

IN THE  
PUBLIC PROCUREMENT APPEALS AUTHORITY  
AT DAR ES SALAAM  
APPEAL CASE NO. 22 OF 2016-17

BETWEEN

M/S H.H. HILLAL AND COMPANY LTD.....APPELLANT

AND

MEDICAL STORES DEPARTMENT .....RESPONDENT

DECISION

CORAM

- |                              |   |                 |
|------------------------------|---|-----------------|
| 1. Ms. Monica P. Otaru       | - | Ag. Chairperson |
| 2. Eng. Francis T. Marmo     | - | Member          |
| 3. Eng. Aloys Mwamanga       | - | Member          |
| 4. Mr. Ole- Mbillie Kissioki | - | Secretary       |

SECRETARIAT

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

FOR THE APPELLANT

- |                        |   |                           |
|------------------------|---|---------------------------|
| 1. Mr. Ayiy Kumal      | - | Chief Executive Officer   |
| 2. Mr. Sultan Said     | - | Marketing officer         |
| 3. Mr. George Nyangusu | - | Advocate, Prime Attorneys |

## FOR THE RESPONDENT

1. Mr. Christopher Kamugisha - Chief Legal Counsel
2. Mr. Abdul Mwanja - Ag. Director Procurement

This Decision was set for delivery today, 31<sup>st</sup> March 2017, and we proceed to deliver it.

This Appeal was lodged at the Public Procurement Appeals Authority (hereinafter referred to as "the Appeals Authority") by M/s H.H. Hillal and Company Ltd (hereinafter referred to as "the Appellant") against Medical Stores Department, commonly known by its acronym MSD (hereinafter referred to as "the Respondent"). The Appeal is in respect of Tender No. IE-009/2016-2017/HQ/G/55 for Supply of Delivery Packs (Kits) to Medical Stores Department (hereinafter referred to as "the Tender").

After going through the records and the written submissions by the Parties, the facts of the Appeal may be summarized as follows:

The Respondent vide the Daily News newspapers dated 24<sup>th</sup> and 26<sup>th</sup> October 2016 invited tenderers in accordance with the Public Procurement Act of 2011, as amended, (hereinafter referred to as "the Act") and the Public Procurement Regulations, GN. No. 446 of 2013 (hereinafter referred to as "G.N. No. 446 of 2013"). By the deadline of 23<sup>rd</sup> November 2016 the Respondent received five (5) tenders from the following firms:-

- i) M/s Global Agency Limited;
- ii) M/s H.H. Hillal & Company Ltd;
- iii) Bahari Pharmacy Limited;

- iv) Nakiete Pharmacy (T) Limited and
- v) M/s Laborex Tanzania Ltd.

The tenders were subjected to evaluation which was conducted in three stages namely; Preliminary, Detailed and Post-qualification Evaluation. During Preliminary Evaluation, two tenders were found to be non-responsive for failure to comply with the eligibility criteria. The remaining tenders were subjected to technical evaluation. During that stage two other tenders were disqualified for failure to comply with technical requirements. The only remaining tender was that of the Appellant and it was subjected to financial and Post-qualification Evaluation whereby it was observed to have all the technical and financial capabilities. However, the Evaluation Committee did not recommend the award of the Tender to the Appellant basing on an existing legal dispute (Civil Case No 105/15 at the High Court of Tanzania, Dar es salaam); instead, the award was recommended to M/s Bahari Pharmacy Ltd and the Tender Board approved it on 10<sup>th</sup> January 2017.

On 3<sup>rd</sup> February 2017, the Respondent issued a Notice of Intention to Award the Tender to all tenderers. Dissatisfied with the said notice, on 9<sup>th</sup> February 2017 the Appellant filed an application for administrative review challenging their disqualification and the proposed award to the successful tenderer. To which the Respondent replied on 14<sup>th</sup> February 2017 that the Appellant's tender was disqualified for higher price than the proposed successful tenderer. Dissatisfied with the response, on 24<sup>th</sup> February 2017 the Appellant lodged this Appeal.

## SUBMISSIONS BY THE APPELLANT

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

1. That the tender evaluation and selection process was not conducted in accordance with the laid down procedures and rules governing public procurement.

In expounding his first ground of Appeal the Appellant submitted that, the Tender has been re-advertised three times; in October 2013, April 2016 and then again in October 2016. In all these re-advertisements, the Appellant and the proposed successful tenderer participated. The Appellant claimed that the re-advertisements were done to favor the proposed successful tenderer who obviously did not qualify, suspecting that his earlier samples might have been passed to the proposed successful tenderer to aid them prepare a responsive tender. The Appellant added that, the proposed successful tenderer has displayed lack of sufficient knowledge of the product from the beginning of the process; hence, they ought to have been disqualified in this Tender too. Furthermore, the Respondent's act of setting cap price on this Tender clearly shows that they had intended to favour the proposed successful tenderer.

The Appellant argued that, the price quoted by them could not be a sufficient reason for disqualification. Much as their price was slightly higher compared to that quoted by the proposed successful tenderer, it could not be the basis of the Appellant's disqualification since the same was subject to negotiations.

2. That the Respondent's decision to award the tender to the proposed successful tenderer was reached without taking into consideration the fact that the tender submitted by the proposed successful tenderer was not responsive in terms of quality and technical specifications.

With regard to the second ground of Appeal the Appellant submitted that, during the tender opening it was noted that the samples submitted by the proposed successful tenderer had some anomalies as they failed to comply with some technical specifications; thus the said tender ought to have been disqualified right from the beginning. The Appellant expounded further that, they had submitted a responsive tender among all bidders as they had knowledge of the product since they designed the concept a few years back; hence their bid should qualify for the award of the Tender.

3. That correspondences between the Respondent and the Attorney General clearly shows that the Respondent's decision of not awarding the Tender to the Appellant was actuated by other factors beyond the criteria stipulated in the Tender Document and advice sought from the Attorney General.

Submitting on this point, the Appellant stated that the Respondent sought for guidance from the Attorney General's Chambers (AGC) concerning awarding the Tender to the Appellant who had a pending Court case against the Respondent. The Appellant stated that the said communication, pointed out that the "Appellant was the lowest evaluated bidder", thus translating that their tender was responsive.

The Appellant submitted that, if their tender was not responsive, the Respondent would not have sought for legal guidance from the AGC. The Appellant submitted further that, the AG in his well-reasoned letter stated that there were no legal grounds prohibiting the award to be made to the Appellant; thus, the Respondent's act of not awarding the Tender to them was contrary to the advice given by the Attorney General and laws governing public procurement.

Finally, the Appellant prayed for the following Orders:-

- a) The decision of the Respondent to award the Tender to the proposed successful tenderer be quashed; and
- b) Order the Respondent to award the Tender to the Appellant.

#### 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 the Respondent submitted that, the evaluation process and selection of the proposed successful tenderer was conducted fairly and in due observance of the legal procedures governing public procurement. The Respondent did not dispute that the Tender was advertised thrice; they however claimed that two of the times it was withdrawn due to budgetary reasons and that the Appellant was duly informed about that. The Respondent claimed further that if the Appellant was dissatisfied, he ought to have raised his concern earlier.

He argued further that, the tender process was conducted fairly and in accordance with the laid down procedures. That each tender was evaluated based on the requirements of the Tender Document and none

of them was favoured. The Appellant's contention that their bid was most responsive since they had developed the concept of delivery pack are baseless and lacks legal justification as the delivery pack was designed and developed by the Ministry of Health.

The Respondent submitted further that, the act of fixing cap price aimed at ensuring that the tender price fall within the budget and therefore avoid variations of bid prices. That the law allows procuring entities to cap prices, therefore the Respondent's act was in compliance with the law. Furthermore, the Respondent submitted that the Appellant could not be invited for price negotiations since their tender was not responsive.

With regard to the second ground of Appeal the Respondent stated that, the award of the Tender to M/s Bahari Pharmacy Ltd was proposed by the Evaluation Committee after it was satisfied that the tender submitted by said tenderer was responsive in terms of quality and technical specifications. Furthermore, the samples of surgical gloves presented by the proposed successful tenderer although were fewer than required, they were enough to evaluate and confirm the quality.

In replying to ground three of the Appeal the Respondent submitted that in approving the award of the Tender to M/s Bahari Pharmacy Ltd, the Tender Board was not guided by the AG's opinion; instead, it was guided by factors as prescribed in the Tender Document and the communication between the two public offices; that is AGC and the Respondent, did not have any influence over the decision of the Tender Board. The Tender Board issued its decision that the award be made to the proposed successful tenderer on 10<sup>th</sup> January 2017 before the AG issued its legal

advice on 17<sup>th</sup> January 2017. As such, the proposed award was clearly based on the conditions of the Tender Document and not otherwise.

The Respondent submitted further that, the Appellant's act of having official letters between the AG and MSD raised a lot questions as to how they managed to have access to internal documents which were not copied to them. The Respondent requested the Appeals Authority to question the Appellant on how they came into possession of the said documents.

Finally, the Respondent prayed for the following reliefs;

- a) Appellant's Appeal be dismissed; and
- b) Award by the Respondent be upheld.

#### ANALYSIS BY THE APPEALS AUTHORITY

Before embarking on the analysis of this Appeal, we wish to point out that this matter came for hearing on 28<sup>th</sup> March 2017; the parties by consensus agreed that hearing proceed by way of written submissions instead. Whereby the Appellant filed their submissions on 29<sup>th</sup> March 2017 and the Respondent filed theirs on the following day. This analysis therefore is based on the record of Appeal together with submissions by the parties.

In this Appeal, it is our considered view that there are three (3) triable issues to be determined. These are:-

- Whether the disqualification of the Appellant was proper in law;
- Whether the award to the proposed successful tenderer is justified; and
- To What reliefs, if any, are the parties entitled to.

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

#### 1.0 Whether the disqualification of the Appellant was proper in law

First and foremost, the Notice of Intention to Award is silent on the reasons that led to the Appellant's disqualification. The decision issued on 14<sup>th</sup> February 2017, however, indicates that the Appellant's tender was disqualified for having higher price than the proposed successful tenderer.

To ascertain if the Appellant's disqualification was proper in law, we revisited the Evaluation Report and observed that the Appellant's price was within the Respondent set cap price; hence, qualified for Post-qualification stage. It was further observed that, during Post-qualification the Appellant's tender was found to have complied with all financial and technical specifications. At this point, the evaluators noted that the Appellant and the Respondent were involved in Civil Case No. 105/15 at the High Court of Tanzania. According to evaluators, the case was yet to be determined; thus the Appellant could not qualify for the award of the Tender.

The evaluators recommended, and the Tender Board approved, the award to M/s Bahari Pharmacy Ltd whose bid, as seen earlier, was disqualified at the Technical Evaluation stage for having submitted samples of two pairs of Surgical Gloves instead of four. The minutes of the Tender Board clearly indicate that the Appellant was disqualified due to existence of litigation between the Parties.

Clause 40 of the Tender Data Sheet (TDS) which modifies Clause 35.1 of the Instruction To Tenderers (ITT) provides that during Post-qualification tenderers were to be assessed on litigation history. Thus, it was among the criteria to be evaluated. Further, the Respondent vide its letter with Ref. No. MSD/003/2016/2017/1367 dated 3<sup>rd</sup> January 2017, sought for legal opinion from the Attorney General's Chambers (AGC) if they can proceed to award the Tender to the Appellant with the existence of the case between the Parties. The AGC via the letter with Ref. No. AGCC/A.130/67 dated 17<sup>th</sup> January 2017 replied that the Respondent had entered an out of Court settlement during mediation, whereby the Respondent agreed to pay the Appellant for the delayed payment and compensation for failure to collect the consignment in time.

The letter further clarified that there was no ground that "in law prohibits award of such tender to Ms. H.H.Hillal Co. Ltd" as such, "if Ms. H.H.Hillal Co. Ltd meets the tender conditions as per the Public Procurement Act and its Regulations, you may consider awarding the tender to them" (Emphasis supplied).

From the above, there is no doubt that the case that was relied upon by the Respondent for not awarding the Tender to the Appellant had already been settled during Court Mediation. As such, as there was no suit pending in Court at the time, the Respondent should have awarded the Tender to the Appellant who was the only responsive tenderer.

From the records, the Respondent sought for a legal advice from AGC on 3<sup>rd</sup> January 2017. While AGC issued its legal advice on 17<sup>th</sup> January 2017

the Tender Board had approved the award on 10<sup>th</sup> January 2017, and the Respondent communicated its intention to award on 3<sup>rd</sup> February 2017. The sequence of events indicates that although the approval of the award by the Tender Board was before the AGCs response, the Notice of Intention to Award was communicated after its receipt.

Since the Respondent was the one who had sought for legal advice from the office with higher authority regarding legal matters in the Government, it was expected that the same would be taken into consideration before proceeding with award process. Much as the Tender Board had already approved the award to the proposed successful tenderer by the time the advice from AGC was received, nothing under the law prohibits re-convening of Tender Board meeting to discuss matters that were the basis for determination of who should be awarded the Tender. That means, the Respondent was able to revise its decision to award before communicating it taking into consideration that the bidder who was proposed for the award of the Tender was found to be non-responsive for failure to comply with one of the requirement of the Tender Document.

As admitted by the Respondent that they had a good reason of seeking legal guidance from AGC, it was expected that they would take it into consideration before approving who should be awarded the tender. To the contrary, the Respondent proceeded to issue a Notice of Intention to Award the Tender to M/s Bahari Pharmacy Ltd without taking into consideration the advice given by the AGC.

The Appeals Authority further considered the Respondent's argument that, the Appellant was not recommended for award of Tender because

their quoted price was higher than that of the proposed successful tenderer. The Appeals Authority observes that, much as the Respondent contends that the Appellant was disqualified because of higher price, nothing in the documents submitted support the said contention. The Evaluation Report and the minutes of the Tender Board clearly indicate that the Appellant's tender was found to be non-responsive due to existence of the case between the Parties. Regulation 238 (2) of GN No. 446 of 2013 requires procuring entity to give out reasons for disqualification of tenderers as were recorded in the Tender Board minutes.

The reason for disqualification of the Appellant given out by the Respondent in his letter dated 14<sup>th</sup> February 2017 was neither recorded in the Minutes of the Tender Board nor in the Evaluation Report. From the facts, the Appeals Authority is of the firm view that the disqualification of the Appellant did not base on price; instead it was based on issues of litigation which were dealt with by AGC. The Appeals Authority is dismayed with the Respondent's act in this Tender process and therefore, it is of the settled view that the Respondent erred in law for intending to award the Tender to the purported successful tenderer ignoring the legal advice given by the office with high authority regarding legal matters in the Government.

We considered the Appellant's argument that they were the founder of the delivery pack and observed that there was no evidence submitted to substantiate the same. Since there is no proof whatsoever, that the Appellant had designed the deliver pack, we therefore find his claim to have no legal basis. In any case, assuming that the Appellant had designed the specifications of the delivery pack as claimed, he would

have been ineligible to participate in this Tender, as his participation would have contravened Regulation 6(3)(b) of GN. No 446 of 2013 which prohibits consultants who designed and developed the specifications for the product/project from participating in the tender when floated.

We also considered the Respondent's argument that the Appellant should be condemned for being able to access internal confidential communications between the Respondent and the AGC without the same being copied to them. We noted that the Respondent's request for legal advice to the AGC and replies thereof were attached to the Appellant's Statement of Appeal. Neither the Appellant nor the Respondent managed to reveal the source of that communication; therefore this point requires further investigation. We would not dwell on this point since we do not have investigative powers.

In conclusion, we answer this issue in the negative, that the Appellant's disqualification was not proper in law.

## 2.0 Whether the award to the proposed successful tenderer is justified

In resolving this issue the Appeals Authority revisited the Appellant's contention that the award has been proposed to a non-responsive bidder whose bid was seen to be defective from the tender opening. In ascertaining the validity of the Appellant's argument we revisited the minutes of the tender opening and observed that nothing was noted in relation to defectiveness of the bid submitted by the proposed successful tenderer.

We also revisited the Evaluation Report and observed that the tender of the proposed successful tenderer was disqualified during technical evaluation for failure to comply with technical requirements. The said tenderer submitted two pairs of surgical gloves while the required quantity was four pairs. The Evaluation Committee had noted such anomaly and the tender was not subjected to further stages of Evaluation. After completion of the evaluation process, Evaluation Committee realized that none of the tenderers qualified for the award; hence, they decided to re-instate in the evaluation process the tender submitted by the proposed successful tenderer and recommended them for award.

We noted further that, the recommendation of the Evaluation Committee was approved by the Tender Board at its meeting held on 10<sup>th</sup> January 2017. Although in that meeting it was claimed that the Tender Document did not specify clearly the quantity of the surgical gloves that were to be submitted as samples; hence, the defect in the tender of the proposed successful tenderer was treated as minor deviation, to the contrary Item 8 of the Schedule of Requirements requires tenderers to submit four (4) pairs of surgical gloves. Thus, it goes without saying that the proposed successful tenderer failed to comply with Item 8 of Schedule of Requirements.

We find the Evaluation Committee's act of re-instating a non-responsive tender to contravene Regulation 206(2) of GN. No. 446 of 2013 read together with Clause 28.5 of the ITT. The said provisions are reproduced herein under;

Reg.206(2) "Where a tender is not responsive to the tender document, it shall be rejected by the procuring entity, and may not subsequently be made responsive by correction or withdrawal of the deviation or reservation". (Emphasis added)

Clause 28.5 "If a tender is not substantially responsive, it will be rejected by the procuring entity and may not subsequently be made responsive by the tenderer by correction of the nonconformity". (Emphasis supplied)

From the above quoted provisions and facts of this Appeal, we are of the firm view that the Respondent erred in law for proposing award to be made to the tenderer whose bid was found non-responsive.

In considering the Appellant's contention that the advertisement of the Tender for three times and fixing of cap price aimed at favouring the proposed successful tenderer, we find the same to have been based on mere speculations with no evidence to substantiate the same. Furthermore, the Appellant should have complained about their dissatisfaction immediately after the tenders were rejected.

All in all it is our conclusion that by proposing the award to be made to the tenderer whose bid was found to be non-responsive is not justified. Therefore, this issue is answered in the negative.

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

Taking cognizance of the findings made above, the Appeals Authority finds the Appeal to have merits and therefore nullifies the award made to the proposed successful tenderer and orders the Respondent to proceed with the award of the tender in observance of the law and advice given by AGC.

The Right of Judicial Review as per Section 101 of the Act is explained to the Parties.

This Decision is delivered this 31<sup>st</sup> March, 2017.



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MONICA P. OTARU

Ag. CHAIRPERSON

MEMBERS:

1. ENG. FRANCIS MARMO



2. ENG. ALOYS MWAMANGA

