

IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY
AT DAR ES SALAAM
APPEAL CASE NO. 44 OF 2016-17

BETWEEN

M/S E.R.P. SOFTWARE TECHNOLOGIES PLCAPPELLANT

AND

TANZANIA ELECTRIC SUPPLY

CO. LIMITED (TANESCO)RESPONDENT

DECISION

CORAM

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| 1. Ms. Monica P. Otaru | - | Ag. Chairperson |
| 2. Mrs. Rosemary Lulabuka | - | Member |
| 3. Eng. Aloys Mwamanga | - | Member |
| 4. Mr. Ole-Mbille Kissioki | - | Secretary |

SECRETARIAT

- | | | |
|-------------------------|---|----------------------|
| 1. Ms. Florida Mapunda | - | Senior Legal Officer |
| 2. Ms. Violet Limilabo | - | Legal Officer |
| 3. Mr. Hamis Tika | - | Legal Officer |
| 4. Mr. Humphrey Kisanga | - | ICT Officer |

FOR THE APPELLANT

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|---------------------------|---|-------------------------------------|
| 1. Mr. Salim Abbas Khatri | - | Director of
Business Development |
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FOR THE RESPONDENT

- | | | |
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| 1. Mr. Florence A. Kahatano | - | Ag. PLO |
| 2. Mr. Evaristo Winyasi | - | Project Manager |
| 3. Mr. Francis Kinjasi | - | Procurement Officer |
| 4. Ms. Grace J. Ngahyoma | - | Procurement Officer |

This Decision was set for delivery today, 6th July 2017 and we proceed to deliver it.

This Appeal was lodged by M/s E.R.P. Software Technologies PLC (hereinafter referred to as "the Appellant") against Tanzania Electric Supply Company Limited, commonly known by its acronym TANESCO (hereinafter referred to as "the Respondent"). The Appeal is in respect of Tender No: PA/001/2016/HQ/W/16 for Supply, Installation, Implementation and Commissioning of Corporate Management System (CMS) (hereinafter referred to as "the Tender").

Pursuant to the records submitted to the Public Procurement Appeals Authority (hereinafter referred to as "the Appeals Authority"), the facts of the Appeal can be summarized as follows:-

The Respondent vide the Daily News newspapers dated 11th April 2017, invited tenderers to participate in the above named Tender which was to be conducted in accordance with the Public Procurement Act of 2011 (as amended), (hereinafter referred to as "the Act") and the Public Procurement Regulations, G.N. No. 446 of 2013 (as amended) (hereinafter referred to as "G.N. No. 446 of 2013"). The deadline for submission of tenders was initially set for 5th May 2017; however, following the pre-bid meeting held on 27th April 2017 the deadline was

extended to 26th May 2017 then further extended to 9th June 2017, to allow for clarifications of the Tender Document by the Respondent.

The Appellant being among the prospective tenderers for the Tender, on 15th May 2017 sought for clarification from the Respondent regarding the limitation of the Tender to particular Enterprise Resource Planning (ERP) solution namely; SAP S/4HANA ERP System. Having not received any clarification from the Respondent, the Appellant, on 19th May 2017, filed an application for administrative review challenging amongst others, the Respondent's act of minimizing competition by restricting technical specifications of the required ERP solution to specific products.

Again, the Respondent did not issue any decision with respect to the application for administrative review; thus, the Appellant lodged this Appeal on 7th June 2017.

SUBMISSIONS BY THE APPELLANT

In this Appeal, the Appellant raised two grounds of Appeal which may be summarized as follows;

- i) The Respondent's use of brand or Trademark names is in contravention of the law; and
- ii) The Respondent's failure to issue its decision on the application for administrative review contravened the law.

In arguing the first ground of Appeal, the Appellant submitted that the Respondent erred in law by specifying in the Tender Document that the required ERP solution is SAP S/4HANA. The said Trade name was clearly stipulated under Clauses 11, 12 and 22 of the Tender Data Sheet (TDS); Pages 164, 246, 250 and 258 of the Technical Requirements and the Drawings (Section VII). The Appellant contended further that, SAP

S/4HANA is a registered Trade name of SAP SE, a German Multinational Software Corporation. Thus, the Respondent's act of specifying the said name in the Tender Document contravened Regulation 22(2) and (4) of G.N. No. 446 of 2013 which prohibits the inclusion of such names in the Tender Document.

The Appellant further submitted that, Clause 12 of the TDS indicates that bid prices should exclude SAP licenses as the same would be procured by the Respondent themselves from the Original Equipment Manufacturer. According to the Appellant the said requirement indicates that there was indirect single source procurement. The purchase of software licenses directly from SAP without following competitive procedures is single source procurement which does not comply with requirements of Regulation 159(1) of G.N. No. 446 of 2013; in addition thereto, it automatically excludes other ERP vendors.

The Appellant contended further that, the same Tender was floated way back in 2011 and the tender specifications were open to all ERP solutions which were available in the market, these included SAP, Oracle, IFS, Unit4 etc. The said Tender was cancelled with a view of re-advertising.

To the Appellant's surprise, the re-advertised Tender limited bidders' participation to SAP providers only. The Appellant argued that, the Respondent's act in this regard is intended to deprive the Respondent from the benefit of getting the best solution which would result out of fair and open competition. Thus, the Respondent contravened Section 4A(2) of the Act which requires tender processes to be conducted in a manner that maximizes integrity, competition, accountability, economy, efficiency and value for money.

Submitting on the second ground of Appeal, the Appellant argued that, the Respondent erred in law for failure to issue his decision with respect to the application for administrative review lodged to them on 19th May 2017 and copied to PPRA. The Respondent ought to have issued his decision within seven (7) working days; however, up to 30th May 2017 there was no decision issued, thus, the Respondent contravened Section 96(6) of the Act.

Finally, the Appellant prayed for the following orders:-

- a) The Respondent be ordered to cancel the procurement process;
- b) The Respondent be ordered to re-tender and issue an amended Tender Document which complies with the law; and
- c) The Respondent be ordered to instruct all staff and bidders who participate in the procurement process to comply with basic procurement principles as per the requirement of the law.

REPLIES BY THE RESPONDENT

The Respondent's replies on the grounds of Appeal may be summarized as follows;

In relation to the first ground of Appeal, although the Respondent expounded that, the Tender has been floated through International Competitive Bidding Procedures thus it did not limit the participation of any ERP System Integrator, they tried to defend that in their view SAP S/4HANA was the best ERP solution for their needs as the current ERP system (ISCALA EPICOR ERP) does not perform satisfactorily due to the growing nature of the Respondent's activities.

They submitted further that, they had an option of contracting SAP as the Software License Supplier and the System Integrator under the

single source procurement; however, they opted for competitive tendering in order to allow competitive participation of System Integrators while maintaining the choice of the solution that has been proven to blend well with the Respondent's business needs.

With regard to the contention of purchasing the software license directly from Original Equipment Manufacturer, the Respondent submitted that, they intended to do so in order to reduce costs by eliminating agents who always add a mark-up to the original cost. Expounding further that, the Tender for purchase of software licenses has not yet been issued.

Regarding to the second ground of Appeal the Respondent submitted that, they had not refused to issue their decision with respect to the Appellant's application for administrative review, rather they were in the process of reviewing the complaints raised at various levels of the organization.

Therefore, the Respondent prayed for the dismissal of the Appeal with costs.

ANALYSIS BY THE APPEALS AUTHORITY

Before embarking on the analysis of the Appeal, the Appeals Authority considered the Appellant's second ground of Appeal, regarding the Respondent's failure to issue his decision on the application for administrative review and observes that Section 96(6) of the Act requires accounting officers to issue their decisions with respect to the application for administrative review within seven (7) working days. In this Tender the Respondent failed to do so, thus contravened Section 96(6) of the Act. The Appeals Authority is of the view that, the

Appellant's rights had not been prejudiced as they were able to submit this Appeal which is a remedy under Section 97(2)(a) of the Act.

Therefore, the Appeals Authority proceeds to determine the first ground of Appeal by framing the following issues;

- Whether the Respondent's technical specifications are in compliance with the law; and
- What reliefs, if any, are the parties entitled to.

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

1.0 Whether the Respondent's technical specifications are in compliance with the law

It is not disputed that the Respondent had explicitly stated under Clauses 11, 12 and 22 of the Tender Data Sheet (TDS) and Pages 164, 246, 250 and 258 of the Technical Requirements and the Drawings (Section VII) that the required ERP solution is SAP S/4HANA. Although the heading of the Tender implied that it was open to all ERP vendors, the Tender Document as well as submissions by the Respondent are clear that they had their preferred ERP system; as such, the Tender Document had specified the brand names of the preferred ERP solution.

Regulation 22(2) of G.N. 446 of 2013 provides as follows;

"Any terms, specifications, plans, drawings, designs and requirements or description of goods, construction or services shall be based on the relevant objective, technical and quality characteristics of the goods, construction or services to be procured and no reference to a particular trade mark, name,

patent, design, type, specific origin or producer shall be issued” (Emphasis supplied).

In their submissions, the Respondent admitted that they had no ERP specifications or standards approved by the relevant authorities. However, they decided to specify the required ERP solution (SAP S/4HANA) after obtaining the approval from the management.

The Appeals Authority finds the Respondent’s acts in this regard to have contravened not only Regulation 22(2) of G.N. No. 446 of 2013 by mentioning specific brand names, but also Regulation 22(4) of the same G.N. by mentioning a specific name without having any established and approved standards to that effect. The law through Regulation 22A of G.N. 446 of 2013 provides for approval by the Public Procurement Regulatory Authority and not the management.

Regulation 22(4) reads;

“Where there is no established and approved standards, no reference to a particular trade mark, name, patent, design, type, specific origin or producer shall be issued” (Emphasis added).

Further, the Tender is contradictory in itself. On one hand the title suggests it to be an open Tender; on the other hand, by providing specific Trade name (s), it turns the same to a single source, thus automatically eliminating other ERP vendors. By so doing, the Respondent contravened the procurement principles enshrined in the law.

As the Tender is visibly intended to be open to all ERP vendors, mentioning specific names with whatever justification there is, is untainted violation of the law.

From the above, it is the Appeals Authority's conclusion with regard to the first issue that, the Respondent's technical specifications are not in compliance with the law.

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

Taking cognizance of the findings above, the Appeal has merits as the Tender is in contravention of the law. The Appeal is hereby upheld and the Respondent is ordered to re-start the tender process by issuing a Tender Document which complies with the law. No order as to costs is given.

This Decision is binding on the parties 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 this 6th July 2017.


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MONICA P. OTARU
Ag. CHAIRPERSON

MEMBERS:

1. MRS. ROSEMARY LULABUKA 

2. ENG. ALOYS MWAMANGA 