

**IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY
AT DAR ES SALAAM
APPEAL CASE NO. 04 OF 2019-2020**

BETWEEN

M/S WASION GROUP (TANZANIA) LIMITED.....APPELLANT

AND

TANZANIA ELECTRIC SUPPLY COMPANY LIMITED.....RESPONDENT

RULING

CORAM

1. Hon. Justice (rtd) Souda Mjasiri - Chairperson
2. Adv. Rosan Mbwambo - Member
3. CPA. Fredrick Rumanyika - Member
4. Ms. Florida Mapunda - Ag.Secretary

SECRETARIAT

Mr. Hamisi O. Tika - Legal Officer

FOR THE APPELLANT

1. Ms. Lucy Kiangi - Advocate, KKB Attorneys
2. Wang Yue (Carol Wang) - Deputy Managing Director

FOR THE RESPONDENT

1. Mr. Alpha Koka - Ass. Procurement Officer
2. Mr. Florence Kahatano - Principal Legal Officer
3. Mr. Fratern Michael - Ag. Zonal Procurement Specialist
4. Mr. Joel Kuandika - Zonal Financial Analyst



The Appeal at hand was lodged by M/s Wasion Group (Tanzania) Limited (hereinafter referred to as "**the Appellant**") against the 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/001/2018-19/CZN/G/45A for the Supply of Meters for Central Zone under Framework Contract, Lots 1, 2, and 3 for Dodoma, Morogoro and Singida for single and three phase meters (hereinafter referred to as "**the Tender**").

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:

On 26th March 2019, the Appellant lodged Appeal Case No. 38 of 2018-2019 before this Appeals Authority challenging its disqualification. It argued that the Respondent's basis for disqualifying its bid, namely; "*its factory was not ready for production*" was not correct since it had complied with the requirement as set in the Tender Document.

Upon hearing of the said Appeal, the Appeals Authority upheld it and declared that the Appellant's disqualification was not justified. It therefore ordered the Respondent to conduct afresh post qualification to the Appellant's factory using another independent team in order to determine whether the factory meets the criteria required under the Tender. This Appeal emanates from the post qualification ordered.

It is on record of the Post Qualification proceedings that on 28th May 2019, the Respondent's Accounting Officer in compliance with the order given, appointed four (4) members of staff to conduct post qualification to the



Appellant's factory. These were Engineer Francis Maze, Francis Kahatano, Mussa Ngozingozi and Jane Lipendé.

The Team was also given seven (7) Terms of Reference being the focal points for Post Qualification. These were as follows:-

- i. Capacity of production of the Appellant's factory;
- ii. Equipment and manufacturing facilities;
- iii. Financial capability and performance on similar contracts;
- iv. Current commitments;
- v. Legal capacity to make binding decisions on its rights, duties and obligations; and
- vi. Litigation history.

On 10th June 2019, the Team visited the Appellant's factory. After the visit and subsequent deliberations, it came up with the findings that at the time of the Tender Opening Ceremony held on 5th December 2018 the Appellant lacked important pre-requisite qualification to enable it to be awarded the contract. The Team observed amongst other things, that the Appellant depended on Wasion Group of China (the parent company), for its financial support, a joint venture arrangement which was not stated in the Appellant's bid during tendering.

On 18th and 19th July 2019, the Report was tabled before the Tender Board for deliberations. It approved the disqualification of the Appellant and ordered re-issuance of the Notice of Intention to award the Tender, with the proposal of awarding it to the previously proposed bidder M/s Inhemeter (Tanzania) Limited for both single and three phase meters for all three Lots.



On 29th July 2019, the Respondent informed both tenderers, its intention to award the Tender to M/s Inhemeter (T) Limited for Lots 1, 2 and 3 at a unit price of TZS. 134,249.54 for Single Phase Meters and TZS. 452,350.40 for Three Phase Meters. The letter also informed the Appellant that its tender was unsuccessful due to the following major reasons:-

- i. Its factory was commissioned in January 2019 while the Tender was opened on 12th December 2018;
- ii. That it had no local personnel with appropriate academic and technical qualifications; and
- iii. That it lacked autonomy on financing the contract since it relies on the financial support of Wasion Group of China.

Dissatisfied, on 7th August 2019, the Appellant submitted its application for administrative review to the Respondent's Accounting Officer. On 14th August 2019, the Respondent issued its decision which rejected the application and re-iterated its position to award the tender to M/s Inhemeter (T) Limited. Aggrieved further, on 27th August 2019, the Appellant filed this Appeal.

SUBMISSIONS BY THE APPELLANT

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

1. That, it is a local manufacturer incorporated and licensed in Mainland Tanzania since June 2018. It has a capability of production that's why the Respondent verified it in February 2019. However, in recent tenders by the Respondent the Appellant has been declared ineligible based on various evaluation reports of the Tenders. In the decision by the Appeals Authority dated 2nd May 2019, the Respondent was ordered to conduct a

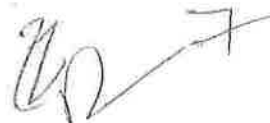


new post qualification regarding the factory since there was no conclusive report from the Respondent regarding the said factory.

2. That, on 29th July 2019 it received the Respondent's Notice of Intention to award the Tender to M/s Inhemeter (T) Limited, this time raising new reasons for not awarding the Tender to it.
3. That, the Respondent's claims that it lacks personnel is not true since it has employed labourers based on the criteria set on the standards and qualifications of the employees to be hired. The Appellant has employed foreign experts from China and one local person who is an assistant Manager to the factory. Therefore, the factory is managed in an acceptable manner.
4. That, it has financial capacity of financing the contract. The factory is financed by its shareholders the main being Wasion Group Limited of China as supported by various documents submitted during tendering process. Thus, the Respondent's claim on this matter is baseless.

Finally, the Appellant prayed for the following orders:-

- i. A declaration that that there was unfairness in the process of re-awarding the Tender since the Respondent has kept on raising new reasons for disqualifying its bid and award it to M/s Inhemeter (T) Limited;
- ii. The Appeals Authority should award this Tender to it since the Respondent proved that there was no proper and justifiable reasons to disqualify it, that's why it keeps on raising new reasons;



- iii. Compensation to the tune of TZS. 6,000,000,000/-;
- iv. Interest at the commercial rate of 22% from March 2019 until the date of the award;
- v. Legal fees to the tune of TZS 10,000,000/-;
- vi. Filing fees and other costs amounting to TZS. 500,000/-; and
- vii. Any other reliefs the Appeals Authority may deem fit and fair to grant.

REPLY BY THE RESPONDENT

The Respondent's reply to the grounds of Appeal may be summarized as follows: -

1. That, it is taking note that the Appellant is a local manufacturer incorporated and licensed in Mainland Tanzania since June 2018.
2. That, the Appellant's grounds of Appeal are disputed since it had conducted the due diligence to the Appellant's factory and observed that the Appellant did not have the required qualifications by the time it submitted its tender. Its factory was yet to be commissioned at the time of bidding. It was therefore not eligible to bid for this tender.
3. That, the Appellant failed to demonstrate by submitting evidence that its mother company has allowed it to use its resources such as financial and labour for this Tender. The Respondent expected that the Appellant would have attached a Resolution from Wasion Group China to support it. The Financial capacity shown in the bid is of Wasion Group of China and not Wasion Group (T) Limited



Finally, the Respondent prayed for the dismissal of the Appeal with Costs.

At the hearing of this Appeal, during the framing up of issues, the Respondent's Counsel sought guidance of the Appeals Authority in relation to the legal status of the Tender after it had observed that the bid validity period of the Tender had expired since 2nd September 2019, and that it was not extended as the law requires.

Based on the Respondent's submission, the Appeals Authority deemed it prudent to determine the legality of the Appeal before it. Therefore it invited both parties to address it as to "*whether or not there was a valid tender for consideration*" before hearing the appeal on merit.

SUBMISSIONS BY THE RESPONDENT

Submitting on the matter, learned counsel for the Respondent argued that the Bid Validity period for the Tender expired on 2nd September 2019. Since there was no extension done, then, there is no valid Tender for consideration and no valid Appeal before this Appeals Authority.

SUBMISSIONS BY THE APPELLANT

The learned counsel for the Appellant conceded that the bid validity period for this Tender had already expired and that it had not received any letter from the Respondent requesting for extension of the bid validity period. On that basis she supported the argument by the Respondent's counsel that there is no valid Tender in place. She argued further that since there is no valid tender in existence, this Appeal lacks any leg to stand on. She rested her submission by leaving the Appeals Authority to determine the matter.



ANALYSIS BY THE APPEALS AUTHORITY

Having heard the parties on the matter, the main issue for consideration and decision is "*whether or not there is a valid tender for consideration*".

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

According to Clause 19 of the Tender Data Sheet (TDS), the bid validity period for the Tender was one hundred and twenty days (120) from the date of tender opening, that is, 5th December 2018. Counting from the tender opening date, the bid validity period expired on 4th April 2019. The record of Appeal indicates that the Respondent had requested for extension of the bid validity period from the tenderers up to 2nd September 2019. However, no further extension was requested.

The Appeals Authority revisited Section 71 of the Act and Regulations 191(3), (4) and 232(2) of GN.No.446 of 2013 which provides guidance on the requirement of the bid validity period. For purposes of clarity the said provisions are reproduced herein below:-

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”.*

Regulation 232(2) “**The award shall be made within the period of tender validity** to the tenderer whose tender has been determined to be the lowest or the highest evaluated, as the case may be, and meets the required financial and managerial capability, legal capacity, experience and resource to carry out the contract effectively”.

[Emphasis Added]

From the above quoted provisions, it is crystal clear that a procuring entity is required to finalize its procurement processes including award of Tenders within the specified bid validity period. It should be noted further 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 and the Respondent is required to request the said extension from tenderers. In this Tender, extension of time was requested from the bidders up to 2nd September 2019. The Appeals Authority is of the considered view that the Respondent ought to have requested another extension prior to the expiry of the bid validity period on 2nd September 2019. To the contrary, it did not do so. It is our view that since the Tender had expired, all subsequent orders which would follow will be null and void.

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In view of what is stated herein above, the Appeals Authority is of the firm 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. 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 Appellant and the Respondent this 20th September 2019.



HON. JUSTICE (rtd) SAUDA MJASIRI

CHAIRPERSON

MEMBERS:

1. ADV.ROSAN MBWAMBO.....



2. CPA. FREDRICK RUMANYIKA.....

