

IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY
AT DAR ES SALAAM
APPEAL CASE No. 40 OF 2016-17

BETWEEN

M/S J.E CONSTRUCTION CO. LTDAPPELLANT

AND

PANGANI BASIN WATER BOARDRESPONDENT

DECISION

CORAM

- | | | |
|------------------------------------|---|--------------|
| 1. Hon. Vincent K.D Lymo, J. (rtd) | - | Chairman |
| 2. Eng. Francis Marmo | - | Member |
| 3. Mr. Louis Accaro | - | Member |
| 4. Ms. Florida Mapunda | - | Ag:Secretary |

SECRETARIAT

- | | | |
|------------------------|---|---------------|
| 1. Ms. Violet Limilabo | - | Legal Officer |
| 2. Mr. Hamis Tika | - | Legal Officer |

FOR THE APPELLANT

- | | | |
|---------------------------|---|------------------|
| 1. Mr. Sixtus Basil Kessy | - | Project Manager |
| 2. Mr. Simon Kessy | - | Telecom Engineer |
| 3. Mr. Peter kessy | - | Engineer |

FOR THE RESPONDENT

1. Mr. Vendelin Z. Basso - Water Officer (Accounting Officer)
2. Mr. Haji Nandule - Advocate
3. Mr. Simon Nkanyerika - Advocate
4. Mr. Freddy Mbeyella - Procurement Specialist
5. Mr. Ghoyella Mpangala - Procurement Officer
6. Mrs. Maria N. Shauri - Procurement Officer
7. Mr. Amiri M. Msangi - Hydrogeology

This Decision was set for delivery today, 16th June 2017 and we proceed to deliver it.

This Appeal was lodged by M/s J.E Construction Co. Limited (hereinafter referred to as "the Appellant") against Pangani Basin Water Board (hereinafter referred to as "the Respondent"). The Appeal is in respect of Tender No.AE/061/2016-2017/HQ/W/01 for the proposed Rehabilitation and Extension of PBWB Arusha Sub office, Water Laboratory Building and Construction of Kikuletwa Juu WUA Office in Arusha (hereinafter referred to as "the Tender").

Pursuant to the records submitted by the respective 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 vide the Daily News newspapers dated 20th December 2016, invited tenderers to participate in the above named Tender in accordance with the Public Procurement Act of 2011 (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").

The deadline for submission of Tenders was initially set on 24th January 2017 but it was later on extended to 16th February 2017, whereby nine (9) tenders were received.

The tenders were subjected to evaluation which was conducted in three stages namely; Preliminary Evaluation, Detailed Examination and Post-qualification. During Preliminary Evaluation eight (8) tenders, the Appellant's inclusive were found to be non-responsive for failure to comply with Tender requirements and were disqualified. The remaining one tender by M/s Bade Contractors Ltd. was subjected to technical, detailed and Post-qualification evaluation. In All these stages the tender by M/s Bade Contractors Limited was found to be responsive and was recommended for the award of the contract at TZS 1,279,010,820.50. The recommendations of the Evaluation Committee were approved by the Tender Board at its meeting held on 27th March 2017.

On 2nd May 2017, the Respondent issued the Notice of Intention to Award the Tender to all tenderers. The said Notice indicated that the Appellant's tender was disqualified for failure to adhere to the clarification given to the tenderers during pre-bid meeting and partial quoting for Bill No. 4 item (s), Bill No. 6 Element No. 10 Items C, D and E.

Dissatisfied, on 5th May 2017 the Appellant filed an application for administrative review challenging their disqualification and award proposed to the successful tenderer. The Respondent on 12th May 2017 issued his decision dismissing the Appellant's complaint for lack of merits. Dissatisfied with the response, on 17th May 2017 the Appellant lodged this Appeal.

SUBMISSIONS BY THE APPELLANT

In this Appeal, the Appellant raised two grounds of Appeal which can be summarized as follows;

- i) Partially quoting of BOQ
- ii) Failure to comply with the Addendum issued.

Submitting on the first ground of the Appeal, the Appellant contended that the Respondent's evaluation results in respect to Bill No. 4 Item (S) and Bill No. 6 Element No. 10 Items C, D and E were wrong and contrary to the requirement of the law. The Appellant submitted that, it is not true that the said bills were not filled as required. According to the Appellant, Bill No. 4 – External works Section No. 3 Item (S) was filled and has a rate of TZS 2,500,000/-. He further contended that Bill No. 6 Element No. 10 Items C, D and E were filled under Items A and B. The description of Item B also covers items C, D and E as it reads “allow for all builders' work in connection with the whole of electrical installation” and the unit is a lump sum. In addition, Items C, D and E did not have their respective quantities and therefore would amount to zero.

The Appellant further submitted that the Respondent's act of disqualifying their tender based on the ground of partial filled BOQ contravened Section 74(1) of the Act, Regulations 202(3), 203(1) of GN No. 446 of 2013 and Clause 14.2 of the Instruction to tenderers (ITT) (sic) which requires tenders to be evaluated on the common basis.

He contended further that even the proposed successful tenderer did not price all of the items from page 1 to page 28 in Bill No. 1-

Preliminaries. The Respondent ought to have equally disqualified the Tender of the proposed successful tenderer for partial quoting.

The Appellant submitted that the Respondent had erred in law by relying on Regulation 205(b) of GN No. 446 of 2013 since in this Tender builders work was not a major item but rather the Electrical Installation works. According to Standard Methods of Measurement of Building works for East Africa Section R26 if the sub-contractor is a domestic firm; builder's work may be included in the electrical installation works; thus the Respondent erred in law for disqualifying the Appellant for partial quoting.

In support of the second ground, the Appellant submitted that, the Respondent erred in law for disqualifying their tender for failure to comply with the clarification given during pre-tender meeting and an Addendum issued thereafter. He submitted that during pre-tender meeting there was only one query in relation to the size of window type "W4" and they were informed that the size would be communicated to them as soon as possible. However, no clarifications were sent to the Appellant despite the reminders. Thus, he assumed that the size of the Window type was the same.

He contended further that, they had not received any communication regarding the Addendum issued by the Respondent. The Appellant became aware that there was an Addendum issued for this Tender after receipt of the Respondent's decision on the administrative review as it was attached to it. The Appellant argued that the Respondent was required to make sure that the Addendum issued is circulated to all tenderers as per Regulation 12, 13(4) and (5) of GN. No. 446 of 2013.

Thus, the Respondent's failure to comply with such requirement had contravened the law.

The Appellant further submitted that, the Respondent intends to award the Tender to a tenderer whose price is higher than the price quoted by them. The Appellant is concerned with the Respondent's act in this regard as it contravened Regulation 4(2)(a) of GN No. 446 of 2013 which emphasizes on the need for economy and efficiency in the use of public funds.

Finally, the Appellant prayed for the following Orders:-

- a) Annulment of the Respondent's decision which disqualified the Appellant's tender;
- b) The Respondent be ordered to start the tender process afresh;
- c) Compensation to the sum of TZS 1,820,000/- as per the following breakdown;
 - i) Appeal filing fees 200,000/-
 - ii) Documentation charges 1,500,000/-
 - iii) Transport Costs 120,000/-
- d) Any other relief which the Appeals Authority shall deem just, proper or equitable.

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 counter argued that, the Appellant's BOQ did not conform to the Addendum given to the tenderers on 2nd February 2017. He contended further that, the Appellant submitted his BOQ based on the requirements provided for in

the original Tender Document instead of the Addendum issued and did not quote for Bill No. 4 Items (S) and Bill No. 6 Element No. 10 Items C, D and E. He further submitted that, the Appellant's argument that the costs for Items C, D and E have been covered under Item B should not be accepted since each of the Items is separate and independent; hence it could not be assumed that Item B also covers Items C, D and E.

Furthermore, the Respondent disputes the Appellant's submission that builders work is not a major item for this Tender because the Addendum issued changed the scope of work which clearly did not separate major and minor works. Thus, the Appellant's arguments on this point should also be rejected.

The Respondent argued that, the Appellant's tender failed to comply with Clause 15.2 of the ITT which requires tenderers to fill in rates and prices for all items of the works described in the BOQ. During Evaluation process the Respondent evaluated all the tenders on a common basis as per the requirement of Section 74(1) of the Act and Regulation 202(3) of GN. No. 446 of 2013.

With regard to the argument that the proposed successful tenderer failed to quote for Bill No. 1, the Respondent submitted that Bill No. 1- Preliminaries contains narrative information about the project which some of them do not attract any costs while others were priced in lump sum. Thus, it was not necessary for tenderers to price each of the items in Bill No. 1 – Preliminaries.

Regarding the Appellant's failure to adhere to the Addendum given, the Respondent submitted that, before the deadline for submission of tenders they issued an Addendum pursuant to Clause 9.1 of the ITT.

The said Addendum was sent to the Appellant on 2nd February 2017 through emails; jecotz@yahoo.co.uk and sbkessy@yahoo.com at 09:17:22 EAT. The Appellant acknowledged receipt of the same through email jecotz@yahoo.co.uk on the same day at 09:28:09. Thus, it is not true that the Appellant was not served with the Addendum issued by the Respondent. The Appellant's non-compliance to the Addendum issued caused disqualification of his tender as per Clause 28.5 of the ITT and Regulation 204(1) of GN. No. 446 of 2013.

Therefore, the Respondent prayed for the following;

- i) Dismissal of the Appeal and they be allowed to proceed with procurement process;
- ii) The Appellant be ordered to compensate the Respondent costs of this Appeal; and
- iii) Any other remedies the Appeals Authority deem just to grant

ANALYSIS BY THE APPEALS AUTHORITY

In this Appeal, 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;
- 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

According to the documents submitted to the Appeals Authority, it is clear that the Appellant was disqualified for partial quoting of BOQ and failure to adhere to the Addendum issued by the Respondent. In order to satisfy ourselves on whether the reasons given for the disqualification can be justified, the Appeals Authority deemed it proper to analyse each of the reasons given as hereunder -

To begin with the Appeals Authority considered the parties' contentions regarding failure to comply with the Addendum issued by the Respondent. It was observed that in this Tender, the Respondent issued an Addendum on 2nd February 2017 before the deadline for submission of tenders. The said Addendum was sent to all tenderers including the Appellant via their email addresses provided during pre-bid meeting. It was further observed that the said Addendum was sent to the Appellant via their email address on 2nd February 2017 at 09:17:22 EAT and for which they acknowledged receipt on the same day at 09:28:09 EAT.

During the hearing, the Appellant made frantic efforts to dispute having received the said Addendum by stating that the e-mail had been received without the attachment by one of the secretaries at Moshi office while the responsible officer was operating from Dar es Salaam. This was an attempt to dissociate and to distance himself from the acts of his own office to explain away the acknowledgement message

reading "Well received". The Appeals Authority does not agree with the Appellant on this aspect.

From the above facts the Appeals Authority is of the view that the Appellant received the Respondent's e-mail with the Addendum through his e-mail address. Therefore, the Appeals Authority is of the settled view that the Appellant was duly served with the Addendum.

Reverting to the second reason for the disqualification of the Appellant, the Appeals Authority considered the parties' arguments on the point of partially quoted BOQ. The Respondent claimed that the Appellant did not quote for Bill No. 4 Items (S) and Bill No. 6 Element No. 10 Items C, D and E while the Appellant claimed to have quoted for the same. In order to substantiate the validity of the parties' argument on this point the Appeals Authority deemed it proper to revisit the Tender Document vis-a-vis the bid submitted by the Appellant.

In the course of doing so, the Appeals Authority observed that the said Bills were indeed not quoted as observed by the Respondent. The Appeals Authority considered the Appellant's argument that they did not quote for Items C, D, and E as the same were part of Item B and deemed it proper to revisit the requirements of Bill No. 6 Element No. 10 Items B, C, D and E as quoted herein under;

B. "Allow for builders work in connection with the whole of the Electrical Installation

Cut away for; make good after electricians installation; allow for checking that switch boxes are set truly square; cutting away necessary chases or holes in block, concrete and

finishing for conduits and boxes in connection with concealed electrical system comprising the following;

- C. Lighting and fan point with associated switch points
- D. Power points
- E. meters; isolator switches, switch fuses, distribution boards and the like

From the above the Appeals Authority observes that the wording of the above quoted Bill No. 6 Element No. 10 Items B clearly indicates that Items C, D and E are part and parcel of item B as they are directly related to it and are not distinct as purported by the Respondent.

The Appeals Authority also revisited Item B of Bill No. 1-Preliminary Particulars: Drawing and other Documents and observed that, it provides guidance on the pricing and correction of BOQ. The said Clause reads;

“Pricing and correction of Bills of Quantities

Costs relating to items which are not priced will be deemed to have been included elsewhere in these Bills of Quantities” (Emphasis added)

It was further observed that, the above requirement is a replica of Clause 15.2 of the ITT which states-

“The tenderer shall fill in rates and prices for all items of then works described in the Bill of Quantities. Items for which no rate or price is entered by the tenderer will not be paid by the procuring entity when executed and shall be deemed

covered by the other rates and prices in the bills of quantities." (Emphasis supplied)

From the above quoted provisions, it is crystal clear that failure to quote for any of the items in the BOQ would not amount to automatic disqualification of tender instead, the un priced items would be deemed to have been covered in other rates. The Appeals Authority is of the firm view that, the Appellant's failure to quote for Bill No. 4 Items (S) and Bill No. 6 Element No. 10 Items C, D and E would not have caused their bid to be disqualified from this Tender process.

Assuming that the Respondent had used the requirement provided for under Item A of Bill No. 1-Preliminary Particulars: Drawing and other Documents in disqualifying the Appellant, the Appeals Authority is also of the firm view that the Respondent would have equally disqualified the proposed successful tenderer for failure to comply with the same requirement since he had partially quoted the Preliminary Bills.

For purposes of clarity the Appeals Authority reproduces the said provision as hereunder;

Pricing of Preliminary Bill

The contractor shall price out individually and in detail all items in this and any other section of the Bills of Quantities as required and under no circumstances will lump sum be allowed." (Emphasis Added)

The Appeals Authority revisited the proposed successful tenderer's tender and observed that out of twenty eight pages of the Preliminary Section which he ought to have indicated their respective prices, he had

indicated prices for only six pages which according to the above quoted Clause, renders his tender unresponsive. To the contrary, the Respondent did not disqualify this tender.

In view of the above, the Appeals Authority is of the settled view that the Respondent did not evaluate the tenders on a common basis as provided for under Section 74(1) of the Act. Therefore, the Appellant's disqualification based on this criterion was not justified.

Accordingly, the Appeals Authority's conclusion on the first issue is that, the disqualification of the Appellant was not proper in law.

2.0 Whether the award to the proposed successful tenderer is justified

In resolving this issue, the Appeals Authority took cognizance of part of its findings on the first issue above that the evaluation of the tender was in contravention with the requirement provided in the Tender Document, specifically on partial quoting and observed that since some bidders such as M/s GFC Investment Ltd, M/s Tender International Co. Ltd, M/s Acquifer Construction Co. Ltd and M/s Wulkan Engineering Ltd were also eliminated based on the above reason, it is not proper to conclude that the award of the tender to the proposed successful tenderer was proper as many bidders were unfairly disqualified based on the criterion. Accordingly, the Appeals Authority's conclusion with regard to the second issue is that the award of the tender to the proposed successful tenderer is not justified.

Last but not least, the Appeals Authority has observed that the threshold within which the Respondent intends to award this tender falls under the margin of exclusive preference for works under Regulation 30 of GN.No.446 of 2013 read together with the 7th Schedule to the Regulations. The law requires the Respondent to grant margin of preference over foreign participants. The Evaluation process was conducted in ignorance of the provisions of Section 55D of the Act and new Regulation 43 of GN No. 446 of 2013.

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

Taking cognizance of the findings made above, the Appeals Authority finds the Appeals to have merits as the Appellant was unfairly disqualified and award proposed to successful tenderer is not justified. The Appeal is upheld and the Appeals Authority orders the Respondent to re-evaluate the tenders in accordance with the law.

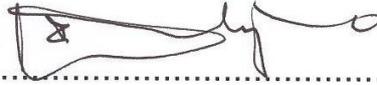
It is so ordered. Costs are allowed as follows;

- i) Appeal filling fees TZS 200,000/-
- ii) Documentation and transportation TZS 500,000/-

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 16th June, 2017.



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VINCENT K.D. LYIMO, J. (RTD)
CHAIRMAN

MEMBERS:

1. ENG. FRANCIS MARMO.....

2. MR. LOUIS ACCARO.....