

IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY
AT DAR ES SALAAM
APPEAL NO. 11 OF 2017-18

BETWEEN

M/S VC (T) LTD, POWERGEN & TD LTD
AND VICTECH LTD JV.....APPELLANT

AND

RURAL ENERGY AGENCY.....RESPONDENT

DECISION

CORAM

- | | | | |
|----|---------------------------|---|-----------------|
| 1. | Mrs. Rosemary A. Lulabuka | - | Ag. Chairperson |
| 2. | Eng. Aloys J. Mwamanga | - | 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 |
| 3. | Mr. Hamis Tika | - | Legal Officer |

FOR THE APPELLANT

- | | | | |
|----|----------------------------|---|-----------------------------------|
| 1. | Mr. Geoffrey Joseph Lugomo | - | Advocate- Mzizima Law Associates |
| 2. | Mr. Fatma Jumbe | - | Advocate – Mzizima Law Associates |
| 3. | Mr. Andrew Muhiri | - | Representative- Victech Ltd, |

FOR THE RESPONDENT

1. Eng Gissima Nyamo Hanga - Director General- REA
2. Mr. George Nchwali - Director of Finance
3. Ms. Willa Haonga - Legal Affairs Officer
4. Ms. Amna Lwasye - Human Resource and Administration Manager
5. Mr. Thomas Wambura - Ag. Head of Procurement Management Unit

This decision was scheduled for delivery today, 19th September 2017 and we proceed to deliver it.

The Appeal was lodged by M/S VC (T) LTD, POWERGEN & TD LTD and VICTECH LTD JV (hereinafter referred to as "the Appellant") against the Rural Energy Agency commonly known by its acronym REA (hereinafter referred to as "the Respondent"). The Appeal is in respect of Tender No. AE/008/2016-17/HQ/G/9,10 and 11 for 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").

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 can be summarized as follows:-

The Respondent by his letter dated 17th January 2017 invited pre-qualified tenderers to participate in the above named Tender. The deadline for submission of bids was 22nd February 2017, whereby forty three (43) firms, the Appellant inclusive submitted their bids.

Tenders were subjected to evaluation and thereafter M/s MF Electrical Engineering Ltd and Gesap Engineering Supplies Group JV was recommended for award of contract for Tender No. 9 Lot 3 and 7. After approval of the award recommendation by the Tender Board, the Respondent issued Notices of Intention to Award the Tender to all bidders who participated in the Tender.

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. He was however, unsuccessful in all Appeals. The Appeals Authority issued its Decision in respect of the said Appeals on 12th May 2017.

On 15th May 2017, the Respondent issued an acceptance letter to M/s MF Electrical Engineering Ltd and M/s Gesap Engineering Supplies Group JV. However, on 13th June 2017, the Respondent rejected/revoked the award made to them on the ground that they had attached a class one Certificate for Electrical Contractor purported to have been issued by CRB. The said information came to the Respondent's knowledge after he had conducted due diligence on the eligibility of the proposed successful tenderers from CRB.

Dissatisfied by the rejection of their award, on 19th June 2017, M/s MF Electrical Engineering Ltd and M/s Gesap Engineering Supplies Group JV applied for administrative review to the Respondent, challenging the reason given for rejection of their award. The Respondent, however, did not respond to the said complaint. On 10th July 2017, M/s MF Electrical Engineering Ltd and M/s Gesap Engineering Supplies Group JV filed Appeal Case No. 5 of 2017-18 to the Appeals Authority.

It is on record of the tender proceedings that after rejection of the award to M/s MF Electrical Engineering Ltd and M/s Gesap Engineering Supplies Group JV, the Respondent's Tender Board Meeting held on 30th June 2017 approved award of the Tender to the Appellant.

On 10th July 2017, the Respondent conducted negotiations with the Appellant and on 19th July 2017 awarded the tender to them.

It is further on record that while the Respondent was rejecting the tender and awarding the same to the Appellant, the Appeal by M/s MF Electrical Engineering Ltd and M/s Gesap Engineering Supplies Group JV was yet to be determined by this Appeals Authority. The Appeals Authority issued its decision on 31st July 2017 whereby the Respondent was ordered to proceed with signing of the contract with M/s MF Electrical Engineering Ltd and M/s Gesap Engineering Supplies Group JV after it had discovered that the rejection of their tender was erroneously made. On 4th August 2017, the Respondent withdrew the award made to the Appellant in order to comply with the Appeals Authority's decision.

Dissatisfied with the withdrawal of the award made to them, on 10th August 2017, the Appellant applied for administrative review to the Respondent challenging the withdrawal of the award. On 16th August 2017 the Respondent dismissed their complaint. Dissatisfied with the Respondent's decision the Appellant lodged this Appeal on 24th August 2017.

SUBMISSIONS BY THE APPELLANT

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

- i. That, upon successful negotiation and issuance of the acceptance letter, the Respondent was not supposed to re-open negotiation with the previous tenderer contrary to Regulation 230 of the Public Procurement Regulation GN. No. 446 of 2013 (hereinafter referred to as "GN No. 446 of 2013").
- ii. That, the Respondent's failure to suspend the procurement process upon receiving complaint or an appeal contravened the requirement of Regulation 106(1) (a) and (b) of the GN. No. 446 of 2013. The Appellant submitted further that, even after he has been notified about Appeal Case No. 5 of 2017-18 the Respondent still did not suspend or notify the Appellant about the existence of the said Appeal; instead, he continued to negotiate with them and issued an acceptance letter. Due to that the Appeals Authority's decision is not implementable since it was overtaken by events.

- iii. That, the acceptance letter required them to register their Joint Venture and process performance security. By doing so they had incurred various costs including fees for registration of the JV to the CRB, fees for the project sticker and cost for processing performance security. Therefore, it was not proper for the Respondent to withdraw the award made to them.
- iv. That, the Respondent did not accord them a right to be heard before withdrawal of their award contrary to the principles of natural justice.
- v. That, the Respondent rejected the award without any agreement regarding costs they have incurred in processing bank facilities, registration of the JV to the CRB and mobilization of the project, a conduct that amounts to breach of natural justice.

Finally, the Appellant prayed for the following orders;

- i. To quash the decision of the Respondent to reject/withdrawal the awarded contract to the Appellant.;
- ii. To direct the Respondent to award the Tender to the Appellant;
- iii. The Respondent to pay costs and incidentals to the tendering process and legal costs for this Appeal at the Tune of TZS. 150,000,000.00;
- iv. The Respondent to pay interest at a commercial rate of 21% on the above referred amount from the date of dispute to the date of final payment;

- v. Any other relief that the Appeals Authority shall deem fit to grant.

REPLIES BY THE RESPONDENT

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

- i. That, pursuant to Section 60(11) of the Public Procurement Act, No. 7 of 2011 as amended (hereinafter referred to as "the Act") the tender process is completed after signing of the contract. Thus issuance of acceptance letter and negotiation could not amount to completion of the tender process as claimed by the Appellant.
- ii. That, the Appeals Authority required them to provide information relating to signing of contract and not award of the contract.
- iii. That, the Respondent was mandatorily required to comply with the Appeals Authority's decision and not to discuss with the Appellant, hence there is no breach of the principle of natural justice.
- iv. That, the Appellant has not attached any document to substantiate costs incurred by them. Therefore, their claims are baseless and have no leg to stand, since the whole tender process involves costs regardless of who win the tender.

Finally, the Respondent prayed for the following orders;

- i. That the Appeal be dismissed for Lack of merits;

- ii. To uphold the Respondent's decision of withdrawal of the award of the tender to the Appellant and proceed with the procurement process
- iii. That the Appellant is not entitled to any reliefs as claimed by him.

ANALYSIS BY THE APPEALS AUTHORITY

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

- 1.0. Whether withdrawal of the award of the tender after issuance of an acceptance letter was justified.
- 2.0. What reliefs, if any, are the parties entitled to.

Having identified the issues in dispute the Appeals Authority proceeded to determine them as follows;

- 1.0. Whether withdrawal of the award of the tender after issuance of an acceptance letter was justified.

In resolving this issue, the Appeals Authority revisited the documents availed and observed that, the Appellant was issued with acceptance letter on 19th July 2017, following rejection of the award made to M/s MF Electrical Engineering Ltd and M/s Gesap Engineering Supplies Group JV. It was further observed that, the Respondent withdrew the award made to the Appellant vide a letter dated 4th August 2017. The said letter informed the Appellant that, the award made to him has been withdrawn in order to

comply with the Appeals Authority's Decision that was delivered on 31st July 2017, whereby the Respondent was ordered to proceed with signing of the contract with M/s MF Electrical Engineering Ltd and M/s Gesap Engineering Supplies Group JV.

To ascertain if the withdrawal of the award of tender after issuance of an acceptance letter was justified, the Appeals Authority revisited Section 97(5) of the Act. The said provision empowers the Appeals Authority to order the procuring entity that has acted or proceeded in unlawfully manner or reached unlawfully decision to act in lawful manner and or revise an unlawfully decision by the procuring entity or substitute its own decision for such a decision. The Appeals Authority in determining Appeal No. 5 of 2017-18 was satisfied that the Respondent's conduct of rejecting the award made to M/s MF Electrical Engineering Ltd and M/s Gesap Engineering Supplies Group JV was not justified, thus ordered the Respondent to proceed with signing of the contract. The Respondent was mandatorily bound to comply with the Appeals Authority's decision pursuant to Section 97(8) of the Act. The Appeals Authority is of the firm view that, the Respondent's act of withdrawing the award made to the Appellant was justified since the same emanated from the lawfully order issued by the Appeals Authority.

The above notwithstanding, the Appeals Authority noted that the Respondent did not suspend the procurement process after receipt of the complaint from M/s MF Electrical Engineering Ltd and M/s Gesap Engineering Supplies Group JV or even after being notified by the Appeals

Authority about the existence of Appeal No. 5 of 2017-18. During the hearing the Respondent conceded to have not suspended the procurement process. The Appeals Authority finds the Respondent's act in this regard to have contravened the requirement of Section 100(1) of the Act. The said provision requires the Accounting Officer to suspend the procurement process pending determination of the complaint or an Appeal. To the contrary, the Respondent's Tender Board meeting held on 30th June 2017, approved award of the Tender to the Appellant and they proceeded with negotiation on 10th July 2017 and subsequently issued an acceptance letter to the Appellant on 19th July 2017. The Appeals Authority finds the Respondent's act to have not only contravened the law but also to have caused unnecessary costs to the Appellant.

Regarding the Appellant's argument that the decision of the Appeals Authority was not implementable for being overtaken by events, the Appeals Authority observes that its decision was implementable since the procurement contract was yet to be concluded in terms of Section 60(11) of the Act as amended. The said provision stipulates that a procurement contract shall enter into force when the formal contract is signed by parties to the contract. In this Tender the contract was yet to be finalized, thus, the decision of the Appeals Authority is implementable.

The Appeals Authority rejects the Appellant's contention that, the Respondent's conduct of re-opening negotiation with M/s MF Electrical Engineering Ltd and M/s Gesap Engineering Supplies Group JV contravened

the requirement of Regulation 230 of the GN. No. 446 of 2013. The Appeals Authority observes that the Respondent did not re-open negotiations rather they complied with the lawfully order issued by the Appeals Authority in relation to Appeal No. 5 of 2017-18.

Furthermore, the Appellant contended that the award made to them was withdrawn without being heard. The Appeals Authority revisited the document availed to them and observed that, the letter that informed the Appellant about withdrawal of the award made to them was issued on 4th August 2017. The Appellant applied for administrative review on 10th August 2017 and the Respondent issued its decision on 16th August 2017. Dissatisfied by the Respondent's decision the Appellant filed this Appeal on 24th August 2017.

From the above facts the Appeals Authority is of the firm view that, the Appellant was accorded right to be heard by the Respondent pursuant to Sections 96 of the Act as amended. Consequently, the Appeals Authority rejects the Appellant's contention on this ground.

Accordingly, the Appeals Authority' conclusion on the first issue is that withdrawal of the award of the tender after issuance of acceptance letter was justified.

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

Taking cognizance of the findings made above, the Appeals Authority finds the Appeal partly to have no merits as the withdrawal of the award made

to the Appellant was justified, thus, the Appeal is hereby dismissed and the Respondent is ordered to proceed with signing of the contract with M/s MF Electrical Engineering Ltd and M/s Gesap Engineering Supplies Group JV.

Regarding the costs incurred by the Appellant due to the Respondent's failure to suspend the procurement process, the Appeals Authority observes that, the Appellant is entitled to compensation. However, the Appellant failed to substantiate the cumulative costs of TZS 150,000,000.00 even after being ordered to submit proof of the same during the hearing or before 16:00 hours of the same date. The Appellant on the same date of hearing at about 16:22 hours submitted an application for extension of time to submit the required evidence. The Appeals Authority could not grant the application sought as well as cannot grant the costs cumulatively as claimed. Therefore, pursuant to Section 97(5)(f) of the Act, the Appeals Authority orders the Respondent to compensate the Appellant a reasonable sum of TZS 2,200,000.00 as per the following breakdown;

- i) TZS 200,000.00 appeal filing fees; and
- ii) TZS 2,000,000 legal fees.

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 Appellant and the Respondent this 19th September, 2017.



.....
MRS. ROSEMARY A. LULABUKA

Ag: CHAIRPERSON

MEMBERS:

1. ENG. ALOYS J. MWAMANGA



2. MR. LOUIS P. ACCARO

