

IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY
APPEAL CASE NO. 25 OF 2017-18
BETWEEN
M/s SECULARMS (T) LIMITED.....APPELLANT
AND
TANZANIA ELECTRIC SUPPLY
COMPANY LIMITED.....RESPONDENT

DECISION

CORAM

- | | | |
|------------------------------|---|-----------------|
| 1. Ms. Monica P. Otaru | - | Ag. Chairperson |
| 2. Mrs. Rosemary A. Lulabuka | - | Member |
| 3. Eng. Aloys J. Mwamanga | - | 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 APPELLANT

- | | | |
|------------------------|---|--------------------------------|
| 1. G. P. Sandi | - | Advocate- G. P. Sandi Advocate |
| 2. Mr. Zakayo I. Kaaya | - | Procurement Manager |

FOR THE RESPONDENT

- | | | |
|--------------------------|---|---------------------------------|
| 1. Ms. Rehema O. Shabani | - | Ag. Zone Procurement Specialist |
| 2. Mr. Mahawa Mkaka | - | Regional Manager –Kilimanjaro |
| 3. Mr. Dominick Nerrey | - | Security Officer – Arusha |
| 4. Mr. Peter Maganga | - | Procurement Officer |

This decision was scheduled for delivery today 26th January 2018 and we proceed to do so.

The Appeal at hand was lodged by M/s Secularms (T) Limited (hereinafter referred to as "the Appellant") against Tanzania Electric Supply Company Limited commonly known by its acronym as TANESCO (hereinafter referred to as "the Respondent").

The Appeal is in respect of Tender No. PA/001/2017-18/NZN/N/001 for Provision of Security Services in the North Zone- Lots 1 and 2 for Arusha and Manyara Regions respectively (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:

On 11th August 2017, the Respondent invited shortlisted tenderers to submit their Quotations in relation to the Tender. The deadline for submission was set for 29th August 2017, whereby six firms submitted their Quotations.

The Quotations were subjected to evaluation which was conducted in three stages, namely; preliminary, technical and detailed evaluation. At the preliminary evaluation, four Quotations were disqualified for failure to comply with the Quotation Form. The remaining two Quotations were subjected to technical evaluation whereby the Appellant's Quotation was disqualified for being non responsive on two grounds, namely; that some

of the documents of Firearm Licences were altered and that some of the motor vehicles registration cards did not belong to the Appellant. The remaining Quotation by M/s Sunshine General Security Services was subjected to detailed evaluation. Upon completion of the evaluation process the Evaluation Committee recommended award of the Tender to M/s Sunshine General Security Services for Lots 1 and 2 at contract prices of TZS.334,176,000/= and 211,352,160/= respectively, subject to post qualification. Post qualification was to ascertain compliance of Clause 1.3 of the Quotation Form. Then negotiation on the contract price and other processes followed.

On 5th December 2017, the Respondent vide a letter Ref. No. PA/001/2017-18/NZN/N/001 issued the Notice of Intention to Award the Contract to all bidders the Appellant inclusive. The letter also informed the Appellant that his Quotation was disqualified for two reasons. One is that copy of Firearm Licenses Nos. 00082687, 00087097 and 00082686 bear uncertified additional information. Second reason is that motor vehicle with registration cards Nos. 6394891 and 88910 were not belonging to the Appellant.

Aggrieved, on 11th December 2017, the Appellant applied for administrative review to the Respondent's accounting officer challenging the intended award and their disqualification.

The Respondent did not respond to the Appellant's complaint. Aggrieved further the Appellant filed this Appeal on 29th December 2017.

SUBMISSION BY THE APPELLANT

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

- i. The Appellant disputes his disqualification on the ground that there was additional information on the certified copies of the Firearm Licences attached to his Quotation. The Appellant submitted that it could have been understood if the Respondent had said that the documents submitted were tempered with when conducting due diligence, rather than just saying "additional information". The Appellant argued further that, he had marked the certified copies so as to differentiate between the "pump action" and "superior firearms".
- ii. Regarding firearm with Certificate No. 13042, the Appellant submitted that, the said weapon was bought from Didas Mtana and registered in the company's name. Finalizing his submission on this point, the Appellant stated that if there were doubts on firearm ownership then the only entity to clarify the same is the police who issued the licences and not otherwise.
- iii. That, he complied with the requirement of Clause 1.2 of the Quotation Form by submitting original ownership certificate for motor vehicle registration cards belonging to one Deo Lekule.
- iv. In support of the above point, the Appellant argued that, the only entity mandated to ascertain ownership of any motor vehicle is Tanzania Revenue Authority (TRA). Hence, the Respondent ought to have requested for original registration card and consult TRA to ascertain who is the real owner of the said motor vehicles.

Submitting further in this regard, the Appellant claimed that, it is common for companies to hire motor vehicles and/or equipment thus even themselves have done so and should not be penalized for that.

- v. That, he has the lowest quoted price and therefore entitled to be awarded the Tender and not M/s Sunshine General Security Services, whose price was higher than the Appellant.
- vi. That, the Respondent issued the Notice of Intention dated 5th December 2017 which was served to them six days later, implying that the Respondent had ill motives towards them.
- vii. That, Section 96(6) of the Public Procurement Act of 2011 as amended (hereinafter referred to as "the Act") requires the procuring entity to issue its decision within seven working days from the date of receiving the complaint, however, the Respondent contravened the said provision for his failure to respond within the time limit.

Finally the Appellant prayed for the following reliefs:-

- i. Order to award the Tender to them;
- ii. Appeal filing fees of TZS. 200,000/=;
- iii. Legal fees TZS. 3,000,000/=; and
- iv. Costs of this Appeal as the Appeals Authority deems fit to grant.

REPLY BY THE RESPONDENT

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

- i. That, the Firearm Licences attached to the Appellant's Quotation were altered by adding additional information which was not in the original licences.
- ii. That one licence indicated that the firearm was owned by two different people, that is; one Didas Mtana and the Appellant, contrary to the requirement of Clause 1.2 of the Quotation Document. Thus the additional information found in the Appellant's Quotation was the cause for his disqualification from the tender process. The Respondent further submitted those documents to Moshi Regional Police for verification.
- iii. The Respondent said that the term "ownership" in the Quotation Form clearly referred to *equipment owned by tenderers* and not anyone else. Thus, if the Appellant did not understand the meaning of the said term, he ought to have sought for clarification, but he did not thus contravening the Quotation Form.
- iv. That, the Appellant was disqualified for his failure to comply with other requirements of the Quotation Form despite of having the lower quoted price.
- v. That, the Notice of Intention dated 5th December 2017, was served to all tenderers on 11th December 2017 after being signed. The delay was due to internal procedures and not because the Respondent had any ill motives.

- vi. That, while the Respondent was still working on the Appellant's administrative review, and before he could respond, the Appellant filed this Appeal.

Finally the Respondent prayed for the following reliefs:-

- i. Dismissal of the Appeal for lack of merits; and
- ii. Costs of the Appeal.

ANALYSIS BY THE APPEALS AUTHORITY

The Appeals Authority is of the view that, the Appeal has three issues calling for determination and these are;

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

Having identified the issues in dispute the Appeals Authority proceeded to resolve them as follows:-

- 1.0 Whether the Appellant's disqualification was justified

In resolving this issue, the Appeals Authority revisited the documents submitted before it and observed that the Appellant was disqualified on two major grounds, namely;

- i. There were some additional information to some of the submitted certified true copies of the original ownership Licence

of Firearms that is; Nos. 00082687, 00087097 and 00082686 compared to the ones seen physically; and

- ii. Some of the certified true copies of original ownership motor vehicle registration cards submitted are not owned by the company that is; Card No. 6394891 for (T940AMM) and Card No. 88910 for (T873ABX).

To ascertain the validity of the reasons given for the disqualification of the Appellant, we revisited the Quotation Form, which in Clause 1.2 reads:-

1.2 "Bidders must submit the following documents in her Quotation

•.....

.....

•Certified true copies of the original OWNERSHIP license for working equipment (Fire arms, communication facilities, and transport/ patrol vehicles).

•.....

•.....

•Certified true copies of pump action shotgun or superior fire arm license.

•....". (Emphasis added)

The above quoted provision entails that it was mandatory for tenderers to attach all the mentioned documents to their Quotation. During the hearing, the Appellant insisted that he complied with all the above requirements. The Appeals Authority revisited the Appellant's Quotation and observed that, although he has attached the Firearm Licences to his Quotation Form;

he had also added the words "pump action" and "superior" to describe the firearms.

When asked by members of the Appeals Authority about the added words, the Appellant responded that, he decided to add those words in order to differentiate between "pump action" and "superior" firearm as per the Quotation Form since these descriptions did not appear on the Licences.

The Appeals Authority also asked the Respondent to clarify, if the Firearm Licence did not indicate whether the firearm was for "pump action" or "superior" how then could one tell which weapon was "pump action" and which one was "superior". In replying, the Respondent stated that the Evaluation Committee comprised of an expert who knew about firearms; thus it was easy for them to identify the required firearms due to its make.

We have considered the Respondent's explanation and consider that the requirement for "pump action" or "superior" firearm was vague and couched in general terms, contrary to Section 72 (1) (2) of the Act and Regulations 184(2) and 203(1) of the Public Procurement Regulations (GN. No. 446 of 2013, as amended) (hereinafter referred to as "GN. No. 446 of 2013") which require the basis for the tender evaluation to be clearly specified in the Tender Document and evaluation to be conducted in compliance with the specified criteria.

The way the said requirement was couched could not assist the Evaluation Committee to determine the responsive tenderer by knowing exactly the

make of firearm licenses submitted if it falls within the type of “pump action” or “superior firearms”.

The Appeals Authority revisited Quotation submitted by the proposed successful tenderer, M/s Sunshine General Security Services and observed that the copies of Firearm Licenses indicated type, calibre, make, and maker’s number without stating if it is “pump action” or “superior firearms”.

The Appeals Authority failed to comprehend how the evaluation was conducted under circumstances of vague description of the requirement. Further we wondered how the Respondent was able to determine that the proposed successful tenderer’s firearm complied with the Quotation Form and not that of the Appellant. Thus, the Appeals Authority finds the Respondent’s act of disqualifying the Appellant for adding some information to be not proper as this aspect in the Quotation Form lacked clarity.

Dual ownership of one firearm was not one of the grounds for disqualification; however it was raised by the Appellant during application for administrative review. To clear the Appellant doubts the Appeals Authority taking cognizance of the Kilimanjaro Regional Police Commander confirmation letters dated 9th and 16th January 2018, we are satisfied that the firearms belong to the Appellant.

Reverting to the Appellant’s second ground of his disqualification, we observed that Clause 1.2 of the Quotation Form, quoted above, requires

bidders to submit certified true copies of the original ownership license of transport or patrol vehicles among other things. The Appellant's Quotation Form had been attached with four motor vehicles registration cards, two of which belonged to Mr. Deo Alois Lekule while the remaining two belonged to the Appellant.

When asked why did he submit motor vehicle registration cards not belonging to him, the Appellant responded that according to Clause 1.2 of the Quotation Form the words original ownership meant that he could submit motor vehicle registration cards of his company or any other person and in any case, although at the time of submission of Quotation, the motor vehicles belonged to the third party, the ownership has now been transferred to the Appellant's name. As such he had complied with the requirement.

On our view bidders were mandatorily required to submit certified original ownership licences. By submitting motor vehicles registration cards belonging to one Mr. Deo Alois Lekule, the Managing Director of the Appellant's company amounted to contravention of the requirement of Clause 1.2 of the Quotation Form. When a company is incorporated it acquires legal personality distinct from its members, as it was stated in the case of *Salomon v Salomon (1897) A.C* by Lord Macnaghten that:

"The company is at law a different person altogether from the subscribers to the memorandum, and though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not in law the agent

of the subscribers or trustee of them, nor are subscribers liable, in any shape or form except to the extent and in a manner provided by the Act”.

The Appeals Authority could have come up with a different position had the Appellant submitted proof of lease of the said motor vehicles. Since proof of lease was not there, the Respondent was proper to disqualify the Appellant for failure to comply with the said requirement.

The Appeals Authority therefore concludes the first issue in the affirmative, that the Appellant’s disqualification was justified, especially so on the second ground.

On the aspect of delaying to issue the Notices of Intention, the Respondent clarified that these letters were sent to all tenderers on 11th December 2017 vide their respective e-mail. As time begun running from that date, thus no ill motive can be inferred.

Regarding the Respondent’s failure to respond to his complaints, the Appeals Authority finds that, the Appellant has not in any case been prejudiced since he has been accorded the right to be heard as per Section 96(7) of the Act.

2.0 Whether the award of the Tender to the proposed successful tenderer is proper in law

The Appeals Authority finds proper to establish whether the proposed successful tenderer was found to be substantially responsive to the

requirement of the Quotation Form. In the cause of so doing, it was observed that the Quotation submitted by them has equally not stated the kind of the firearms whether "pump action" or "superior" and this is due to non clarity of the Quotation Form as we have observed in the first issue above. The Appeals Authority finds that the tenderer could not be faulted for the same.

Furthermore, the Appeals Authority considered the Appellant's contention that his tender had the lowest quoted price; thus was entitled for award of Tender and not M/s Sunshine General Security Services who quoted the highest price.

To ascertain the Appellant's contention, the Appeals Authority revisited Regulation 212(a) of GN. No.446 of 2013 which provides clearly that the successful tender shall be the tender with the lowest evaluated tender price which may not necessarily be the lowest quoted price. The said provision read as follows:-

Reg. 212 "The successful tender shall be-

- (a) The tender with the lowest evaluated tender price in case of goods, works or services, or the highest evaluated tender price in case of revenue collection, but not necessarily the lowest or highest submitted price, subject to any margin of preference applied".

The above quoted provision entails that to be successful in any tender process does not mean having the lowest or highest price rather it means

compliance with all requirements provided in the Tender Document. The Appellant could have been the lowest evaluated tenderer if he had complied with all the requirements stated in the Quotation Form. Since he had been fairly disqualified at the technical stage for reason stated hereinabove, then he could not be considered for price comparison (which the Appellant called commercial evaluation) with the successful tenderer. The proposed successful tenderer was found to be the only successful tenderer at the final stage.

The Appeals Authority concludes the second issue in the affirmative that the award of the Tender to the proposed successful tenderer was proper in law.

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

Taking cognizance of its findings above, we 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 Respondent and in absence of the Appellant today 26th January 2018.

M. Otaru

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Ms. MONICA P. OTARU
Ag. CHAIRPERSON

MEMBERS

1. MRS. ROSEMARY A. LULABUK/ *R. Lulabuk*

2. ENG. ALOYS J. MWAMANGA, *A. Mwamanga*