

IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY
AT DAR ES SALAAM
CONSOLIDATED APPEAL CASES NO. 29, 30 AND 33 OF 2018-19
BETWEEN
M/S INTERBEST INVESTMENT COMPANY LTD.....APPELLANT
AND
TANZANIA ELECTRIC SUPPLY COMPANY LTD.....RESPONDENT

DECISION

CORAM

- | | |
|------------------------------------|---------------|
| 1. Hon. Justice (rtd) Suda Mjasiri | - Chairperson |
| 2. CPA. Fredrick Rumanyika | - Member |
| 3. Adv. Rosan Mbwambo | - Member |
| 4. Mr. Ole-Mbille Kissioki | - Secretary |

SECRETARIAT

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

FOR THE APPELLANT

- | | |
|----------------------------------|--------------------------------|
| 1. Mr. Audax Kahendaguza Vedasto | -Advocate- Auda &Co. Advocates |
| 2. Mr. Pascal Mshanga | - Advocate-Auda &Co. Advocates |
| 3. Mr. Musa Masonga | - Marketing Manager |

4. Mr. Castory Masonga - Operations Manager

FOR THE RESPONDENT

1. Mr. Norbert Bedder - Zonal Legal Officer
2. Mr. Peter Kabendera - Zonal Procurement Officer
3. Mrs. Rehema M. Obatmus - Regional Financial Accountant
4. Mr. Thomas E. Mwinuka - Regional Human Resource
Manager

The Appeals at hand were lodged by M/s Interbest Investment Company Ltd (hereinafter referred to as "the Appellant") against the Tanzania Electric Supply Company Ltd commonly known by its acronym TANESCO (hereinafter referred to as "the Respondent"). The Appeals are in respect of Tender No. PA/001/2018-19/WZN/G/29 for Supply of Distribution Service Line Materials for West Zone Regions- Lot 1 for Supply of Insulators, Lot 2 for Supply of HT Line Accessories and Lot 4 for Supply of Stay Materials (hereinafter referred to as "the Tender").

The Tender was conducted using Restrictive National Competitive Bidding procedure specified in the Public Procurement Regulations, Government Notice No. 446 of 2013 as amended (hereinafter referred to as the "GN. No. 446 of 2013").

After going through the records submitted by the parties to the Public Procurement Appeals Authority (hereinafter referred to as "the

Appeals Authority”), the background to the Appeals can be summarized as follows:-

The Respondent through the Daily News newspaper dated 24th August 2018, invited tenderers to participate in the Tender. The deadline for the submission was set for 4th October 2018, whereby eight firms submitted their tenders.

Tenders were then subjected to evaluation which was conducted into three stages namely; preliminary, technical and financial evaluation. At the preliminary evaluation two tenders, including that of the Appellant were disqualified for being non responsive to the requirements of the Tender Document. The Appellant’s tender was disqualified for failure to submit audited financial statements. The remaining six tenders were subjected to further stages of evaluation and after completion of the process, the Evaluation Committee recommended for award of the Tender as follows:-

- i. M/s Volex Electrical and Decorators Ltd at a contract price of TZS. 1,816,517,944.44 VAT inclusive for Lot 1;
- ii. M/s Mshale Tanzania at a contract price of TZS. 439,927,600.00 VAT inclusive for Lot 2; and
- iii. M/s Pentagon Trading Agency at a contract price of TZS. 646,047,640.00 VAT inclusive for Lot 4.

The Tender Board at its meeting held on 3rd January 2019 approved the award as recommended by the Evaluation Committee.

On 12th, 14th and 15th January 2019, the Respondent issued the respective Notices of Intention to award the Tender to all tenderers who participated in the Tender including the Appellant. The said letter also informed the Appellant that its tender was disqualified for quoting a higher price compared to that of the proposed successful tenderers in the disputed Lots.

Dissatisfied, on 19th January 2019, the Appellant applied for administrative review to the Respondent's Accounting Officer challenging the reasons given.

On 21st January 2019, the Respondent issued its decision in respect of Lots 2 and 4, in which it conceded that the Appellant's tender had a lower quoted price compared to the successful tenderers. The letter also informed the Appellant that the reason provided was a result of an error apparent, and that the proper reason for its disqualification was failure to attach audited financial statements contrary to the requirement of Clauses 13.3 (b) of the Instructions To Tenderers (ITT) and 13 of the Bid Data Sheet (BDS). However, the Appellant received no response in relation to Lot 1.

Dissatisfied further by the reason given, the Appellant on 22nd January, 2019 filed another application for administrative review in which it attached the audited report of its firm. However, the Respondent did not respond to the complaint so raised. Consequently, the Appellant on 29th and 31st January 2019, lodged these Appeal to this Appeals Authority.

SUBMISSIONS BY THE APPELLANT

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

1. That, the Respondent erred in fact and law for not awarding the Tender to the Appellant upon conceding that it had the lowest quoted price in all disputed Lots compared to the proposed tenderers.
2. That, the Respondent erred in fact and law, breached the principles of transparency and good governance for its failure to award the Tender to the Appellant after conceding that the reason for its disqualification as stated in the Notice of Intention was not true. Instead the Respondent proceeded to award the Tender to M/s Pentagon Trading Agency, M/s Mshale Tanzania and M/s Volex Electrical and Decorations Ltd by raising a new ground that was not stated in the Notice of Intention.

Amplifying on the said ground, the Appellant's counsel submitted that the Respondent's Accounting Officer had no mandate to peruse the tender again after issuing the Notice of Intention and to come up with another reason for the Appellant's disqualification.

3. With regard to Lot 1, the Appellant submitted that, there is a difference of price quoted by the proposed successful bidder M/s Volex Electrical and Decorations Ltd which is TZS. 1,524,027,766.92 VAT inclusive compared to TZS. 744,515,976.49 VAT inclusive quoted by it.

4. That, the Respondent erred in law and fact by holding that the reason for the Appellant's disqualification was failure to submit audited financial statements. It insisted that its bid was attached with the financial statements authorized by auditors and the same were endorsed by the Tanzania Revenue Authority.

The Appellant's counsel further insisted that, the audited financial statements were submitted with its bid, and it seems that its tender has been tempered with.

5. Finally the Appellant prayed for the following orders:-

- i. To set aside the Respondent's decision to award the Tender to the proposed successful tenderer in respect to Lot 1, and award the same to the Appellant;
- ii. To quash the Respondent's decision dated 21st January 2019 in respect to Lot 2 and 4;
- iii. To award the Tender to the Appellant in relation to Lots 2 and 4;
- iv. To grant general damages of TZS. 20,000,000/= for each disputed Lot;
- v. Costs of handling these appeals; and
- vi. Any other reliefs the Appeals Authority may deem just and right to grant.

REPLY BY THE RESPONDENT

The Respondent's reply to the grounds of Appeals may be summarized as follows:-

1. That, the Appellant was disqualified from the tender process due to its failure to submit audited financial statements contrary to the requirements of the Tender Document. Thus, the Appellant's bid was not evaluated at the financial stage and its price was not compared with the price quoted by other tenderers. Furthermore, the earlier Notice of Intention to Award issued contained a wrong reason for the Appellant's disqualification. However, the same was corrected and the Appellant was given a proper reason for its disqualification. This anomaly was caused by the type setting done by its office as a result of copy and paste as most bidders were disqualified for having higher prices than the proposed bidders.
2. That, tenders were evaluated in compliance with the criteria stated in the Tender Document. In doing so the Appellant's tender was found to be non responsive at the preliminary evaluation stage. Thus, its tender could not have been evaluated at further stages of evaluation to compare its quoted price with that of the other tenderers.
3. That, only some extracted copies of the audited financial statements were submitted by the Appellant during the review process contrary to the requirement under the law, that all documents should be submitted with the tender.
4. Finally the Respondent prayed for the following orders which are reproduced as under:-
 - i. "The procurement proceeding was suspended immediately on receipt of first complaints;

- ii. Order issued by the Authority will be complied with;
- iii. Award can't be awarded directly, even if this requirement of the audited report is waived at appeal moment, the appellant must be required to be evaluated, financially and technically because price is not award criteria as evaluated abnormal lowest price in some case may led to disqualification;
- iv. The general damages cannot be granted to the Appellant, since it exercised its right in compliance of the Tender Document;
- v. That the costs of handling these Appeals be borne by the Appellant, as what is claimed is stated in the Tender Document."

ANALYSIS BY THE APPEALS AUTHORITY

The Appeals Authority having gone through the Tender proceedings including various documents and the submissions by the parties during the hearing of the appeals is of the view that the Appeal is centred on two main issues for determination, these are:-

1.0 Whether or not the Appellant's disqualification is justified.

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

Having identified the issues, the Appeals Authority proceeded to determine them as hereunder:-

1.0 Whether or not the Appellant's disqualification is justified

It is not disputed that the first Notice of Intention sent to the Appellant provided a wrong reason for its disqualification. The same was conceded by the Respondent in its decision letter issued on 21st January 2019. With this concession the Appellant contended that the Respondent should not have looked for another reason of its disqualification. Instead it should have proceeded to award the Tender to the Appellant. This is because according to the Appellant, the Respondent became *functus officio* after it had issued the Notice of Intention to award to all bidders.

Section 60(3) of the Public Procurement Act of 2011 as amended (hereinafter referred to as "the Act") empowers an aggrieved bidder to lodge a complaint to the Accounting Officer challenging the Intention to award and the complaint so raised to be deliberated by the Accounting Officer within the time prescribed by the law. The said Section read as follows:-

"S.60(3) Upon receipt of notification, the accounting officer shall, immediately thereafter issue a notice of intention to award the contract to all tenderers who participated in the tender in question giving them seven working days within which to submit complaints thereof, if any."

Furthermore, the Appeals Authority revisited Sections 96(2)(6) of the Act read together with Regulation 106(3)(a)(b)(6)(7)(a)(c) of the GN. No.446 of 2013, which provide as follows:-

"S. 96 (2) On receiving a complaint under this section the accounting officer may, depending on the nature of the complaint, constitute an independent review panel from within or outside his organization which shall review the complaint and advise him on the appropriate actions to be taken.

(6) The accounting officer shall, within seven working days after the submission of the complaint or dispute deliver a written decision which shall:-

(a) state the reasons for the decision; and

(b) if the complaint or dispute is upheld in whole or in part indicate the corrective measures to be taken."

"R. 106(3) Upon receiving an application for review, an accounting officer shall institute an investigation to consider-

(a) the information and evidence contained in the application;

(b) the information in the records kept by a procuring entity;

(c) the information provided by other tenderers; and

(d) any other relevant information.

(7) The decision of accounting officer shall address fully the tenderer's grounds of complaints and shall indicate-

(a) whether the application is upheld in whole, part or rejected;

(b) the reason for the decision; and

(c) any corrective measures to be taken."

[Emphasis provided].

The above quoted provisions indicate clearly that upon receipt of the complaint and depending on the nature of the complaint, the Accounting Officer constitutes an independent review panel to investigate the matter in order to advise him on the appropriate actions to be taken. The Appeals Authority is of the settled view that much as the law empowers the Accounting Officer to correct any anomaly seen after the review, its act of issuing a correct reason for the Appellant's disqualification was indeed within the ambits of the law.

In addition to what has been stated herein above, the Appeals Authority finds that the Respondent's acts were done within the time limit provided by the law hence its acts was not *ultra vires* and not *functus officio* as asserted by the Appellant. The Appeals Authority is of the firm view that the powers of the Accounting Officer ceases when the seven working days of issuing the decision lapses or when an aggrieved bidder lodges an appeal to this Appeals Authority in terms of Section 96(7) of the Act.

Furthermore, the Appeals Authority revisited the Respondent's Evaluation Report and finds that the reason for the Appellants disqualification was its failure to submit audited financial statements for three years. This position was indeed communicated to the Appellant following the investigation done by the panel duly formed by the Respondent.

In order to substantiate the validity of the Appellant's disqualification, provided in the Respondent's subsequent letter, the Appeals Authority revisited the Tender Document and observed that Clause 13.3(b) of the

ITT read together with Clause 13 and 30 of the TDS clearly indicated that tenderers were required to submit audited financial statements. The said Clauses are reproduced hereunder for ease of reference.

“ITT 13.3 The documentary evidence of the Tenderers qualification to perform the contract if its Tender is accepted shall establish to the Procuring Entity satisfaction:

(b) the Tenderer has the financial, technical and production capability necessary to perform the Contract, meets the qualification criteria specified in the Tender Data sheet.

“TDS 13 The qualification criteria required from Tenderers in ITT Clause 13.3(b) is modified as follows:

Financial Capacity;

Audited financial statements (including Balance Sheets) for the last three years - 2015, 2016 &2017.”

“BDS 30 Criteria for evaluation.

....

....

Sound audited financial statement for the past three years, 2015, 2016 and 2017.”

Furthermore, the Appeals Authority revisited the Appellant’s bid and observed that only two statements that is; the balance sheet and cash flow statement for the years 2015, 2016 and 2017 were submitted. According to the International Accounting Standards (IAS) 1, a complete set of the financial statements should include the following; *A statement of financial position (balance sheet), a statement of profit or loss*

and other comprehensive income, a statement of changes equity, a statement of cash flows, a notes comprising a summary of significant accounting policies and other explanatory notes and comparative information prescribed by the standard. Once these financial statements are audited the Auditor issues his opinion in the form of a report signed, dated and stamped; evidencing that the financial statement have been audited. The Audited financial statements were not submitted as required by the Tender Document.

When asked by Members of the Appeals Authority as to whether it complied with such a requirement, the Appellant strongly submitted that it complied with such a requirement to the extent that the attached statements were certified by the Tanzania Revenue Authority pursuant to Section 91 of the Income Tax Act of 2004 as amended. The Appellant's counsel submitted further that if the same are not in the Appellant's bid then someone might have tempered with the document. However the Appellant did not produce a copy of its bid submitted to the Respondent. In addition, this issue was not raised in the Appellant's grounds of appeal nor was any additional document filed despite the fact that the Appellant had the opportunity of doing so.

The Appeals Authority does not agree with the Appellant's contention since determination of the tender's responsiveness is not based on extrinsic evidence rather on the content of the Tender Document pursuant to Regulation 206(1) of the GN. 446 of 2013. Thus, the Respondent's act of

disqualifying the Appellant was justified since the evaluation of tenders has to be consistent with the terms and conditions stated in the Tender Document pursuant to Section 72(1) of the Act read together with Regulation 203 of the GN. No. 446 of 2013.

The learned Advocate for the Appellant conceded that the Audited Financial Accounts for the period 2015, 2016 and 2017 were not submitted as required, however he capitalized on the Respondent's failure to communicate the proper reasons for its disqualification when the letter of Intention to award a tender was first issued by the appellant. According to him, the reasons provided were absurd and lacked transparency as the Appellant's bid was the lowest and not the highest. As earlier observed the Appeals Authority does not agree with the learned proposition.

In relation to the Appellant's contention that the Respondent had not issued a decision in relation to Lot 1 that is; Appeal No. 33, the Appeals Authority is of the view that the Respondent's failure to issue a decision within time in respect to Lot 1 did not prejudice the Appellant's rights. The Appellant had the avenue of lodging a complaint to this Appeals Authority which it did. However, the Appeals Authority revisited the Appellant's application for administrative review to the Respondent's Accounting Officer and observed that the Appellant's application for administrative review challenged the proposed award of the Tender to M/s Volex Electrical & Decorators Ltd at a price of TZS. 1,524,027766.92 VAT inclusive whilst on its part it quoted TZS. 744,515,976.49 VAT inclusive. During the hearing

the Appellant insisted that there is a difference of the price quoted by the proposed tenderer being almost twice as much of its quoted price.

The Appeals Authority revisited Regulation 212 of the GN. No. 446 of 2013. This Regulation provides that a successful tender is the tender with the lowest evaluated price in case of goods, works or services or the highest price in case of revenue collection. It does not mean that the lowest quoted price as asserted by the Appellant. As observed earlier the Appellant was disqualified at the preliminary evaluation stage before reaching the financial stage. Therefore no price comparison was done regarding its tender for all Lots. Consequently, its disqualification based on the reasons given in Lots 2 and 4 equally applied to Lot 1.

From the above findings and observations, the Appeals Authority is of the firm view that the Appellant's disqualification was justified.

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


Taking cognizance of the findings above, the Appeals Authority dismisses the Appeals for lack of merit. Each party to bear its own costs.

It is so ordered.

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 Decision is delivered in the presence of the parties today, 15th February 2019.



HON. JUSTICE (RTD) SAUDA MJASIRI

CHAIRPERSON

MEMBERS:

1. CPA. FREDRICK RUMANYIKA 

2. ADV. ROSAN MBWAMBO 