

IN THE PUBLIC PROCUREMENT APPEALS AUTHORITY

APPEAL CASE NO. 6 OF 2023-24

BETWEEN

M/S CHINA ELECTRIC POWER EQUIPMENT AND

TECHNOLOGY COMPANY LTD.....APPELLANT

AND

TANZANIA ELECTRIC SUPPLY

COMPANY LIMITEDRESPONDENT

RULING

CORAM

- | | |
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| 1. Hon. Justice (rtd) Sauda Mjasiri | - Chairperson |
| 2. Eng. Stephen Makigo | - Member |
| 3. Mr. Rhoben Nkori | - Member |
| 4. Mr. James Sando | - Secretary |

SECRETARIAT

- | | |
|------------------------|------------------------------|
| 1. Ms. Florida Mapunda | - Deputy Executive Secretary |
| 2. Ms. Violet Limilabo | - Senior Legal Officer |

FOR THE APPELLANT

- | | |
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| 1. Mr. Daudi Maneno | - Advocate, DSG Consult Law Chamber |
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2. Mr. Gamaliel Kisanga - Accountant
3. Mr. Zhang Xiang - Chief Representative
4. Mr. Jin Xi - Representative

FOR THE RESPONDENT

1. Mr. Elias Mkumbo - State Attorney
2. Mr. Elias Makunga - Project Coordinator
3. Mr. Abdallah Awadhi - Principal Procurement Officer
4. Mr. Fredy Mushi - Accountant

This Appeal was lodged by **M/S China Electric Power Equipment and Technology Company Ltd** (hereinafter referred to as "**the Appellant**") against the Tanzania Electric Supply Company Limited, commonly known by its acronym as "**TANESCO**" (hereinafter referred to as "**the Respondent**"). The Appeal is in respect of Tender No. PA/001/2020-2021/HQ/W/46 for Engineering Design, Manufacture, Supply, Construction, Installation, Testing and Commissioning of the proposed 400/330Kv Tunduma Auto Transformation Substation and a 4KM of 330Kv Double Circuit Transmission Line from Tunduma to Zambian Border – Lot 4 (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 background of this Appeal may be summarized as follows:-

The Tender was conducted through the International Competitive Bidding Procedures as specified in the World Bank's Procurement Regulations for



IPF Borrowers, Fourth Edition, issued in November 2020 (hereinafter referred to as the "**World Bank Procurement Regulations**").

The record indicates that the Government of the United Republic of Tanzania entered into an agreement through the Ministry of Finance and Planning as a borrower and Agence Francaise De Development through the financiers of the World Bank, French and European Union. Tanesco in this Tender process issued the Tender Document as an employer responsible for administering the project.

On 16th September 2022, the Respondent invited ten pre-qualified tenderers which participated in this Tender. The deadline for submission of tenders was on 14th December 2022 and six tenderers responded to the invitation including the Appellant.

The received tenders were then subjected to evaluation that was conducted in three stages namely; preliminary, detailed and financial evaluation. After completion of the evaluation process, the Evaluation Committee recommended an award to M/S TBEA Company Limited subject to negotiations. The recommended contract price was Tanzania Shillings Ninety Seven Billion Eight Hundred Fifty Two Million Four Hundred Thirty Three Thousand One Hundred Forty Three Cents Fifty Two only (TZS 97,852,433,143.52) VAT exclusive.

The Tender Board at its meeting held on 15th April 2023 approved the Evaluation Committee's recommendations subject to No Objection from the financiers. On 15th April 2023 the Respondent submitted a request for No Objection to the French Development Agency. No objection was granted

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through a letter dated 28th April 2023. Negotiations successfully took place from 19th to 24th May 2023.

On 8th June 2023, the Respondent issued the Notice of Intention to award to all tenderers. The Notice was received by the Appellant through email on 15th June 2023. It indicated that the Respondent intended to award the Tender to M/S TBEA Company Limited at a negotiated contract price of Tanzania Shillings One Hundred Eleven Billion Five Hundred Forty Nine Million Three Hundred fifty Eighty Thousand Nine Hundred and Three Cents Fifty Two (TZS 111,549,358,903.52). The Notice also informed the Appellant that its tender was not successful due to a negative working capital as well as a negative cash flow. Therefore, it would not be able to execute the intended project.

Dissatisfied with the reasons given for its disqualification, on 20th June 2023 the Appellant filed a procurement related complaint to the Respondent. On 12th July 2023 the Respondent issued its decision which rejected the Appellant's application for administrative review. Aggrieved with the Respondent's decision, the Appellant lodged this Appeal on 17th July 2023.

When the matter was called on for hearing and at the time of framing up the issues, the Appeals Authority informed the parties that it observed from the record of Appeal that there is a point of law to be determined. This was about the jurisdiction of the Appeals Authority on determination of the substantive Appeal. The Appeals Authority observed that the Tender was



conducted under the World Bank's Procurement Regulations. Given the circumstances, the following issues were framed:-

- 1.0 Whether the Appeals Authority has jurisdiction to entertain the Appeal;**
- 2.0 Whether the Appellant's disqualification was justified; and**
- 3.0 What reliefs, if any, are the parties entitled to?**

After framing the issues, the Appeals Authority required the parties to address the first issue which relates to the point of law raised *suo motu* by the Appeals Authority before embarking on the substantive Appeal.

Mr. Daudi Maneno, learned advocate for the Appellant took the floor first. He submitted that the Appeals Authority has been mandated by Section 88 of the Public Procurement Act No. 7 of 2011 as amended (hereinafter referred to as "**the Act**") to hear and determine complaints arising out of public procurement processes. The Tender under Appeal is a public tender and therefore governed by the Act and its Regulations. The learned counsel contended that according to Section 96 of the Act, disputes arising out of the public procurement processes are to be submitted to the procuring entity. If a tenderer submitting a complaint would be dissatisfied with the procuring entity's decision, it is required to submit its Appeal to this Appeals Authority pursuant to Section 97 of the Act.

The learned counsel submitted that in the disputed Tender the Appellant submitted its complaint to the Respondent after being dissatisfied with the Notice of Intention to award. The Respondent issued its decision and the



Appellant was dissatisfied with the same and lodged this Appeal. Therefore, the Appeal is properly before the Appeals Authority.

Members of the Appeals Authority asked the learned counsel to clarify the law governing the Tender process. The learned counsel stated that the Tender was governed by the World Bank's Procurement Regulations as it was indicated in the Tender Document. However, the Respondent indicated that under Clause 48 of the Bid Data Sheet (BDS) a complaint arising out of this Tender process was to be submitted to the Respondent's accounting officer. The Tender Document is silent on the next stage of submitting an Appeal if a tenderer is dissatisfied with the Respondent's decision. Therefore, the Appellant opted to submit its Appeal to this Appeals Authority as the dispute arose out of the public procurement process.

The learned counsel submitted that complaints arising under the tender process which had been conducted under the World Bank's Procurement Regulations, are to be submitted to the borrower and then to the World Bank's country office. However, the Appellant could not follow this procedure since the Respondent has provided in the Tender Document that complaints are to be filed to the Respondent's accounting officer and no further steps for review were provided.

The learned counsel contended that the Tender Document provides guidance for submission of complaints which differs with the World Bank's Procurement Regulations. Due to this difference, the Appellant had no other option than filing its Appeal to this Appeals Authority. The learned



counsel stated that because of this confusion as to where the Appeal should be filed, the Appeals Authority should provide guidance on the appropriate avenue for filing this Appeal.

On his part, Mr. Elias Mkumbo, learned State Attorney from the Respondent's office submitted that, as correctly pointed out by the Appeals Authority, this Tender was conducted under the World Bank's Procurement Regulations. He stated that according to the said Regulations complaints arising out of this Tender process were to be submitted to the Respondent and subsequently to the World Bank's country office. Thus, the Appeals Authority lacks jurisdiction to entertain this Appeal. Therefore, the Appeal should be dismissed.

ANALYSIS BY THE APPEALS AUTHORITY ON THE PO

1.0 Whether the Appeals Authority has jurisdiction to entertain the Appeal

In resolving this issue, the Appeals Authority revisited the record of Appeal and observed that Item 3 of the Request for Bids talks about the governing law of this Tender. It indicates that the Tender was to be conducted through International Competitive Procurement procedures as specified in the World Bank's Procurement Regulations for IPF Borrowers. Item 3 of the Request for Bids reads as follows: -

- "3. ***Bidding will be conducted through the International Competitive Procurement using a Request for Bids (RFB) as specified in the World Bank Procurement Regulations for IPF Borrowers, Fourth Edition,***



November 2020 (Procurement Regulations) and is open to all pre-qualified eligible tenderers". (Emphasis supplied)

It was further observed that Clause 45 of the ITB read together with Clause 48.1 of the Tender Data Sheet (BDS) provide guidance on the procedures to be followed in filing a complaint. Clause 45 of the ITB and Clause 48 of the BDS read as follows: -

"45.1 On receipt of the Employer's Notification of Intention to award referred to in ITB 42.1, an unsuccessful Bidder has three (3) Business Days to make a written request to the Employer for a debriefing. The Employer shall provide a debriefing to all unsuccessful Bidders whose request is received within this deadline.

45.2 Where a request for debriefing is received within the deadline, the Employer shall provide a debriefing within five (5) Business Days, unless the Employer decides, for justifiable reasons, to provide the debriefing outside this timeframe. In that case, the Standstill period shall automatically be extended until five (5) Business Days after such debriefing is provided. If more than one debriefing is so delayed, the standstill period shall not end earlier than five (5) Business Days after the last debriefing takes place. The Employer shall promptly inform, by the quickest means available, all Bidders of the extended standstill period.



45.3 Where a request for debriefing is received by the Employer later than the three (3) Business Day deadline, the Employer should provide the debriefing as soon as practicable, and normally no later than fifteen (15) Business Days from the date of publication of Public Notice of Award of contract. Request for debriefing received outside the three (3) day deadline shall not lead to extension of the standstill period.

45.4 Debriefing of unsuccessful Bidders may be done in writing or verbally. The Bidder shall bear their own costs of attending such a debriefing meeting.

BDS 48.1 The procedures for making Procurement-related Complaint are detailed in the Procurement Regulations for IPF Borrowers (Annex III). *If a bidder wishes to make a Procurement - related Complaint, the Bidder should submit its complaint following these procedures, in writing (by the quickest means available, that is either by email or fax).."*

(Emphasis supplied)

The Appeals Authority further revisited the World Bank Procurement Regulations. It observed that the World Bank Procurement Regulations provide guidance on among other things the procedures for resolving disputes arising out of procurement processes. Clauses 5.81 to 5.92 of the World Bank's Procurement Regulations provide clearly the time limit within which the tenderer should request for debriefing and the time the procuring entity to issue its decision thereof. Clause 5.96 of the same



Regulations guides on the debriefing with the World Bank if a tenderer would be dissatisfied with the decision of the procuring entity. Clauses 5.81, 5.82 and 5.96 of the World Bank Procurement Regulations are reproduced as follows:-

"Debriefing by the Borrower

*5.81 On receipt of the Borrower's Notification of Intention to Award referred to under Paragraphs 5.72 to 5.74 (Goods, Works and Non-consulting Services), or Paragraphs 5.75 to 5.77 (Consulting Services), **an unsuccessful Bidder/Proposer/Consultant has three (3) Business Days to make a written request to the Borrower for a debriefing.** The Borrower shall provide a debriefing to all unsuccessful Bidders/Proposers/Consultants whose request is received within this deadline".*

*"5.82 Where a request for debriefing is received within the deadline, **the Borrower is required to provide a debriefing within five (5) Business Days,** unless the borrower decides for justifiable reasons, to provide debriefing outside this time..."*

"Debriefing by the Bank

5.96 If, after publication of the Contract Award Notice, a Bidder/Proposer/Consultant who has not received a satisfactory explanation from the Borrower as to why its Bid/Proposal was not successful, may request a meeting with the Bank. Such request should be addressed to the Accredited Practice Manager for the



Borrower's country, who will arrange a meeting at the appropriate level and with relevant staff. The purpose of such meeting is not to discuss the Bids/Proposals of competitors or, in the case of prior review contracts, the Bank's position that has been conveyed to the Borrower".

(Emphasis supplied)

The Appeals Authority further reviewed Annex III of the World Bank's Procurement Regulations. It observed that the said Annex III provides general guidance on the procedures to be followed by a tenderer and the procuring entity with respect to procurement related complaints.

In view of the above quoted provisions, the Appeals Authority observed that for the procurement process conducted under the World Bank's Procurement Regulations, complaints are to be resolved in two stages. The first stage comes into play when a tenderer is dissatisfied with the Notice of Intention to award. At this stage, a tenderer is required to file a complaint to the respective procuring entity within three business days. The procuring entity would be required to issue its decision within five business days. A second stage comes into a play if a tenderer would still be dissatisfied with the procuring entity's decision. At this stage, a tenderer would be required to seek a debriefing with the World Bank's Accredited Manager of the borrower's country.

In this Appeal the Notice of Intention to award was issued through a letter dated 8th June 2023. The Appellant received the letter through email on 15th June 2023. Dissatisfied with the decision, the Appellant filed a



complaint to the Respondent on 20th June 2023. On 12th July 2023 the Respondent issued its decision. Aggrieved further, on 17th July 2023, the Appellant filed this Appeal.

As per the guidance provided in the World Bank's Procurement Regulations on procurement related complaints, the Appellant being dissatisfied with the Respondent's decision ought to have sought a debriefing with the World Bank's country Accredited Manager. To the contrary, the Appellant filed an Appeal before this Appeals Authority.

In relation to the Appellant's argument that the dispute resolution procedures in the Tender Document differed with the procedures under the World Bank's Procurement Regulations, the Appeals Authority observed that there was no difference as alleged by the Appellant. Clause 48.1 of the BDS states clearly that a procurement related complaint is to be handled as per the World Bank's Procurement Regulations (Annex III). In addition, Clause 45 of the ITB provides guidance on the handling of a procurement complaint at the Respondent's office.

With regard to the Appellant's contention that the Tender Document did not indicate a second stage for submission of a complaint, the Appeals Authority observed that Clause 5.96 of the World Bank's Procurement Regulations, states clearly that if a tenderer is not satisfied with the procuring entity's decision, a complaint should be filed with the World Bank's country office. Thus, the procedures for handling procurement related complaints are covered under the World Bank's Procurement



Regulations. Therefore, the Public Procurement Act and its Regulations are not applicable under the circumstances.

Given the circumstances, the Appeals Authority finds the Appeal to be improperly before it as it has no jurisdiction to determine the same. In view of our findings hereinabove, the Appeals Authority would not delve into the remaining issues. The Appeals Authority hereby dismiss the Appeal for want of jurisdiction.

It is so ordered.

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

The Right of Judicial Review is as provided under Section 101 of the Act.

This Ruling is delivered in the presence of the Appellant and in the absence of the Respondent though duly notified this 18th day of August 2023.

HON. JUSTICE (rtd) SAUDA MJASIRI



.....
CHAIRPERSON

MEMBERS: -

1. ENG. STEPHEN MAKIGO.....

2. MR. RHOBEN NKORI.....