

IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY

AT DAR ES SALAAM

APPEAL CASE NO. 23 OF 2018-19

BETWEEN

M/S TERA TECHNOLOGIES ENGINEERING
LIMITED.....APPELLANT

AND

MEDICAL STORES DEPARTMENT.....RESPONDENT

RULING

CORAM

- | | |
|-------------------------------------|---------------|
| 1. Hon. Justice (rtd) Sauda Mjasiri | - Chairperson |
| 2. Dr. Leonada Mwangi | - Member |
| 3. Mr. Rhoben P. Nkori | - Member |
| 4. Mr. Ole-Mbille Kissioki | - Secretary |

SECRETARIAT

- | | |
|---------------------------|-----------------|
| 1. Ms. Florida R. Mapunda | - DST |
| 2. Mr. Hamisi O. Tika | - Legal Officer |
| 3. Ms. Violet S. Limilabo | - Legal Officer |

FOR THE APPELLANT

- | | |
|-----------------|---------------------------|
| 1. Esther Misso | -Advocate, KEMI Advocates |
|-----------------|---------------------------|

2. Mr. Daud Charles -Chief Executive Officer
3. Ramadhani Juma -Developer, Software
4. Mr. Goodluck Msangi -Technology Consultant

THE RESPONDENT

1. Mr. Christopher Kamugisha -Chief Legal Counsel
2. Mr. Emmanuel Mnzava -Ag. Director, Information Technology
3. Mr. Abdul Mwanja -Ag. Director of Procurement
4. Mr. Owden Mhabuka -Procurement Manager

This Appeal was lodged by M/s Tera Technologies and Engineering Limited (hereinafter referred to as “the Appellant”) against the Medical Stores Department commonly known by its acronym MSD (hereinafter referred to as “the Respondent”). The Appeal is in respect of Tender No. IE-009/2017/2018/HQ/NC/17 for the Supply, Installation, Training and Maintenance of Human Resources Information Management System (hereinafter referred to as “the Tender”). The Tender was conducted using National Competitive Bidding method specified under the Public Procurement Act, No. 7 of 2011 as amended (hereinafter referred to as “the Act”) and the Public Procurement Regulations GN. No. 446 of 2013 as amended (hereinafter referred to as “the Regulations”).

After going through the record of appeal submitted to the Public Procurement Appeals Authority (hereinafter referred to as “the Appeals Authority”), the background of the Appeal may be summarized as follows:

The Respondent through the Daily News newspapers, MSD Website and the Public Procurement Journal of 21st and 26th March 2018 respectively, invited tenderers to participate for the Tender. The deadline for submission of tenders was initially set for 10th April 2018 but was later on extended to 17th April 2018, whereby ten tenders were received.

Tenders were then subjected to evaluation and after completion of the process, M/s NPK Technologies was recommended for the award as the system it offered was more favourable to the Respondent.

On 27th September 2018, the Respondent issued the Notice of Intention to Award the contract to all tenderers who participated in the Tender process. The Notice informed the bidders that the tender was to be awarded to M/s NPK Technologies at a contract sum of TZS. 269,796,000.00. The Appellant was further informed of the following reasons for its disqualification:

- i. The system had undergone development and testing for all HR modules except recruitment module but it has not gone live due to merging of pensions fund;
- ii. Users license was unlimited, a constant annual maintenance fee is charged from the second year after implementation;
- iii. There was no interface with their accounting system although it is expected that the interface will be developed; and
- iv. Attendance management module had integration with biometric system and the system provided attendance report.

Dissatisfied, on 2nd October 2018, the Appellant applied for administrative review to the Respondent.

On 11th October 2018, the Respondent issued its decision by dismissing the complaint. It also altered and/added other reasons for the Appellant's disqualification. Aggrieved further, on 22nd October 2018, the Appellant filed this Appeal.

SUBMISSIONS BY THE APPELLANT

The Appellant's submissions may be summarized as follows:

That, the reasons for its disqualification are ambiguous and contradictory.

That, the Respondent failed to avail justifiable reasons for the disqualification of its bid.

The Respondent intended to award the Tender to the bidder whose quoted price was much higher.

Finally, the Appellant prayed for the following orders:-

- i. A Declaration that the Respondent's decision was unlawful;
- ii. Annulment of the Respondent's decision; and
- iii. Any other relief the Appeals Authority may deem fit to grant.

REPLY BY THE RESPONDENT

The Respondent's reply may be summarized as follows:-

The demonstration for completeness and functionality of the Appellant's system offered to the Respondent was found to have various technical weaknesses.

That, the reasons for the Appellant's disqualification availed in the Notice of Intention to award were supplemented by other reasons contained in the Respondent's decision. Thus, the reasons were clear and unambiguous and were justified.

That, the lowest quoted price was not the only determinant factor for the award of the Tender. It required compliance with other factors provided in the Tender Document, such as quality of the system in terms of its effectiveness and value for money.

Finally the Respondent prayed for the dismissal of the Appeal for lack of merits.

At the hearing of this Appeal during the framing up of issues, the Appeals Authority was of the considered view that there was a point of law for determination before hearing the appeal on merit. This was in relation to the legal status of the Tender. The Appeals Authority noted that the Bid Validity period and the Bid Securities had long expired and no extension of time was in place. In that respect, the Appeals Authority called on the learned counsel to address it as to *whether or not there was a valid tender for consideration after the lapse of the bid validity period.*

SUBMISSIONS BY THE APPELLANT

The counsel for the Appellant stated that the Appellant submitted its bid to the Respondent on 15th April 2018 and the same was publicly opened on 17th April 2018. She conceded that when the Appellant received the Notice of Intention to award the contract from the Respondent, the bid validity period of the tenders had already lapsed; and that no extension of time was sought by the Respondent. She argued that it was the duty of the

Respondent to request bidders to extend the validity period of their bids, but it did not do so.

Upon being invited by the Members of the Appeals Authority to read the provisions of Section 71 of the Public Procurement Act, 2011 as well as Regulation 191(3) and (4) of the Regulations, GN.NO.446 of 2013, (both as amended), the Appellant's counsel conceded that at the time the Appellant received the Notice of Intention to Award the contract, there was no valid tender in place. She insisted that it was the responsibility of the Respondent to extend it. In addition, she urged the Appeals Authority to ignore the question of bid validity, since it would adversely and unfairly affect the Appellant.

SUBMISSIONS BY THE RESPONDENT

On his part, the counsel for the Respondent argued that the approval of award by the Tender Board was made prior to the expiry of the bid validity period. However, upon being reminded by the Appeals Authority that the award of the tender is finalized upon the signing of the contract, in terms of the Public Procurement (Amendment) Act, 2016. Counsel readily conceded that the bid validity period for the tender had already expired. He left the matter in the hands of the Appeals Authority.

ANALYSIS BY THE APPEALS AUTHORITY

The main issue for determination and decision is *whether or not there is a valid tender for consideration after the lapse of the bid validity period.*

The counsel for both the Appellant and the Respondent readily conceded that the bid validity for the Tender under consideration had already expired.

It is evident from the record of appeal that according to Instructions to Bidders (ITB) Clause 18 read together with Bid Data Sheet (BDS) Clause 14, the Bid Validity period for the tender was one hundred and twenty days (120) from the date of opening, i.e. 17th April 2018. The same expired on 11th August 2018 and the respective Bid Securing Declarations for all bids expired on 8th September 2018. The Respondent never requested for extension of the bid validity period on the bids or their respective bid securing declarations.

The Appeals Authority is of the settled view that the provisions under Section 71 of the Public Procurement Act, 2011 and Regulation 191(3) of GN.NO.446 of 2013 are very clear. The law imposes a mandatory requirement for a procuring entity to finalize all procurement processes within a specified period of time provided for in the Tender Document. Extension of time may be sought by a procuring entity prior to the expiry of the original period of effectiveness.

"Section 71: The procuring entity shall require tenderers to make their tenders and tender securities including tender securing declaration valid for the periods specified in the tendering documents, 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

approve the contract or contracts to be awarded whilst the tenders are still valid”.

“Regulation 191(3): The period fixed by a procuring entity shall be sufficient to permit evaluation and comparison of tenders, for obtaining all necessary clearances and approvals, and for the notification of the award of contracts and finalise a contract but the period shall not exceed one hundred and twenty days from the final date fixed for submission of tenders.

(4) In exceptional circumstances, prior to expiry of the original period of effectiveness of the tenders, a procuring entity may request tenderers to extend the period for an additional specified period of time”.

[Emphasis Added]

The Appeals Authority is of the firm view that it is a requirement under the law that a procuring entity should finalize its proceedings and award the contract within the specified time limit.

It should be noted that while the law permits extension of time under Regulation 191(4), the same is not automatic. The law allows extension of time if there are exceptional circumstances. No extension of time was granted in respect of the above tender.

While, the Appeals Authority appreciates the Appellant’s submissions that the duty to request for extension of time lies with the procuring entity, that is, the Respondent; Regulation 13 of the GN.NO.446 of 2013 empowers the

Appellant to seek clarification from the Respondent. The Appellant did not exercise that right.

The Appeals Authority is of the considered view that where the law clearly provides for a certain act or acts to be done; there should be total compliance unless there are exceptional circumstances.

In view of what is stated hereinabove, the Appeals Authority is of the considered view that there exists no valid tender for consideration after the lapse of the bid validity period.

What relief (s), if any, are the parties entitled to

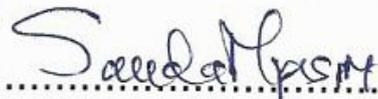
Given the Appeals Authority's findings on the point of law, that there is no valid tender after the expiry of the bid validity period, the Appeal has no basis and is hereby dismissed. As the point of law was raised *suo motu* by the Appeals Authority, each party is to bear its own costs.

Order accordingly.

This Ruling 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 Ruling is delivered in the presence of the parties this 27th November, 2018.



HON. JUSTICE (RTD) SAUDA MJASIRI

CHAIRPERSON

MEMBERS:

1. DR. LEONADA MWAGI KE 

2. MR. RHOBEN P. NKORI 