

IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY
AT DAR ES SALAAM

APPEAL CASE NO. 04 OF 2017-18

BETWEEN

M/S JV JOE'S ELECTRICAL PTY LTD,
AT AND C PTY, AND L'S SOLUTION LTD..... APPELLANT

AND

RURAL ENERGY AGENCY.....RESPONDENT

DECISION

CORAM

- | | | | |
|----|---------------------------------|---|-----------|
| 1. | Hon. Vincent K.D Lymo, J. (rtd) | - | Chairman |
| 2. | Mrs. Rosemary Lulabuka | - | Member |
| 3. | Eng. Francis T. Marmo | - | Member |
| 4. | Mr. Ole-Mbille Kissioki | - | Secretary |

SECRETARIAT

- | | | | |
|----|---------------------|---|----------------------|
| 1. | Ms. Florida Mapunda | - | Senior Legal Officer |
| 2. | Ms. Violet Limilabo | - | Legal Officer |
| 3. | Mr. Hamisi Tika | - | Legal Officer |

FOR THE APPELLANT

- | | | | |
|----|-------------------------|---|-----------------------------|
| 1. | Mr. Alipo A. Mwakanyika | - | Advocate- Law's Connoisseur |
| 2. | Eng. Arnold N. Nzali | - | Appellant's Representative |
| 3. | Eng. S. Minja | - | Appellant's Officer |

FOR THE RESPONDENT

1. Mr. George M. J. Nchwali - Director of Finance and Administration
2. Ms. Willa Haonga - Legal Affairs Officer
3. Eng. Jones Olotu - Ag. Project Planning and Research Manager
4. Ms. Theresia N. Nsanzugwanko - Head Procurement Management Unit
5. Mr. Elineema Mkumbo - Ag. Director Marketing Development and Technology

This Decision was scheduled for delivery today 31st July 2017, and we proceed to deliver it.

The above Appeal was lodged by M/s JV Joe's Electrical Pty Ltd, AT & C Pty Ltd & L's Solution Ltd (hereinafter referred as "the Appellant") against the Rural Energy Agency known by its acronym as "REA" (hereinafter referred to as "the Respondent"). It is in respect of Tender No. AE/008/2016-17/HQ/G/11 Lots 1 and 4 for the Supply and Installation of Medium and Low Voltage Lines, Distribution of Transformers and Connection of Customers in Un-electrified Rural Area of Mainland Tanzania on Turnkey Basis (hereinafter referred to as "the Tender").

From the records of various tender proceedings submitted by the parties 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 by his letter dated 17th January 2017 invited sixty seven (67) pre-qualified tenderers to participate in the above named Tender. The deadline for the submission of the tenders was 22nd February 2017 whereby forty three (43) firms, the Appellant inclusive submitted their bids.

Tenders were subjected to evaluation and the Appellant was recommended for the Award of contract for Tender No. 11 Lots 1 and 4. Thereafter, the Respondent issued the Notices of Intention to Award the Tender to all bidders who participated in the Tenders.

One of the participating tenderers M/s Future Century Ltd being dissatisfied by the Respondent's Intention to award the Tender filed Appeal Cases No. 30, 31, and 32 of 2016/17 respectively. He was unsuccessful in all the said Appeals. One amongst the Appellant's grounds in the quoted Appeals was that the Respondent intended to Award Tenders to unqualified tenderers contrary to the requirement of the Contractors Registration Board (CRB). Further, that some of the tenderers have been registered with lower class and thus are prevented from awards of contracts with values above TZS two billion. That ground of appeal was rejected by the Appeals Authority on the reason that it was a new ground raised at an appellate level without it being subjected to administrative review.

That, immediately after the said Decision, on 15th May 2017, the Respondent proceeded to issue an acceptance letter to the Appellant and other proposed successful tenderers.

On 18th May 2017, the Respondent conducted due diligence of the bidder's responsiveness. He thus, wrote to CRB requesting the Board to confirm registration status of all contractors awarded the contracts before signing the same. The said letter was attached with tenderers CRB Certificates submitted for ease of reference.

On 24th May 2017, CRB responded to the Respondent's letter by giving out registration status of each tenderer. In the said letter CRB informed the Respondent that Certificate with Registration No. E7/0356/08/2009 issued by CRB to the Appellant earlier had been deleted since 2014.

The Tender Board meeting held on 29th May 2017, deliberated on the CRB report and resolved that contracts be signed with firms whose registration status had been cleared by CRB and to reject the tenders for those found with anomalies. The Respondent vide his letter ref. No. AG 143/171/30/09 dated 13th June 2017 communicated his decision to reject the award of contract made to the Appellant.

Dissatisfied, on 19th June 2017, the Appellant applied for administrative review to the Respondent's Accounting Officer challenging the reason for the rejection. The Respondent did not respond to the Appellant's complaint. On 10th July 2017 the Appellant lodged this Appeal.

SUBMISSIONS BY THE APPELLANT

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

1. That, the Respondent misdirected himself by rejecting the award made to the Appellant by relying on Certificate No. E7/0356/08/2009 for Electrical Contractor Class Seven, a requirement that was not provided for in the Tender Document.
2. That, there should be a distinction between the local, foreign tenderer and the JV since the Appellant tendered as a JV and not as a local tenderer.
3. That, the Respondent misdirected himself by holding that by producing the said certificate M/s L's Solution Ltd committed a misrepresentation of facts in order to influence a procurement process or the execution of a contract.
4. That, it was unfair for the Respondent to reject the award made to the them without affording them the right to be heard, contrary to the principles of natural justice.
5. That, it was not fair for the Respondent to reject the award without citing provisions of the law in which such rejection was based.
6. That, it was not fair for the Respondent to accuse the local partner of a serious offence of fraudulent practice contrary to the statutory provision of the Act. That has caused the complainant to apprehend debarment proceedings and may subsequently cause mistrust in the

partnership and destabilize the JV Company that is underway for incorporation by Business Registration and Licensing Agency (BRELA).

7. That, the Respondent contravened the law by not entertaining the Appellant's application for administrative review submitted to him.

Finally, the Appellant prayed for the following orders:-

- i. To prohibit the Respondent from continuing to act and decide in unlawfully and from following unlawfully procedure;
- ii. The Respondent be required to act and proceed in a lawfully manner in the process towards execution of contract constituted by awards to the Appellant on 15th May 2017 in respect of Tender No. 11- Lot 1 and 4;
- iii. To annul in whole the unlawful act and decision of the Respondent to reject award dated 15th May 2017, in respect of this tender;
- iv. To revise unlawful decision of the Respondent to reject awards both dated 15th May 2017, for Tender No. 11 Lot No. 1 and 4;
- v. To set aside the decision, if any, to debar/blacklist the Appellant and or; and
- vi. Any other relief(s) as the Appeals Authority may deem fit to grant.

REPLIES BY THE RESPONDENT

The Respondent's replies to the grounds of appeal may be summarized as follows.

1. That, the Respondent decided to verify the authenticity of the successful tenderers documents as per the requirement of the law.

In verifying the said documents the Respondent consulted CRB, BRELA and Foreign Affairs, in which CRB informed the Respondent that a Class Seven Certificate with Registration No. E7/0356/08/2009 by L's Solution Ltd was deleted in 2014.

2. That, the Appellant provided false information regarding his registration status contrary to Clause 27.2 of the Instructions To Bidder (ITB).
3. That, the act to reject the award of tender was made pursuant to Section 83(2) of the Public Procurement Act of 2011 as Amended (hereinafter referred to as "the Act").
4. That, the Appellant's acts of providing false information that he was registered while he was deleted way back 2014 amounts to misrepresentation aimed at gaining unfair treatment.
5. That, the Respondent responded to the complaint lodged by the Appellant as per the requirement of the law.
6. That, the loss of business and expected income to the Appellant was due to misrepresentation made by him and not the Respondent.

Finally the Respondent prayed for the following orders:-

- i. The Appellant is not entitled to any of the reliefs claimed in this Appeal;
- ii. Dismissal of the Appeal in its entirety for being devoid of merits.

ANAYSIS OF THE APPEALS AUTHORITY

Having heard the parties, the Appeals authority is of the view that, the Appeal has two main issues calling for determination; and these are:-

- i. Whether the rejection of the award made after issuance of letter of acceptance to the Appellant was proper in law; and
- ii. What reliefs, if any, are the parties entitled to.

Having framed the issues in dispute, the Appeals Authority proceeded to determine the as follows.

1.0 Whether the rejection of the award made after issuance of letter of acceptance to the Appellant was proper in law

In resolving this issue, the Appeals Authority observed that the Tender under appeal had undergone two major stages namely; pre-qualification and tendering stages. It was observed further that the tender was open for all individual firms as well as the Joint Venture (JV's) as per Clause 3.1(a) of the Pre-Qualification Document. However, Clauses of the said Document provided in no uncertain terms that whenever JV existed the individual

partners were under obligation to be registered in their respective source of countries for the assignment. Clause 5.1 of the Pre-Qualification Document is relevant, and it is hereby reproduced for clarity:-

“5.1 If the Applicant comprises a number of firms combining their resources in a joint venture and the individual partners in the joint venture shall be registered in eligible source countries and shall otherwise meet the requirements of GITA Clause 3 above.”(Emphasis Added)

Pursuant to the above extract read together with Regulation 118(1) of GN. No. 446 of 2013, the Appeals Authority is of the view that the partner in the JV, M/s L's Solution Ltd indeed did not meet the requirement, since at the time of tendering it was not in existence to qualify for the floated Tender. When asked about this glaring anomaly, the learned counsel for the Appellant conceded that the party to the JV had been delisted and that the same did not participate as an individual tenderer. Further, the learned counsel informed the Appeals Authority that the Appellant was disputing its delisting by CRB. In addition, the learned counsel argued that the Tender Document did not provide for registration requirement and it was not necessary for the JV to be registered before award of the contract. The Appeals Authority does not agree with the learned counsel's argument. Tendering in Tanzania is regulated by law and one amongst the requirements of the law is the requirement to be registered, as clearly provided under Regulation 116(1) (a) and 118 (1) of GN. No. 446 of 2013 which read as follows:-

“116 (1) For the purpose of qualifying to participate in procurement proceedings, a tenderer shall-

- (a) Possess the necessary professional and technical qualifications, professional and technical competence, financial resources, equipment and other physical facilities, managerial capability, reliability, experience and reputation, and the personnel to perform the assignment.”

“118(1)A local tenderer who wishes to participate in any procurement proceeding shall comply with all relevant requirements for registration required by an appropriate statutory body.” (Emphasis Added)

From the above, the assertion put forward by learned counsel that the requirement was not provided in the Tender Document is vitiated by the cited provisions of the law. The JV partner M/s L's Solution Ltd was delisted effective 2014 before the floating of the above Tender and it is the view of the Appeals Authority that the Appellant did not disclose that fact of Litigation History if any, to the Respondent in both the Pre-qualification and during tendering stage. The Appeals Authority is of the firm view that, the Appellant's partner M/s L's Solution Ltd concealed information relating to its deletion, which he had knowledge with intent to deceive or mislead the Respondent contrary to Section 17(1)(b) of the Law of Contract Act, [CAP 345]. Therefore, the Respondent's act of revoking or rejecting the award of Contract made to the Appellant was proper in law.

Reverting to the Appellant's arguments that he was not accorded the right to be heard as well as the Respondent's failure to react to his application for administrative review. The Appeals Authority is of the view that, the Appellant has not been prejudiced. It remains a fact that a JV partner was delisted in 2014 before the floating of this tender a matter that has been verified by CRB. What a Respondent could do under the circumstances was to inform the Appellant of its being deregistered. From the above observation the Appeals Authority is of the firm view that the Respondent's rejection of award was proper and the Respondent's decision is hereby upheld.

Accordingly, the Appeals Authority's conclusion with regard to the first issue is that rejection of award made to the Appellant was proper in law.

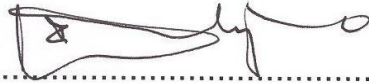
1.0 What reliefs, if any, are the parties entitled to

Taking cognizance of the findings made above, the Appeals Authority upholds the Respondent decision to reject the award. In the upshot this Appeal is hereby dismissed for lack of merits. Each party to bear own costs.

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 Appellant and the Respondent this 31st July, 2017.



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VINCENT K.D. LYIMO, J. (RTD)

CHAIRMAN

MEMBERS:

1. MRS. ROSEMARY LULABUKA 

2. ENG. FRANCIS T. MARMO 