

IN THE  
PUBLIC PROCUREMENT APPEALS AUTHORITY  
AT DAR ES SALAAM

APPEAL NO. 16 OF 2017-18

BETWEEN

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

AND

TANZANIA ELECTRIC SUPPLY COMPANY LTD.....RESPONDENT

DECISION

CORAM

- |    |                        |   |                 |
|----|------------------------|---|-----------------|
| 1. | Ms. Monica P. Otaru    | - | Ag. Chairperson |
| 2. | Eng. Francis T. Marmo  | - | Member          |
| 3. | Eng. Aloys J. Mwamanga | - | Member          |
| 4. | Ms. Florida Mapunda    | - | Ag. Secretary   |

SECRETARIAT

- |                     |   |               |
|---------------------|---|---------------|
| Ms. Violet Limilabo | - | Legal Officer |
|---------------------|---|---------------|

FOR THE APPELLANT

- |    |                         |   |                     |
|----|-------------------------|---|---------------------|
| 1. | Mr. Athuman A. Kibodya  | - | Managing Director   |
| 2. | Mr. Hassan A. Mwanyenza | - | Technical Director  |
| 3. | Ms. Hamida Khalifa      | - | Procurement Manager |

FOR THE RESPONDENT

- |    |                          |   |                         |
|----|--------------------------|---|-------------------------|
| 1. | Mr. Florence A. Kahatano | - | Principal Legal Officer |
| 2. | Mr. David C. Kapongo     | - | Procurement Officer     |
| 3. | Ms. Grace J. Ngahyoma    | - | Procurement Officer     |

The Appeal at hand was lodged by M/s M.A.K. Engineering Company Ltd (hereinafter referred to as “the Appellant”) against the Tanzania Electric Supply Company Ltd., commonly known by its acronym TANESCO (hereinafter referred to as “the Respondent”). The Appeal is in respect of Tender No. PA/001/2016/HQ/N/009 for the Provision of Repair, Maintenance and Services of Air Conditioners at Tanesco Umeme Park Building, Kurasini Central Store, Computer Building, Grid Control, Ubungo I Gas Plant, Ubungo II Gas Plant, TTS Masaki, TTS City Centre, UPL Offices, Kinyerezi I Gas Plant, Civil Maintenance Building, Bahari Beach Store Yard, North West Grid Projects Rented Offices, Kaunda Offices and Selected Staff Houses under Framework Contract (hereinafter referred to as “the Tender”).

After going through the records submitted by the parties to the Public Procurement Appeals Authority (hereinafter referred to as “the Appeals Authority”), the facts of the Appeal are summarized as follows:-

This is a re-advertised Tender after the initial Tender process was concluded without a successful tenderer. The re-advertisement was through the Daily News Newspaper dated 13<sup>th</sup> April 2017, whereby tenderers were invited to participate by the deadline of 28<sup>th</sup> April 2017. Five (5) firms, including the Appellant submitted tenders.

The tenders were subjected to evaluation which was conducted in two stages, namely; preliminary and detailed evaluation. At the preliminary evaluation stage, three (3) tenders including that submitted by the Appellant were disqualified for failure to comply with the requirements of

the Tender Document. The remaining tenders were subjected to detailed evaluation whereby both were found to contain arithmetical errors which were then corrected. After completion of the evaluation process the Evaluation Committee recommended award of the Tender to M/s New Refrigeration & General Electrical Services at a contract price of TZS. 46,685,520/- VAT Inclusive. On 24<sup>th</sup> August 2017 the Tender Board approved the award as recommended by the Evaluation Committee.

Meanwhile, on 15<sup>th</sup> August 2017, the Appellant inquired from the Respondent about the progress of the tender as the bid validity period was close to expiration. It is on record that although the Respondent received the said letter on 16<sup>th</sup> August 2017; they did not respond. After about a fortnight of silence, on 29<sup>th</sup> August 2017 the Appellant applied for administrative review basing on the bid validity period of 120 days, pursuant to Clause 14 of the Bid Data Sheet (BDS), which were to expire on 25<sup>th</sup> August 2017.

The Appellant claimed that the Respondent's failure to finalize the tender process within the stipulated time contravened the requirements of Regulation 191(3) of the Public Procurement Regulations GN. No. 446 of 2013, as amended, (hereinafter referred to as "GN. No. 446 of 2013").

On 7<sup>th</sup> September 2017, the Respondent issued the decision dismissing the Appellant's complaint. Consequently, the Appellant lodged this Appeal on 18<sup>th</sup> September 2017.

## SUBMISSIONS BY THE APPELLANT

The Appellant's grounds of Appeal are summarized as follows:-

1. That, the Respondent contravened Regulation 191(3) of GN. No. 446 of 2013 which requires all internal processes to be finalized within the fixed bid validity period stipulated in the Tender Document.
2. That, they were never requested for the bid validity period extension, neither were they informed that the request has been sent to some tenderers. The Appellant submitted further that the request for extension of bid validity period was to be sought from all tenderers. Thus the Respondent's act of sending the extension request to only some of the tenderers amounted to unfair treatment.
3. That, the bid validity for this tender expired on 25<sup>th</sup> August 2017. Thus, the Respondent's failure to communicate the tender results within the bid validity period contravened the law, indicating that the Respondent had bad intentions towards the Appellant.

Finally, the Appellant prayed for the following reliefs;

- i. A declaration that the Appellant was the lowest evaluated tenderer;
- ii. The Respondent to compensate the Appellant a sum TZS. 200,000/- being the Appeal filing fees; and
- iii. Any other reliefs the Appeals Authority deems fit and just to grant.

## REPLY BY THE RESPONDENT

The Respondent's reply to the grounds of Appeal is summarized as follows;

1. That, they were in compliance with the requirements of Regulation 191(3) cited by the Appellant; since extension of bid validity period was requested before it had expired. Thus, the Tender is still within the bid validity period;
2. That, even if the request for extension of the bid validity period was communicated to only two (2) tenderers, the extension is valid as the Appellant was disqualified at the preliminary evaluation stage for failure to submit Certificate of Registration as Electrical Contractor Class VI or above; and
3. That, the Appellant should prove the allegation that the Respondent had bad intention for his failure to communicate the tender results.

Finally, the Respondent prayed for dismissal of the Appeal for lack of merits with costs.

## ANALYSIS BY THE APPEALS AUTHORITY

Having gone through the documents submitted by both parties and oral submissions, the Appeals Authority is of the view that there are two (2) triable issues calling for determination. These are:-

- 1.0 Whether the Tender is still within the bid validity period; and
- 2.0 What reliefs, if any, are the parties entitled to.

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

1.0 Whether the tender is still within the bid validity period; To start with, it is not in dispute that the bid validity period for this tender was 120 days; this is stipulated in Clause 16.1 of the Instruction To Tenderers (ITT) modified by Clause 14 of the BDS.

Counting from 28<sup>th</sup> April 2017, when the Tender was opened, we are in agreement with the parties that 120 days expired on 25<sup>th</sup> August 2017. It is observed however that the period is extended up to 31<sup>st</sup> October 2017. Unfortunately, it seems that the extension was done without the Appellant's involvement, on the pretext that their tender had been disqualified by then.

Regulation 191(4) of GN. No. 446 of 2013 reads as follows:-

R. 191(4) "In exceptional circumstances, prior to the expiry of the original period of effectiveness of tenders, a procuring entity may request tenderers to extend the period for an additional specified period of time. (Emphasis added)

The above quotation clearly states that tenderers may be requested to extend the time. It does not state that this extension is to be requested from only responsive tenderers, but "tenderers" without any further qualification. Logically this applies to all tenderers who participated in the Tender process. Thus, the Respondent's act of requesting for extension of the bid validity period from only some tenderers without doubt amounted to unfair treatment, contrary to Section 4A(3)(b) of the Public Procurement

Act of 2011, as amended, (hereinafter referred to as "the Act"). The provision reads as follows;

4A(3) "Procuring entities shall, in the execution of their duties, undertake to achieve the highest standards of equity, taking into account-

(b) fairness of treatment to all parties" (Emphasis added)

We find the Respondent's act to have contravened the above quoted provision of the law.

The above notwithstanding, we considered the Respondent's justification for not involving the Appellant in the extension process. We revisited the Evaluation Report and observed that the Appellant was indeed disqualified at the preliminary evaluation stage for failure to submit Certificate of Registration as Electrical Contractor Class VI or above.

To ascertain if the Appellant's disqualification was justified on that ground, we revisited the Tender Document and observed that, the said criterion was provided under Clause 10 of the BDS which modified Clause 11.1(h) of the ITT, the said Clause reads as follows;

10 "In addition to the documents stated in ITT Clause 11, the following documents must be included with the Tender-

(i) ...N/A

...N/A....

(viii) Certified true copy of registration with CRB as both Specialist Contractor (Refrigeration) Class III or above and Electrical Contractor Class VI or above. (Emphasis added)

During the hearing, the Appellant did not dispute the omission; they rather tried to justify it claiming that for the task at hand, the ideal qualification should have been mechanical contractor which includes Heat, Ventilation and Air Conditioning which they complied with, and not electrical contractor.

It is surprising that if the Appellant believed that the qualifications were misdirected, why did they not request for clarification at the very initial stages pursuant to Regulation 13 of GN. 446 of 2013. We are of the view that, the Appellant ought to have sought for clarification as required by the law. We therefore find that the Appellant was fairly disqualified.

The above notwithstanding the Respondent's act of excluding the Appellant from the extension process although contravened the law, but did not prejudice the Appellant in any way whatsoever.

From the above findings the Appeals Authority concludes the first issue in the affirmative that the tender is still within the bid validity period.

## 2.0 What reliefs, if any, are the parties entitled to

Taking cognizance of the findings above, the Appeals Authority finds that the Appeal is partly meritorious due to the Respondent's act of excluding some tenderers from the extension in contravention of the law; even though the exclusion did not prejudice the Appellant in any way whatsoever, as his tender was fairly disqualified.

Due to the Respondent's omission as pointed above, the Appeals Authority finds the Appellant to be entitled to compensation of costs incurred as a

result. Therefore, the Respondent is ordered to proceed with the Tender process but compensate the Appellant the sum of TZS. 200,000/- being the Appeal filing fees.

It is so ordered.

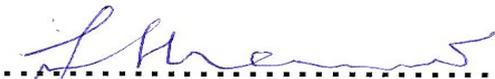
This Decision is binding on the parties and can be enforced in accordance with Section 97(8) of the Act.

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 in the absence of the Respondent today, 19<sup>th</sup> October 2017.

  
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Ms. MONICA P. OTARU  
Ag. CHAIRPERSON

MEMBERS:

1. ENG. FRANCIS T. MARMO ..... 
2. ENG. ALOYS J. MWAMANGA ..... 