

IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY
AT DAR ES SALAAM
APPEAL NO. 15 OF 2017-18

BETWEEN

M/S ADVANCED SECURITY COMPANY LTD.....APPELLANT

AND

KINONDONI MUNICIPAL COUNCIL.....RESPONDENT

DECISION

CORAM

- | | | |
|----------------------------|---|-----------------|
| 1. Ms. Monica P. Otaru | - | Ag. Chairperson |
| 2. Eng. Francis T. Marmo | - | Member |
| 3. Mr. Louis P. Accaro | - | Member |
| 4. Mr. Ole-Mbille Kissioki | - | Secretary |

SECRETARIAT

- | | | |
|------------------------|---|----------------------|
| 1. Ms. Florida Mapunda | - | Senior Legal Officer |
| 2. Ms. Violet Limilabo | - | Legal Officer |

FOR THE APPELLANT

- | | | |
|-------------------------|---|----------------------------------|
| 1. Mr. Alex M. Balomi | - | Advocate, Legal Clinic Advocates |
| 2. Mr. Juma Ndambile | - | Managing Director |
| 3. Mr. Mwakipunda Henry | - | Operation Manager |

FOR THE RESPONDENT

- | | | |
|-----------------------|---|------------------|
| 1. Ms. Renatha Nicokw | - | Supplies Officer |
| 2. Mr. Salehe Mohamed | - | Legal Officer |
| 3. Mr. Hussein Ulugum | - | Legal Officer |
| 4. Mr. Albert Mgoye | - | Supplies Officer |

The Decision was scheduled for delivery today 12th October 2017, and we proceed to deliver it.

The Appeal was lodged by M/s Advanced Security Company Ltd (hereinafter referred to as "the Appellant") against Kinondoni Municipal Council (hereinafter referred to as "the Respondent"). The Appeal is in respect of Tender No. LGA/017/2017-2018/HQ/NC/16 Lot 1 for Provision of Security Services in Kinondoni Municipality (hereinafter referred to as "the Tender").

After going through the records submitted by the parties to the Public Procurement Appeals Authority (hereinafter referred to as "the Appeals Authority"), the facts of the Appeal are summarized as follows:-

On 18th August 2017 the Respondent invited shortlisted tenderers to submit Quotations in the above named Tender. The deadline for submissions was set for 21st August 2017, whereby three (3) firms, including the Appellant responded.

The Quotations were subjected to evaluation which was conducted in two stages, namely; preliminary and detailed evaluation. At the preliminary evaluation stage two (2) Quotations, including that submitted by the Appellant were disqualified for failure to comply with the requirements of the Quotation Document. The remaining Quotation by M/s Telesecurity Company Ltd was found to be responsive hence subjected to detailed evaluation. At the end of evaluation process the Evaluation Committee recommended the Tender to be awarded to M/s Telesecurity Company Ltd at a contract price of TZS. 274,137,600/- VAT Inclusive. The Tender Board through Circular Resolution No. KMC/PMU/HQ/C.3/02/1/14 dated 21st August 2017 approved the recommendation.

On 21st August 2017, the Respondent issued the Notice of Intention to Award the Tender and informed the Appellant that his Quotation was disqualified for the following reasons;

- a) failure to submit a list of recently performed contracts of similar nature to prove his experience;
- b) failure to submit Tax Clearance Certificate; and
- c) that he was not the lowest evaluated tenderer.

Dissatisfied by the grounds given for his disqualification, on 25th August 2017, the Appellant applied for administrative review challenging his disqualification and the award made to the proposed successful tenderer; however, the Respondent did not respond. Consequently, the Appellant lodged this Appeal on 15th September 2017.

SUBMISSIONS BY THE APPELLANT

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

1. That, the Respondent erred in law by holding that the Appellant has not submitted evidence to prove his experience while they have been executing a contract of security services with the Respondent for almost four years. During the hearing the Appellant submitted further that, he did not submit the list of recently performed contracts because the timeframe given was not sufficient.
2. That, the Respondent erred in law by holding that the Appellant has not attached Tax Clearance Certificate while he has attached a valid Business License which cannot be granted in the absence of Tax Clearance Certificate.
3. That, the Respondent erred in law by holding that the Appellant was not the lowest evaluated tenderer while his quoted price was within the pre-agreed price between him and the Respondent in the previously executed contract regarding costs for operation of security services.
4. That, the award of the Tender to the successful tenderer contravenes the law since the said tenderer lacked clean tax records. He further

argued that the Tax Clearance Certificate submitted by the successful tenderer was fraudulently obtained and that should have been a ground for disqualification rather than award.

5. That, the Respondent contravened the law by awarding the Tender to the successful tenderer without ascertaining if the said tenderer is shortlisted by the Government Procurement Supplies Agency (GPSA).

Finally the Appellant prayed for the following reliefs;

- i. The Appeal be allowed with costs;
- ii. Nullification of the award made to the successful tenderer and order the Respondent to award the Tender to the Appellant; and
- iii. Any other reliefs the Appeals Authority may deem fit to grant.

REPLY BY THE RESPONDENT

The Respondent's reply to the grounds of Appeal may be summarized as follows;

1. That, the Appellant was disqualified for his failure to list recently performed contracts, as per the requirement of Clause 2.4 of the Quotation Document, in order to prove experience.
2. That, the Appellant was disqualified for his failure to submit Tax Clearance Certificate pursuant to Clause 2.8 of the Quotation Document. The Respondent argued further that the Appellant's act of submitting Business License does not exonerate them from submitting other required documents stipulated in the Quotation Document.
3. That, there was no pre-agreed price between the Appellant and the Respondent, since the Tender allowed competition from invited tenderers with regard to quality and cost.

4. That, the Tender was awarded to the successful tenderer after confirmation from TRA that the Tax Clearance Certificate was genuine even if it indicates that the successful tenderer has arrangement to clear the owed taxes. Thus, the Respondent does not have doubt with the successful tenderer, taking into consideration that his price was the lowest.
5. That, GPSA is yet to shortlist service providers for security services for the year 2017-18. The Respondent further argued that, the invited service providers were approved by the Respondent's Tender Board, thus, registration of service providers by GPSA was not among the requirements in the Quotation Document.

Finally, the Respondent prayed for the following reliefs:-

- i. Dismissal of the Appeal for lack of merits;
- ii. The Appellant to compensate the Respondent a sum of TZS. 80,000,000.00 as disturbance and delay of procurement process.

ANALYSIS BY THE APPEALS AUTHORITY

It should be noted from the outset that the Respondent raised a Preliminary Objection that the Appeal is time barred; however, upon perusal of the documents submitted before it, the Appeals Authority was satisfied that the Appeal was lodged within the prescribed time. The Respondent conceded and proceeded to the hearing of the Appeal on merits.

Having gone through the documents submitted by both parties and oral submissions, we are of the view that there are three (3) triable issues calling for determination. These are:-

- 1.0 Whether the Appellant's disqualification was proper in law;
- 2.0 Whether the award of the Tender to the successful tenderer is justified; and
- 3.0 What reliefs, if any, are the parties entitled to.

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

1.0 Whether the Appellant's disqualification was proper in law

In resolving this issue we revisited Clause 2 of the Quotation Document which reads as follows:-

2. "Tenderers (SP) shall attach the following documents to its quotation:
 - 2.1 a duly completed and signed priced quotation as per the statement of Requirements and Schedule of Prices;
 - 2.2 A valid Business License;
 - 2.3 A Valid VAT and TIN certificate;
 - 2.4 A list of recently performed contracts of similar nature in any of the last two years including the names and addresses of the Employers for verification;
 - 2.5 Tender Securing Declaration;
 - 2.6 Power of Attorney;
 - 2.7 Form of Integrity in Section IX duly filled and signed; and
 - 2.8 A Tax Clearance Certificate."

The above quoted Clause entails that it was mandatory for tenderers to attach all documents mentioned therein. As stated by the Respondent, the Appellant's Quotation missed list of recently performed contracts of similar nature and the Tax Clearance Certificate contrary to Clauses 2.4 and 2.8 cited above.

The Appellant conceded not attaching the requisite documents, he however tried to justify the failure to do so, among others, blaming a short timeframe given and claiming that, in any case, they were in the Respondent's custody. The Appellant also persisted that since the Business License was attached, the Respondent ought to have considered them as the same is issued only after tax clearance and that by necessary implication, the Respondent should have taken tax issues as cleared.

The Appeals Authority disagrees with the Appellant's assertion that the Respondent is presumed to know that the Appellant has experience since

he worked with him for several years and that by submitting a Business License it should be understood that tax issues are cleared. Pursuant to Regulation 203 of Public Procurement Regulations, GN. No. 446 of 2013, as amended, (hereinafter referred to as "GN. No. 446 of 2013"), evaluation should be conducted basing on the terms and conditions provided in the Quotation Document and that is what the Respondent did.

We find the Appellant's failure to submit the list of recently performed contracts of similar nature and failure to submit Tax Clearance Certificate to have contravened the requirements of Regulation 204(2)(f) and (k) of GN. No. 446 of 2013 which provides in clear terms what material deviations to commercial terms and conditions justify rejection of a tender; these include issues of experience and non-submission of major supporting documents.

The Appeals Authority is not satisfied with the Appellant's contentions and justifications, as he ought to have sought for clarifications from the Respondent pursuant to Regulation 13 of GN. No. 446 of 2013, instead of creating own interpretations and justifications. By remaining silent the Appellant was bound to comply with the requirements of the Quotation Document.

From the above quoted provisions and findings, the Appeals Authority is of the firm view that the Appellant's quotation was properly disqualified for failure to substantially comply with the requirements of the Quotation Document.

Regarding the Appellant's contention that his quoted price was the pre-agreed price with the Respondent in the previous contract for security services, the Appeals Authority observes that if there were any negotiations concerning the price, there is no indication that they were in respect of this Tender. In addition thereto, we wish to note that the Appellant was disqualified before reaching the detailed evaluation stage thus no price comparison could have been done. As such, the ground that the Appellant

was not the lowest evaluated tenderer could not and should not have been among the reasons for disqualification of the Appellant.

Concerning the contention that the Respondent contravened the law by awarding the Tender to the proposed successful tenderer without ascertaining if the said tenderer is shortlisted by GPSA, since this was a new ground that has not been dealt with by the Respondent pursuant to Section 96(4) of the of the Public Procurement Act No. 7 of 2011, as amended (hereinafter referred to as "the Act"), it cannot be raised at the Appellate level. Nevertheless, just to enlighten the Appellant, we are in agreement with the Respondent that GPSA is yet to shortlist service providers for security services for the year 2017-18. In the absence of such a list, it is sufficient that the invited service providers were approved by the Respondent's Tender Board.

All in all, the Appeals Authority concludes the first issue in the affirmative, that the Appellant's disqualification was proper in law.

2.0 Whether the award of the Tender to the successful tenderer is justified

In resolving this issue the Appeals Authority considered the Appellant's contention that, the Respondent erred in law for awarding the Tender to the successful tenderer who is indebted to TRA and submitted a fraudulently obtained Tax Clearance Certificate. During the hearing the Appellant submitted further that, TRA does not issue Tax Clearance Certificate if there is over one million shillings debt, but failed to provide the authority for this.

To ascertain the Appellant's contention, the Appeals Authority revisited the documents availed before it and observed that, the Respondent enquired about the successful tenderer's Tax Clearance status from TRA. In response thereof the Respondent was informed that, the said Tax Clearance Certificate attached by the successful tenderer was genuine and issued by TRA Kinondoni Tax Region. Although it is indicated that the said

successful tenderer owes TRA significant amount of tax liability, there seems to be a settlement agreement arrangement internally. From the above facts, the Appeals Authority sees no reason why the successful tenderer should not qualify for the award of the Tender.

From the foregoing, there is no doubt therefore that the award of the Tender to the successful tenderer is justified, thus the second issue is concluded in the affirmative.

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

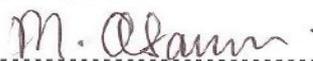
Taking cognizance of the findings above, the Appeals Authority dismisses the Appeal for lack of merits. The Respondent is hereby ordered to proceed with the Tender process. Each party to bear own costs.

It is so ordered.

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

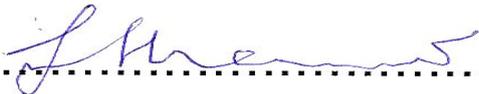
The Right of Judicial Review as per Section 101 of the Act is explained to the parties.

This Decision is delivered in the presence of the parties today, 12th October 2017.



Ms. MONICA P. OTARU
Ag. CHAIRPERSON

MEMBERS:

1. Eng. FRANCIS T. MA 

2. Mr. LOUIS P. ACCARC 