laying down detailed rules for the implementation of Council Regulation (EC, Euratom) No. 1605/2002 on the Financial Regulations applicable to the general budget of the European Communities (OJ 2002 L357, p.1) now Article 138(2) (c) of the Implementing Rules, the invitation to tender or to negotiate or to take part in the dialogue shall at least... (c) specify the period during which a tender will remain valid and may not be varied in any respect”.*

It is the view of the Appeal's Authority that the law applicable in the cited cases did impose an obligation on the contracting authority to

complete evaluation of a tender within the validity period and that failure to extend did not in any way invalidate the tender.

This position differs significantly with our procurement law. Our position as provided for under Section 71 of the Act and Regulation 191(3) is clear and self-explanatory. The law imposes a mandatory requirement for a Procuring Entity to finalize all procurement processes within a specified period of time provided for in the Tender Document and that extension of the same depends on exceptional circumstances. The proviso reads;

Section 71: "The procuring entity shall require tenderers to make their tenders and tender securities including tender securing declaration valid for the periods specified in the tendering documents, sufficient to enable the procuring entity to complete the comparison and evaluation of the tenders and for the appropriate tender board to review the recommendations and approve the contract or contracts to be awarded whilst the tenders are still valid".

Regulation 191(3): The period fixed by a procuring entity shall be sufficient to permit evaluation and comparison of tenders, for obtaining all necessary clearances and approvals, and for the notification of the award of contracts and finalise a contract but the period shall not exceed one hundred and twenty days from the final date fixed for submission of tenders.

(4): In exceptional circumstances, prior to expiry of the original period of effectiveness of the tenders, a procuring entity may request tenderers to extend the period for an additional specified period of time.

It is the Appeals Authority's firm view that what is gathered from these provisions is that the Procuring Entity is required to finalize its proceedings and award the contract within the specified time limit.

It should be noted that while the law permits extension of time under Regulation 191(4) of GN.NO.446 of 2013 the same is not automatic. The law allows extension where exceptional circumstances emerge. In the current Appeals the time was not extended.

The European cases referred to by the Appellants are distinguishable with the current Appeals and do not support Appellants propositions due to the difference in the provisions of the law. Under the laws referred to by the learned counsel for the Appellants, it will be noted that where extension is not granted by any party to the proceedings, the tender becomes annulled. Under Tanzanian procurement laws if one of the parties to the Tender does not extend the validity of his tender, he is rendered unresponsive.

While, the Appeals Authority appreciates the Appellants' submissions that the duty to request for extension of time lies with the Procuring Entity, to wit the Respondent; it does not agree with them that extension of time is optional. The extension becomes optional only if the time provided for under Section 71 and Regulation 191 (3) is sufficient to finalize the tender process. Short of that, it is obligatory. In the event the contrary is done by a Procuring Entity, it entails that the bidders' tender securities submitted will equally expire and render the submitted tenders unsecured, contrary to the law.

The Appeals Authority observes that despite the finding that the duty to request for extension of time lies on the Respondent's side, the law as provided for under Section 60(3) and (4) of the Act requires a Procuring Entity to issue an acceptance letter to the proposed successful tenderer if no bidder has disputed the proposal made by the Procuring Entity after

lapse of the then fourteen days provided under the law. As a diligent and experienced bidder in the industry, the Appellants were bound to inquire from the Respondent on the delay, since the law allows them to do so. To the contrary, the Appellants slept on their rights and blessed Respondent's violation of the law.

It is the Appeals Authority's view that where the law explicitly provides for a certain act or acts to be done; the words of the law should be adhered to unless there is an exception to that effect.

The Appellants also made reference to the decision of the Appeals Authority in Appeal Case No. 29 of 2015-16, M/s Muwa Trading (T) Limited *Versus* Tanesco, claiming that the Bid Validity Period of that Appeal had expired but the same was still heard and deliberated on merits. It must be understood and pointed out that the issue of Validity Period of the Tender was not raised at that time.

Based on the above analysis, the authorities relied upon by the learned counsel for the Appellants are of no help to these Appeals and they are not applicable under the circumstances.

With regard to the Appellants' submissions that this Appeals Authority is not bound by strict rules of evidence and procedure when determining matters before it, the Appeals Authority agrees with the Appellant that we are not bound by such rules. However, the issue posed by the Appeals Authority relates neither to the procedure nor evidence. It is a matter of law that determines tenability of the Appeals lodged. The Appellants have therefore misdirected themselves.

In view of the above, the Appeals Authority's conclusion with regard to the issue is that a lapse of Bid Validity Period negates Award of the Tender and subsequent actions by the parties. Accordingly, the Appeals Authority's conclusion with regard to the first issue is that there exists no valid tender for consideration after the lapse of Bid Validity Period.

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

In resolving this issue, the Appeals Authority took cognizance of its findings on the first issue and observes that since there is no valid Tender calling for determination, the Appeals at hand cannot stand. And are hereby dismissed. It is so ordered and each part to bear own costs.

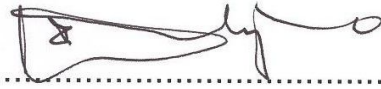
Last but not least, the Appeals Authority observes with concern the Respondent's acts towards this tender and the present Appeals at large. It is evident and from record of proceedings that the Respondent acts in this tender from the date of Appeals Authority's decision dated 6th May 2016, amounted to a deliberate breach of the procurement law.

As evidenced by the Appellants' submissions, there were an ongoing negotiation of Tender beyond Tender Validity Period, a matter that causes serious concern.

This Decision is binding 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 Ruling is delivered in the presence of the Appellants' counsel this 28th April, 2017.



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HON. V.K.D. LYIMO (J) RTD

CHAIRMAN

MEMBERS:

1. Ms. M.P. OTARU.....

2. ENG. F.T MARMO.....