

IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY
APPEAL CASE NO. 24 OF 2017-18
BETWEEN
M/s HELPING HANDAPPELLANT
AND
TANZANIA ELECTRIC SUPPLY COMPANY
LIMITED.....RESPONDENT

RULING

CORAM

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| 1. Mrs. Rosemary A. Lulabuka | -Ag. Chairperson |
| 2. Eng. Francis T. Marmo | - Member |
| 3. Eng. Aloys Mwamanga | - Member |
| 4. Ms. Florida R. Mapunda | - Ag. Secretary |

SECRETARIAT

- | | |
|---------------------------|-----------------|
| 1. Ms. Violet S. Limilabo | - Legal Officer |
| 2. Mr. Hamisi O. Tika | - Legal Officer |

FOR THE APPELLANT.

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| 1. Mr. Florence A. Kahatano | - Principal Legal Officer |
| 2. Ms. Grace J. Ngahyoma | - Procurement Management Unit |

FOR THE RESPONDENT

- | | |
|-------------------------|---------------------------|
| 1. Mr. Bwigane B. Kaisi | - Chief Executive Officer |
| 2. Ms. Janet Minja | - Managing Director |

This Ruling was scheduled for delivery today 24th January 2018, and we proceed to do so.

The Appeal at hand was lodged by M/s Helping Hand (hereinafter referred to as "the Appellant") against Tanzania Electric Supply Company Limited, commonly known by its acronym TANESCO (hereinafter referred to as "the Respondent"). The Appeal is in respect of Tender NO. PA/001/2016-17/HQ/C/004 for Provision of Consultancy Services for Retirement Planning Training Programme for TANESCO Staff under Framework Contract (hereinafter referred to as "the tender").

According to the documents submitted to the Public Procurement Appeals Authority (hereinafter referred to as "the Appeals Authority"), the facts of the Appeal may be summarized as follows:

On 2nd September 2016, the Respondent invited various consultancy firms to submit their Expression of Interest (EoI). The deadline for the submission was set for 23rd September 2016, whereby eleven EoIs were received including the Appellant's.

The EoIs were then subjected to evaluation and finally the following shortlisted firms were proposed for issue of Request For Proposal (RFP).

These were;

1. M/s Institute of Management & Consultancy
2. M/s Disney International Consultancy
3. M/s Institute of Management and Entrepreneurship Development
4. M/s ESAMI

The Tender Board at its meeting held on 23rd February 2017, approved the RFP document and the same was issued to the four firms. However, only three firms submitted their RFP before the deadline. M/s Institute of Management & Consultancy did not submit his RFP.

The RFPs were then subjected to evaluation of technical proposals, whereby two firms were found to be substantially responsive after scoring the set minimum score of 75%. The proposal by M/s ESAMI was disqualified for failure to meet the minimum score.

The Tender Board at its meeting held on 24th August 2017, approved the Technical Evaluation Report and blessed opening of financial proposals of the qualified firms. In August 2017, the two firms' Financial Proposals were opened and evaluated. Based on the combined technical and financial scores, the proposal by M/s Disney International Consultancy was ranked first and recommended for award of the contract, at the contract price of TZS. 110,920,000.00 Exclusive of local taxes.

The Tender Board later on approved the award recommendations by the Evaluation Committee and awarded the contract to the proposed bidder at the above mentioned contract price.

On 9th November 2017, the Respondent vide his letter with Ref. No. SMP/MMC/PMU/17/8/1073 issued the respective Notice of Intention to award the contract to the Appellant and other bidders. The Notice informed the Appellant that his EOI has been disqualified for failure to indicate adequate training personnel. According to the Respondent, the Appellant's EOI had only one trainer.

Aggrieved, on 27th November 2017, the Appellant requested for administrative review to the Respondent's Accounting Officer challenging the award of the tender. The Appellant's grounds were as follows;

- i. That, Respondent did not follow the proper procedures for awarding the tender since there was no RFP issued; and that it appears that the proposed successful bidder has been awarded the tender on the basis of the EoI, which is against the Public Procurement Act.
- ii. It is not correct that their firm has only one trainer. The trainer indicated in their EoI is the CEO and not the only trainer. Besides, in the EoI they were required to mention if they have any associates. They mentioned in the EoI that they have two associate firms with whom they are working together depending on the size of the assignment. Therefore, the reason given that they did not indicate adequate training personnel is not valid.
- iii. That, the addressed letter to them bears an address of a firm based in Arusha while their firm is based in Dar es salaam. Therefore, there is a likelihood that the contents of the letter has been mixed up with another firm based in Arusha.

The Respondent however, did not respond to the Appellant's complaint. Further aggrieved, on 12th December 2017, the Appellant filed this Appeal.

Upon being served with the Notice of Appeal and require him to respond to the grounds of Appeal, the Respondent did so. Apart from responding to the issues raised, he also submitted various documents relevant to the tender under dispute. The Appeals Authority, on perusal of the said documents as well as the Public Procurement Act, (hereinafter referred to

as the Act), observed that there is pertinent question of its jurisdiction to entertain the Appeal at hand prior to embarking into the merits of the matter. We therefore proceeded to determine the jurisdiction by framing the following issue;

Whether the Appeal is properly before the Appeals Authority.

In determining this issue, the Appeals Authority revisited Section 95 of the Act and observed that, while Section 95(1) provides for the general powers of aggrieved bidder to complain, Section 95 (2) restricts him from complaining among other things refusal by the procuring entity to respond to expression of interest; as it is in this case. The provision reads;

Section 95 (1)

Any tenderer who claims to have suffered or that may suffer any loss or injury as a result of a breach of a duty imposed on a procuring entity by this Act may seek a review in accordance with sections 96 and 97.

(2) The review referred to in sub section (1) shall not apply to-

- a) N/A
- b) N/A
- c) in the case of services, a refusal by the procuring entity to respond to an expression of interest in participating in request for proposals proceedings.

In view of the above cited provision, the Appeals Authority observed that the appeal at hand originates from the Appellant's disqualification in the EOI proceedings. It follows therefore, that by any means, whether the disqualification of the Appellant was right or wrong, according to the law,

this is a non appealable matter. To entertain this Appeal would not only mean violation of law but also acting *ultra vires*.

The above findings notwithstanding, we further revisited Regulations 280(6), (7) and 281 of the Public Procurement Regulations GN. NO.446 of 2013 (hereinafter referred to as GN.NO 446/2013) and observed that, the choice of consultants to be issued with RFP from those who participated in the EOI lies on the discretionary powers of the procuring entities. It is therefore, not necessary for the consultant who participated in the EOI to be selected for issuance of the RFP.

The Provisions read:-

Reg. 280 (6) A consultant who wishes to provide the requested services may express his desire in writing to be short-listed to the procuring entity concerned.

(7) Notwithstanding sub-regulation (6), an expression of interest to participate in the provision of services shall not oblige the procuring entity to include the applicant in the short list.

Reg. 281(1) The short-list shall be made up of consultants who, in the view of a procuring entity, possess the required capabilities and experience to provide the specific services.

(Emphasis Supplied)

We are of the considered view that the wording of this provision might be the basis of the restriction made under Section 95(2) (c) supra.

Accordingly, the Appeals Authority's conclusion regarding the issue is that the Appeal is not properly before it.

In view of the above, we reject this Appeal for want of jurisdiction and order each party to bear its own cost.

It is so ordered.

Right of Judicial Review as per Section 101 of the PPA/2011 explained to parties.

Ruling delivered in the presence of the Appellant and the Respondent this 24th January 2018.



MRS. ROSEMARY. A. LULABUKA

Ag. CHAIRPERSON

MEMBERS:

1. ENG. F.T.MARMO



2. ENG. A. J. MWAMANGA

