

**IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY
AT DAR ES SALAAM**

APPEAL NO. 22 OF 2013/14

BETWEEN

**M/S M.A.K ENGINEERING
COMPANY LTD.....APPELLANT**

AND

**TANZANIA ELECTRIC SUPPLY
COMPANY LTD.....RESPONDENT**

DECISION

CORAM:

1. Hon. Augusta G. Bubeshi, J. (rtd) – Chairperson
2. Mr. Haruni S. Madoffe – Member
3. Mrs. Nuru S.N. Inyangete - Member
4. Mr. Ole-Mbille Kissioki - Ag.Secretary

SECRETARIAT

1. Mrs. Toni S. Mbilinyi – Principal Legal Officer
2. Mr. Hamis O. Tika – Legal Officer

3. Ms. Violet S. Limilabo- Legal Officer

FOR THE APPELLANT:

1. Athuman A. Kibobya – Managing Director
2. Hassan A. Mwanyenza – Technical Director

FOR THE RESPONDENT:

1. Howa H. Msefya – Senior Legal Officer
2. Elly C. Musyangi - Assistant Legal Officer

This decision was scheduled for delivery today 9th January, 2014, and we proceed to deliver it.

The appeal at hand was lodged by **M/s M.A.K ENGINEERING COMPANY LIMITED** (hereinafter to be referred to as "**the Appellant**") against the **TANZANIA ELECTRIC SUPPLY COMPANY LIMITED** commonly known by its acronym **TANESCO** (hereinafter to be referred to as "**the Respondent**").

The said Appeal is in respect of Tender No. PA/001/12/HQ/W/037 for Supply, Installation and Commissioning of a Complete set of a Water Cooled Liquid Chiller (hereinafter to be referred to as "**the tender**").

According to the documents submitted to the Public Procurement Appeals Authority (hereinafter referred to as "**the Authority**"), as well as oral submissions by the parties during the hearing, the facts of the Appeal may be summarized as follows:

The Respondent vide the Daily Newspaper of March, 2013, invited tenderers to submit their tender for the tender under appeal.

The deadline for the submission of the tenders was set for 3rd May, 2013, whereby three tenders were received from the following firms;

S/NO	Tenderers Name	Quoted price
1	M/s Diak Technical Export Ltd	133,560.70 USD
2	M/s Go On Investment Ltd	218,300,000.00 Tshs VAT inclusive
3	M/s M.A.K Engineering Company Ltd	289,750,317.00 Tshs VAT inclusive

The tenders were then subjected to evaluation which was conducted in three stages namely; preliminary, technical and detailed evaluation stages.

At the preliminary evaluation stage, two tenders submitted by M/s Go On Investment Ltd and M/s M.A.K Engineering Company Ltd were disqualified for failure to comply with the requirements of the Tender Document.

The Appellant's tender was disqualified on the reasons that they did not indicate the completion period contrary to Clause 1.2 of the Instruction To Bidder (hereinafter referred to as ITB) and Clause 1 of the Bid Data Sheet (hereinafter referred to as BDS). Furthermore, the attached Manufacturer Authorization letter did not indicate the address of the manufacture for purpose of verification.

The remaining tender by M/s Diak Technical Export Ltd was then subjected to detailed and technical evaluation. The tender was found free from arithmetic errors. However, the tenderer was disqualified for failure to comply with the technical requirement contrary to Section VI of the Tender Document which provided for the supply of reciprocating open type compressor; while the tenderer had quoted a screw type compressor. The Evaluation Committee therefore recommended for retendering.

The Evaluation Report was submitted to the Procurement Management Unit (hereinafter referred to

as PMU) which requested the Evaluation Committee to re-evaluate the tender taking into consideration that the Appellant was disqualified while they had submitted the Manufacturer's Authorization letter, further that the completion period could be negotiated later and that the price quoted by the Appellant was VAT inclusive.

The Appellant wrote two letters dated 26th July, 2013, and 13th August, 2013, requesting for the tender results.

On 2nd and 3rd September, 2013 the tenders was re-evaluated whereby all tenderers were found to be non responsive to the requirements of the Tender Document. Thereafter, the Evaluation Committee recommended again for retendering.

The Appellant vide a letter referenced TESCL/Kihansi/2013/004 dated 10th September, 2013 sought for administrative review to the Respondent taking into consideration that the bid validity period of 120 days had expired. All those letters were copied to

the Public Procurement Regulatory Authority (hereinafter referred to as PPRA).

On 23rd September, 2013, PPRA vide a letter referenced PPRA/01/E/109, reminded the Respondent on the need to review the complaint submitted to them within the time prescribed by the law.

On 17th October, 2013, the Appellant vide a letter referenced TESCL/Kihansi/PPRA/2013/005 filed an application for review to PPRA.

On 24th October, 2013, vide a letter referenced PPRA/PA/01/F/13 PPRA ordered the Respondent to provide the tender results to the tenderers and the same to be copied to them.

The Respondent vide a letter referenced SMP/MCC/PMU/06/036, dated 30th October, 2013, informed PPRA that they were in the process of cancelling the tender and retendering, thus upon

completion of the process tenderers would be notified about the tender results.

The Tender Board at its meeting held on 20th November, 2013, approved the recommendation made by the Evaluation Committee and directed that the tender be cancelled and the same be retendered.

Having received no response from both the Respondent and PPRA, on 27th November, 2013, the Appellant lodged their Appeal to this Authority.

SUBMISSIONS BY THE APPELLANT

The Appellant's arguments as deduced from documents availed to this Authority, as well as oral submissions and responses to questions raised by the Members of the Authority during the hearing, may be summarized as follows;

That, the Appellant participated in the tender under appeal.

That, they wrote three letters requesting for the tender results and the said letters were not responded too by the Respondent.

That, they wrote a letter to PPRA requesting for their intervention, yet they had not received any response from them.

That, they received a letter informing them that the tender under appeal had been cancelled due to non responsiveness of the tenderers.

That, they become aware that they were disqualified because of failure to indicate the manufacturer's address for purpose of verification after receiving the Respondent's reply. However, they could have given that address if they have been given opportunity to do so.

Finally the Appellant prayed for the following orders;

- i. The Respondent to inform them about the tender results.
- ii. Re- evaluation of the tender if the reason for rejection of the tender is not justifiable
- iii. Pay costs of the Appeal

iv. Take any other action deemed necessary.

SUBMISSIONS BY THE RESPONDENT

The Respondent's documentary, oral submissions as well as responses from questions raised by the Members of the Authority during the hearing may be summarized as follows:

That, the Appellant attached a Manufacturer's Authorization letter which did not indicate the manufacturer's address for the purpose of verification; and that was the reason for their disqualification.

That, M/S Diak Technical Export Ltd was disqualified for failure to comply with the technical specification which required the tenderer to quote for reciprocating open type compressor.

That, due to non responsiveness of all tenders the Evaluation Committee recommended for retendering.

That, the Bid Validity Period was not extended after its expiry since the Respondent was working on the cancellation of the tender and preparation for retendering.

That, tenderers could have been notified after approval of the cancellation as per the requirement of Regulation 97(1) of the Public Procurement (Goods, Works, Non-Consultant Services and Disposal of Public Assets by Tender) hereinafter referred to as ("**the GN No. 97 of 2005**").

That, the Appellant was notified about the tender results to the effect that the tender had been cancelled due to non responsiveness vide a letter referenced SMP/MCC/PMU/12/8/774 dated 6th December, 2013.

That, the Appellant did not complain about the reason for disqualification in their pleadings, therefore; that complaint is a new matter and which cannot be raised at this stage.

Finally the Respondent prayed for the following orders;

- i. Declaration that notification of the tender results will be made upon completion of the cancellation process.
- ii. Dismissal of the Appeal.

ANALYSIS BY THE AUTHORITY

In analyzing the contended issues by parties, the Authority deems it prudent to point out from the outset that, during the hearing of the Appeal, the Appellant contended also that, according to the Respondent's Statement of Reply, tenders were rejected due to non responsiveness of all tenders and that the appellant's tender was disqualified on the reason that they did not indicate the manufacturer's address. Thus, the Authority should examine the said ground and ascertain whether rejection on the said ground was lawful or not and that should the Authority find that, the respondent's rejection was not justified; it should order the Respondent to re-evaluate the said tender.

The Authority is of the considered view that this is a new matter which was not raised by the Appellant in their complaints to the Respondent's Accounting Officer and PPRA. Thus, it cannot be raised at this stage.

It is a cardinal principle of law that a party cannot raise a new matter at the appellate stage; this is enshrined in the Civil Procedure Code Cap 33 R.E 2002.

Furthermore, the Appellant ought to have exhausted the procedure enshrined under Sections 80, 81, 82(1) of the PPA of 2004. Under those provisions they should have lodged their complaint to the Accounting Officer first and if dissatisfied with his decision, they should file the administrative review to PPRA, and if still dissatisfied to lodge their Appeal to this Authority.

In view of the above findings the Authority is of the settled view that, the Appeal is centered on the following two issues:

1.0 Whether the Respondent's decision to reject all the tenders and failure to notify tenderers within the bid validity period was contrary to the law.

2.0 To what reliefs, if any, are the parties entitled to

Having identified the issues in dispute, the Authority proceeded to resolve them as hereunder;

1.0 Whether the Respondent's decision to reject all the tenders and failure to notify tenderers within the bid validity period was contrary to the law.

In resolving this issue the Authority considered the Appellant's complaint on the undue delay to notify them of the tender results taking into consideration that the Bid Validity Period of 120 days had expired.

In ascertaining the Appellant's complaints the Authority revisited the Tender Document, the Evaluation Report and the Appellant's tender vis-à-vis the applicable law. In the course of doing so, the Authority noted that, the deadline for submission of the tenders was on 3rd May, 2013 and the bid validity period ended on 3rd September, 2013, as per Clause 16.1 of the BDS. However, the Tender Board meeting which approved the cancellation of the tender and ordered for retendering was held on the 20th November, 2013. Thus, this Tender Board's decision was made well outside the Bid Validity Period, contrary to the requirement of Section 64 of the Act and Regulation 87 (2) of GN. No. 97 of 2005. The said provisions state as follows:

"S.64 the procuring entity shall require tenderers to make their tenders and tender securities valid for periods specified in the tendering documents, and such periods shall be sufficient to enable the **procuring entity to complete the comparison and evaluation of the tenders and for the appropriate**

tender board to review the recommendations and give its approval for the contract or contracts to be awarded whilst the tenders are still valid” (Emphasis added)

“Reg. 87 (2) **The period fixed by the procuring entity shall be sufficient to permit evaluation and comparison of tenders, for obtaining all necessary clearance and approvals, and for the notification of the award of contracts and finalise a contract”.**

As stated earlier the Appellant complained that they were not notified about the tender results despite the various letters they wrote on the subject and even with PPRA’s directives, when asked during the hearing about the Appellant’s complaints in this regard the Respondent submitted that they could not respond to the Appellants letters until they had approval of the Tender Board to cancel and order re-entering. Furthermore, they notified all the tenderers on 6th December, 2013, of the tender results after the Tender Boards decision.

Additionally, the Respondent explained that the long delay resulted from internal problem which, they could not elaborate during the hearing.

The Authority observes that the Respondent ought to have communicated the cancellation decision to all tenderers pursuant to Regulation 20(3) of GN. No. 97 of 2005 which reads as follows;

“Reg. 20 (3) In the event of annulment of any tender proceedings all tenderers who submitted tenders shall be notified thereof by the procuring entity.

Notification of the tender outcome must be done within the Bid Validity Period. In this case the decision of the Tender Board was made on 20th November, 2013, and Notification was made on 6th December, 2013 which was received by the Appellant on 19th December, 2013. As already observed above the Tender Board’s decision was made outside the bid validity period. This means that

both the decision and the notification thereof were contrary to the law.

It is true that the Respondent did notify the Appellant about the tender outcome. However, to the extent that the Tender Board's decision to reject the tenders and retender and the notification thereof were done beyond the Bid Validity Period, the said decision and subsequent notification were a nullity in the eyes of the law and of no legal effect.

The Authority hastens to add that the Respondent's repeated failure to respond to letters from its customers is not in conformity with principles and practices of Good Governance.

Accordingly, the Authority's conclusion with regard to the first issue is that the Respondent's decision to reject all tenders and failure to notify tenderers within the bid validity period was contrary to law.

3.0 To what reliefs, if any, are the parties entitled to.

Having analyzed the contention issue in dispute, the Authority finds it prudent to consider prayers by the parties.

To start with, the Authority considered the Appellant's prayer that they should be informed about the tender results and re-evaluation of the tender.

The Authority observes that, the prayer regarding tender results had already been overtaken by events. However, what the Appellant received was a *de-facto* and not a *de-jure* notification.

With regard to prayer for compensation as raised by the Appellant; the Authority orders the Respondent to pay the Appellant a sum of Tshs 120,000/= only being Appeal filing fees since the Appeal has merit.

The Authority also considered the Respondents prayer that the Appeal be dismissed. The Authority does not agree with the Respondent as the Appeal has merit.

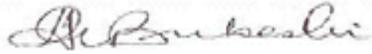
Accordingly, the Authority upholds the Appeal and faults the Respondent for failure to make a decision and notify the tenderers within the Bid Validity Period.

Consequently the Authority orders the Respondent to do the following;

- Proceed with retendering as already decided by them in accordance to the law; and
- Compensate the Appellant a sum of Tshs 120,000/=

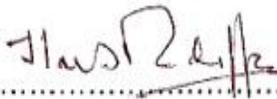
Right of Judicial Review as Per Section 85 of the PPA/2004 explained to parties.

Decision delivered in the presence of the Appellant and the Respondent this 9th January, 2014.



.....
JUDGE (rtd) A. BUBESHI
CHAIRPERSON

MEMBERS:

1. MR. H.S. MADOFFE 

2. MRS. N.S.N. INYANGETE 

