

IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY

APPEAL CASE NO. 07 OF 2016-17

BETWEEN

M/S DARWORTH LIMITEDAPPELLANT

AND

AGENCY FOR DEVELOPMENT OF
EDUCATIONAL MANAGEMENT (ADEM)RESPONDENT

DECISION

CORAM

- | | |
|----------------------------|-------------------|
| 1. Ms. Monica P. Otaru | - Ag. Chairperson |
| 2. Eng. Francis T. Marmo | - 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. Mr. Joseph Assenga | - Advocate - Novelty Advocates |
| 2. Mr. Gerald Msovela | - Advocate - Novelty Advocates |
| 3. Mr. Bernad Makanta | - Sales Department - Darworth Ltd |

FOR THE RESPONDENT

1. Dr. Siston M. Mgullah - Chief Executive Officer – ADEM
2. Mr. Oscar Ngenzi - Legal Officer-Ministry of Education, Science and Technology
3. Eng. Lameck M. Kagaali - System Administrator - ADEM
4. Mr. Eugene D. Assenga - Procurement Officer - ADEM

This Decision was scheduled for delivery today, on 11th November 2016 and we proceed to deliver it.

The Appeal is in respect of Tender No. AE/014/2015-2016/G/01 for Supply and Installation of Table/Desk and Chairs (hereinafter referred to as “the Tender”), lodged by M/s Darworth Limited (hereinafter referred to as “the Appellant”) against the Agency for Development of Educational Management known by its acronym ADEM (hereinafter referred to as “the Respondent”).

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:

The Respondent vide the ‘Mtanzania’ newspaper dated 15th August 2016 advertised the Tender which was conducted using the National Competitive Bidding (NCB) procedures specified in the Public Procurement Regulations GN. No. 446 of 2013, as amended, hereinafter referred to as “the Regulations”. The deadline for submission of tenders was set for 07th September 2016, whereby seven tenders were received.

Tenders were subjected to evaluation which was conducted in three stages namely; preliminary evaluation, detailed evaluation and post qualification. After completion of the said evaluation process, the Evaluation Committee recommended the award of contract to M/s Moltz Enterprises at a contract price of TZS. 170,156,000.00. This was approved by the Tender Board on 19th September 2016.

On 26th September 2016 the Respondent vide a letter with Ref. No. ADEM /B.10/TB/2/III/34 notified all tenderers including the Appellant of his intention to award the Tender to M/s Moltz Enterprises. The same letter informed all tenderers reasons for their disqualification. The Appellant's tender was disqualified during post qualification for failure to attach evidence of supplying similar items to any reputable or Government Institution.

Dissatisfied with the decision, the Appellant applied for administrative review through his letter with Ref. No. DW2016/05/10/ADEM/01 dated 5th October 2016.

On 10th October 2016, the Respondent vide a letter with Ref. No. ADEM/B.10/TB/2/III/38 communicated to the Appellant his decision to dismiss the complaint for lack of merits.

Aggrieved further by the Respondent's decision, on 17th October 2016, the Appellant lodged this Appeal.

SUBMISSIONS BY THE APPELLANT

For record purposes the Appellant had raised four grounds of appeal which during hearing were reduced to two and summarized as follows;

1. That, the Respondent erred in fact and law in disqualifying the Appellant's tender as they had attached evidence of supplying similar items to reputable or Government institutions as per Clause 13.3 of the Instructions To Bidders (ITB).
2. That, the Appellant's tender was the lowest tender and had complied with the requirements of the Tender Document. Thus, it was not proper for the Respondent to award the Tender to another tenderer who had higher price than theirs.

Finally the Appellant prayed for the following reliefs: -

- i. To be awarded the Tender at a contract sum of TZS 103,999,555.68;
and
- ii. Costs of the Appeal.

SUBMISSIONS BY THE RESPONDENT

In response to the Appellant's contentions, the Respondent stated that the evidence attached by the Appellant titled "similar jobs done previously" was irrelevant compared to the requirements of the Tender Document.

The Respondent prayed for dismissal of the Appeal in its entirety and for costs associated thereto.

ANALYSIS BY THE APPEALS AUTHORITY

During hearing of the Appeal, it was agreed by the parties that the issue to be determined by the Appeals Authority at this stage is whether the Appellant's tender was unfairly disqualified followed by the reliefs that the parties are entitled to.

The Appeals Authority proceeded to resolve them as follows;

1. Whether the Appellant was unfairly disqualified

In resolving this issue the Appeals Authority considered the Appellants contention that they had attached evidence to prove that they had been supplying similar items to reputable or Government institutions as required by Clause 13.3(b) of the ITB.

The Appeals Authority observed that, the Appellant had successfully qualified at the preliminary and detailed evaluation stages. During post qualification, tenderers were *inter alia* required to prove their experience and technical capability by providing documentary evidence that they had supplied the said items to any reputable or Government Institution as per Clauses 13.3 (b) and 35.1 of the ITB which were modified by Clauses 13 and 44 of the Bid Data Sheet BDS. The said provisions of the BDS provide as follows:-

Clause 13 "The qualification criteria required from tenderers in ITT Clause 13.3(b) is modified as follows:

(a)...

(b) Experience and Technical Capacity

The Tenderer shall furnish *documentary evidence* to demonstrate that it meets the following requirement(s) (emphasis added):

Has been supplied the said (items) equipment in any reputable institutions or Government departments etc. sic.

Clause 44 - Post Qualification shall be;

(a) Experience and Technical capacity

The bidder shall furnish *documentary evidence* to demonstrate that it meets experience of past performance of three similar contract." (emphasis added).

The Appeals Authority revisited the Appellant's tender and observed that they had listed various institutions they had supplied items of similar nature to, without any documentary evidence to prove the same. After deliberation, the Appellant conceded that although they had provided the list of institutions they had supplied to, they had not attached documentary evidence to that effect. As such they had not complied with the requirements of the Tender Document.

As it has now been admitted by the Appellant that they did not comply with the requirement of the Tender Document; the Appeals Authority firmed up its view that, the Respondent's act to disqualify the Appellant was in conformity with Section 72(1) of the Public Procurement Act of 2011 as amended (hereinafter referred to as "the Act") and Regulation 203 of the Regulations which provide that basis for tender evaluation shall be consistent to the terms provided in the Tender Document. It thus goes without saying that the Appellant's tender was not the lowest evaluated.

This issue therefore is answered in the negative that is the Appellant was not unfairly disqualified.

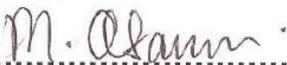
2. What reliefs, if any, are the parties entitled to

In determining the prayers, the Appeals Authority took cognizance of its findings made above, that is, the Appellant was not unfairly disqualified. The Appeals Authority rejects all the prayers by the Appellant and hereby upholds the Respondent’s prayer that the Appeal be dismissed for lack of merits. The Appeal is hereby dismissed in its entirety and each party is to bear own costs. It is so ordered.

This Decision is binding upon the parties and may be enforceable in the same manner as a Decree or Order of a court of law in terms of Section 97(8) of the Act.

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

This Decision is delivered in the presence of the parties this, 11th day of November 2016.


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MONICA P. OTARU
Ag. CHAIRPERSON

MEMBERS

1. ENG. FRANCIS T. MARMO 

2. ENG. ALOYS J. MWAMANGA 