

**IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY
AT DAR ES SALAAM
APPEAL CASE NO. 05 OF 2019-20
BETWEEN
M/S SHANGHAI EASTIMAGE EQUIPMENT
COMPANY LTD.....APPELLANT
AND
TANZANIA AIRPORTS AUTHORITY.....RESPONDENT**

DECISION

CORAM

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|-------------------------------------|----------------|
| 1. Hon. Justice (rtd) Souda Mjasiri | - Chairperson |
| 2. CPA. Fredrick Rumanyika | - Member |
| 3. Dr. Leonada Mwangike | - Member |
| 4. Ms. Florida Mapunda | - Ag.Secretary |

SECRETARIAT

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

FOR THE APPELLANT

- | | |
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| 1. Mr. Sigsbert Ngemera | - Advocate – MNL Law Chambers |
| 2. Mr. Gustav Hokororo | -Managing Director- Westside Power and Energy Co. Ltd |



3. Mr. Sultan Said - Sales Officer-Westside Power and Energy Co. Ltd
4. Mr. Michael Oswald - Legal Officer- MNL Law Chambers
5. Ms. Lilian Kweka - Legal Officer- MNL Law Chambers
6. Ms. Monica Midelo - Legal Officer- MNL Law Chambers

FOR THE RESPONDENT

1. Mr. Elias Mwashuuya - Legal Secretary
2. Mr. Josephat Msafiri - Procurement and Supplies Officer

This Appeal was lodged by M/S Shanghai Eastimage Equipment Company LTD (hereinafter referred to as "**the Appellant**") against Tanzania Airports Authority commonly known by its acronym, TAA (hereinafter referred to as "**the Respondent**"). The Appeal is in respect of Tender No. AE-027/2018-2019/HQ/G/03 for Supply, Installation, Configuration, Testing and Commissioning of X-rays Machines and Walk through Metal Detectors for Iringa, Songea, Kigoma, Musoma, Lindi and Shinyanga Airports (hereinafter referred to as "**the Tender**").

The Tender was conducted through National Bidding Procedures specified in the Public Procurement Act of 2011 as amended (hereinafter referred to as "**the Act**") and the Public Procurement Regulations, Government Notices No. 446 of 2013 and No.333 of 2016 (hereinafter referred to as "**the Regulations**").

After going through the record of Appeal submitted to the Public Procurement Appeals Authority (hereinafter referred to as "**the Appeals Authority**"), the Appeal may be summarized as follows:-

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On 5th July 2019, the Respondent invited eligible tenderers to submit tenders; the deadline for submission was set for 16th July 2019; whereby ten tenders were received.

Tenders were then subjected to evaluation which was conducted into four stages namely; preliminary, detailed stage one, detailed stage two and price comparison.

During preliminary evaluation one tender was disqualified for failure to comply with the requirement of the Tender Document. The remaining nine tenders were subjected to detailed evaluation stage one. In that process two tenders including that of the Appellant were disqualified for being non-responsive. Specifically, the Appellant was disqualified for the reason that the attached Curriculum Vitae (CVs) and Academic Certificates differed. The names on the CVs did not match with the names on Academic Certificates.

The remaining seven tenders were subjected to detailed evaluation stage two. Five tenders were disqualified whereas two tenders were subjected to arithmetic correction of errors and price comparison. Finally, the Evaluation Committee recommended award of the Tender to M/s Secure Seven Systems Ltd at a contract price of TZS. 1,893,334,279.68 VAT inclusive. The Tender Board held a meeting on 7th August 2019 and approved the award as recommended.

On 19th August 2019, the Respondent issued the Notice of Intention to award to all bidders who participated in the Tender. The Notice informed the Appellant that, the Respondent intended to award the Tender to M/s

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Secure Seven Systems Ltd. The Notice also informed the Appellant that its tender was disqualified for failure to submit Anti- Bribery statement in either of the two provided formats.

Dissatisfied, on 23rd August, 2019 the Appellant applied for administrative review to the Respondent challenging the reason for its disqualification. On 29th August 2019, the Respondent issued the decision by dismissing the complaint on the ground that the Appellant failed to comply with the format of anti-bribery policy and that the attached CVs differed with academic certificates. Aggrieved further, on 9th September 2019, the Appellant lodged this Appeal.

SUBMISSIONS BY THE APPELLANT

The Appellant's grounds of Appeal as well as oral submissions during the hearing may be summarised as follows:

- i. That, the gist of the dispute arose from the Notice of Intention to award the Tender issued by the Respondent on 19th August 2019. The Notice informed the Appellant that, it had been disqualified for failure to submit anti-bribery statement in either of the formats provided in the Tender Document. The Appellant submitted that the anti-bribery policy was attached in its tender in two formats. The first format was as provided by the Respondent and the second was the Appellant's own standard.
- ii. That, even the Respondent admitted in its decision dated 29th August 2019 that the anti-bribery statement was attached in two formats.

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- iii. That, the issue relating to the CVs was an afterthought as the same was not raised in the Notice of Intention to award issued to the Appellant. The Respondent brought the issue of CVs when issuing its decision in relation to the application for administrative review to the Appellant. Further to that, a person who could clarify on the compatibility of CVs and academic certificates is in China so an agent could not argue on it.

Finally, the Appellant prayed for the following orders:-

- i. The tender be awarded to the Appellant as it complied with the requirements of the Tender Document; and
- ii. The Respondent to compensate the Appellant in respect of Appeal filing fee, legal fee and other costs relating to tender process.

REPLY BY THE RESPONDENT

The Respondent's reply to the grounds of Appeal as well as oral submissions during the hearing may be summarised as follows:-

- i. That, there was an error on the face of record in respect of the reason provided in the Notice of Intention to award issued to the Appellant. However, after receiving the Appellant's complaints, the Respondent investigated the matter and it was revealed that the Appellant had submitted two anti-bribery policies instead of either of the two formats provided in the Tender Document.
- ii. That, the names of key personnel appearing in the CVs differed with those contained in the academic certificates attached to the

Appellant's tender. Furthermore, the said academic certificates were not certified contrary to the requirements of the Tender Document. The Respondent's decision dated 29th August 2019 indicated all the grounds that disqualified the Appellant from the Tender process.

Finally the Respondent prayed for the following orders:-

- i. The Appeal be dismissed with costs;
- ii. The outcome of the evaluation and decision by the Respondent in respect of the Tender in issue be maintained;
- iii. The Respondent to proceed with award process; and
- iv. Any other order the Appeals Authority may deem fit to grant.

ANALYSIS BY THE APPEALS AUTHORITY

The Appeals Authority having gone through the record of Appeal, tender proceedings including various documents and the oral submissions by the parties, is of the view that the Appeal is centred on two main issues calling for determination. These are:-

- 1. Whether the disqualification of the Appellant was justified; and**
- 2. What reliefs, if any, are the parties entitled to.**

Having identified the issues in dispute, the Appeals Authority proceeded to resolve them as hereunder:-

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1. Whether the disqualification of the Appellant was justified

In resolving this issue, the Appeals Authority revisited the Evaluation Report and observed that, the Appellant's tender was disqualified at the detailed evaluation stage 1 for attaching CVs and Academic Certificates which differed. The names on the CVs did not match with the names on the Academic Certificates. The Appeals Authority observed further that the Notice of Intention to award issued to the Appellant indicated that the Appellant's bid was disqualified for failure to submit anti-bribery statement in either of the formats provided in the Tender Document.

From the above facts, it is observed that the reason which led to disqualification of the Appellant as contained in the Notice of Intention to Award was different from the one stated in the Evaluation Report, deliberated and approved by the Tender Board. That is to say; the names contained in the CVs differed significantly with those contained in the Academic Certificates.

According to Regulation 231(4)(c) of the Regulations the Respondent ought to have informed the Appellant the reason for its disqualification as stated in the Evaluation Report which was approved by the Tender Board. To the contrary, the Respondent stated a different reason, to wit, that the anti- Bribery policy was not submitted in either of the two provided formats in the Tender Document.

With regard to anti-bribery policy the Appeals Authority revisited Section X of the Tender Document that deal with Integrity and observed that,

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tenderers were required to submit an undertaking on anti-bribery policy in either of the two formats that is; format 1 or 2 provided in the Tender Document. Bidders were also required to attach copies of their anti- bribery policy in compliance with the program. We revisited the Appellant's tender and observed that the anti-bribery policy attached was in format 1 and the Appellant also included its own anti-bribery policy. The only discrepancy noted by the Appeals Authority is that the Appellant instead of presenting format 1 as provided, it printed the same on its headed paper. However this could not be a basis for its disqualification as this was not provided for in the Evaluation Report.

The Appeals Authority observed that, the Respondent's decision dated 29th August 2019, informed the Appellant that its bid was also disqualified because the CVs provided differed with the names contained in the Academic Certificates. Since this was the only reason indicated in the Evaluation Report and approved by the Tender Board leading to the disqualification of the Appellant, the Appeals Authority deemed it necessary to examine whether or not the disqualification of the Appellant was proper.

In ascertaining the Appellant's disqualification in this regard the Appeals Authority revisited Clause 30 of the BDS which provides guidance in relation to qualification of key personnel. The Clause reads:-

BDS.30. "Criteria for Tender evaluation

B. Detailed Evaluation I

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- *Qualification and Experience of Key personel in handling Such Technical Sales/ training of Users (At least 3 Qualified Technical Staff with a minimum qualifications of Undergraduate degree or equivalent and 10 years practical technical training on the products (X Ray Machines) Maintenance (**Signed CV's and Certified Photocopies of Certificates to be submitted**))."*

(Emphasis Added).

Based on the above the Appeals Authority revisited the tender by the Appellant and observed that it attached CV's of Key Personnel with names of Wang Cheng, Aaron Zhou, Du Shuhua and Wu Yutao. It also attached copies of Academic Certificates with names of Shilei Liang, Yuyue Zou, Ming Mu and Yunpeng Zou. The Appeals Authority is of the settled view that the names appearing in the CVs differed significantly with those in the Academic Certificates.

Regulations 203(1) of the Regulations provide as follows:-

Reg. 203(1) "The Tender evaluation shall be consistent with the terms and conditions prescribed in the tender Document and such evaluation shall be carried out using the criteria explicitly stated in the tender documents."

Therefore, the Appeals Authority finds that the Appellant's disqualification on such criterion is justified taking into consideration that the anomaly regarding CVs and Certificates appeared in the Evaluation Report that was approved by the Tender Board on 7th August 2019. The Respondent

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should have indicated this anomaly in the Notification made to the Appellant on 19th August, 2019.

The Appeals Authority entirely disagrees with the Appellant's argument that, the issue relating to CVs was an afterthought by the Respondent. The Appellant was aware of the said issue from the date it received the Respondent's decision on its Administrative Review through a letter dated 29th August 2019 even though this was not contained in the Notice of Intention issued to the Appellant. The Appellant had adequate time to look into the issue relating to qualification and the CVs presented. Therefore the Appellant had liberty to raise it before the Appeals Authority.

From the above findings, the Appeals Authority concludes the first issue in the affirmative that, the Appellant's disqualification is justified.

2. What reliefs, if any, are the parties entitled to.

Given our findings on the first issue that the Appellant's disqualification is justified, we hereby dismiss the Appeal and make no order as to costs.

Order accordingly.

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 parties this 4th day of October 2019.

HON. JUSTICE (RTD) SAUDA MJASIRI

Sauda Mjasiri
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CHAIRPERSON

MEMBERS:

1. CPA. FREDRICK RUMANYIKA..... *FRW*

2. DR. LEONADA MWAGIKE..... *LM*