

**IN THE  
PUBLIC PROCUREMENT APPEALS AUTHORITY  
AT DAR ES SALAAM**

**APPEAL CASE NO. 06 OF 2019-2020**

**BETWEEN**

**M/S ENSOL (T) LIMITED.....APPELLANT**

**AND**

**MPANDA MUNICIPAL COUNCIL .....RESPONDENT**

**DECISION**

**CORAM**

- |                                     |                |
|-------------------------------------|----------------|
| 1. Hon. Justice (rtd) Sauda Mjasiri | - Chairperson  |
| 2. Dr. Leonada Mwangike             | - Member       |
| 3. Adv. Rosan Mbwambo               | - Member       |
| 4. Ms. Florida Mapunda              | - Ag.Secretary |

**SECRETARIAT**

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

**FOR THE APPELLANT**

- |                       |                                   |
|-----------------------|-----------------------------------|
| 1. Mr. Hamis Mkate    | - Managing Director               |
| 2. Mr. Lauden Mwamelo | - Director                        |
| 3. Ms. Magdalena Ally | - Logistics and Operation Manager |



## **FOR THE RESPONDENT**

1. Mr. Deogratius Nchimbi - Municipal Legal Officer
2. Ms. Hobokela Mwakagamba - Ag. Head Procurement  
Management Unit

This Appeal was lodged by M/s Ensol (T) Limited (hereinafter referred to as "**the Appellant**") against the Mpanda Municipal Council (hereinafter referred to as "**the Respondent**"). The Appeal is in respect of Tender No. LGA.101/2018/2019/NCT/G/01 for Supply, Installation, Test and Commission of Solar Street Lights for the 7.7KM various Urban Roads in Bitumen Standards (hereinafter referred to as "**the Tender**").

The Tender was conducted through Competitive Bidding method specified under the Public Procurement Act, No. 7 of 2011 as amended (hereinafter referred to as "**the Act**") and the Public Procurement Regulations GN. No. 446 of 2013 and GN.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 background of the Appeal may be summarized as follows:

The Respondent through Mtanzania newspaper dated 17<sup>th</sup> July 2019, invited eligible tenderers to participate in the Tender. The deadline for the submission of tenders was set for 30<sup>th</sup> July 2019 whereby five tenders were received including that of the Appellant.



Tenders were then subjected to evaluation which was conducted into three stages namely; preliminary, detailed and post-qualification evaluation. During Preliminary Evaluation three tenders, including that of the Appellant were found to be non-responsive to the terms and conditions of the Tender Document, hence were disqualified. The remaining two tenders were subjected to Detailed Evaluation and both were found to be responsive. The Tenders were then checked for arithmetic errors and ranking. M/s Future Century Limited emerged to be the 1<sup>st</sup> ranked tenderer and was subjected to Post-qualification. Finally, the evaluation committee recommended award of the Tender to M/s Future Century Limited at a contract price of TZS 896,110,000/-. The Tender Board at its meeting held on 16<sup>th</sup> August 2019, approved the award as recommended by the Evaluation Committee.

On 30<sup>th</sup> August 2019 the Respondent issued the Notice of Intention to Award the Tender to all tenderers who participated in the Tender. The notice informed the Appellant that it has not been considered for award of the Tender due to the reason that it is registered with Contractors Registration Board as Electrical Contractor Class V instead of class III and above as required by the Tender Document.

Dissatisfied with the given reason, on 7<sup>th</sup> September 2019, the Appellant submitted its application for administrative review to the Respondent's Accounting Officer challenging its disqualification. On 9<sup>th</sup> September 2019, the Respondent issued its decision rejecting the application. Aggrieved further, on 13<sup>th</sup> September 2019, the Appellant filed this Appeal.

Handwritten signature and initials in blue ink, appearing to be 'ER' followed by 'M'.

## STATEMENT OF APPEAL

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

1. That, the reason given by the Respondent which led to the disqualification of the Appellant from the Tender process is disputed. The Appellant is registered as a Specialist Electrical Contractor Class I in the field of Renewable Energy – Solar and the Tender under Appeal is in relation to a Solar Project. Thus, it was eligible to be awarded the Tender. Therefore, its disqualification on the ground that it is registered as Electrical Contractor class V instead of class III was baseless.
2. That, paragraph 7 of the Contractors Registration (Amendments) By Laws GN. No.477 of 2017 states that "every contractor should perform services only in the type of his registration with an observance of the set class limit". Further, paragraph 8 under table 1 of the same by laws set class limits for various types of contractors. The Appellant being registered as Specialist Electrical Contractor Class I in the field of Renewable Energy – Solar, its class limit is unlimited. It added that, despite being class I Specialist Electrical Works Contractors in the field of Renewable Energy – Solar, the firm is also capable of being registered as Class III and above as Specialist Electrical Contractor; thus, its disqualification is unfair.
3. That, the Appellant complied with all the requirements specified under Clause 3.1 and 3.6 of the Instruction to Tenderers (ITT) as it possessed all relevant licensing/registration with appropriate statutory bodies in Tanzania. As a proof of its registration the Appellant attached to its bid various certificates including registration from Contractors Registration



Board (CRB) as Electrical Specialist Contractor Class I in the field of Renewable Energy – Solar and Class V Electrical Works Contractor. The Respondent unfairly disqualified the Appellant on the ground that it is registered as Class V Electrical Works Contractor while the Tender Document required contractors registered or capable of being registered as electrical contractor class III or above.

4. Finally, the Appellant prayed for the following orders:-

- i. A declaration that the eligibility criteria set forth by the Respondent were contrary to the type of work advertised;
- ii. A declaration that eligibility criteria were set purposely to exclude the type of contractors specialized in the said works and favouring type of contractors who are not registered for such a specialized work;
- iii. The Appellant be confirmed as eligible bidder for the Tender;
- iv. The award proposed to the successful tenderer be nullified;
- v. The Appellant bids be re-instated and all bids be re-evaluated from preliminary stage to confirm that the Appellant is eligible for award;
- vi. Procuring entities be instructed to observe contractors categories and class limits in their procurement process; and
- vii. The Respondent to compensate the Appellant the following:-
  - Appeal filling fees TZS 300,000/-
  - Legal Fees TZS 4,000,000/-



- Costs incidental to the Appeal as shall be justified in due course.

### **REPLY BY THE RESPONDENT**

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

1. That, the Tender was competitively conducted and it required Electrical Contractors registered under class III and above. The Appellant is registered as Class V Electrical Works Contractor, thus lacked the required qualification; hence it was disqualified.
2. That, the Respondent conducted the Tender process in a fair manner and there were no arrangements to award an unqualified contractor. The Tender process adhered to all legal requirements.
3. In relation to Appellant's reliefs sought, the Respondent prayed as follows:-
  - i. A Declaration that the eligibility criteria set forth by the procuring entity were similar to the work advertised;
  - ii. A declaration that the eligibility criteria were legally set for competitive tendering and not to favour any contractor in the Tender;
  - iii. The Appellant be confirmed as a disqualified bidder;
  - iv. Award be confirmed so as to allow performance of the contract;
  - v. The eligibility of the bids be evaluated from the documents presented; and
  - vi. The Appellant be ordered to pay the Respondent all costs incurred upon failure of his Appeal.



During the hearing parties agreed on the following issues which were also approved by the Members of the Appeals Authority:-

- 1. Whether the Appellant's disqualification was justified;  
and**
- 2. What relief(s), if any, are the parties entitled to**

In the course of reviewing the documents submitted by the parties, the Appeals Authority observed that, the evaluation criterion used to disqualify the Appellant to wit: contractor's should be registered or capable of being registered as electrical contractor class III and above was provided for under paragraph 2 of the Invitation to Tender. However, such criterion was neither amplified in the ITT nor Bid Data Sheet (BDS). Taking into consideration the requirement of Section 72 of the Act, read together with Clause 8.1 and 8.3 of the ITT, Members of the Appeals Authority invited both parties to submit on whether inclusion of the said criterion in the Invitation to tender and its exclusion in the Tender Document was in accordance with the law.

### **SUBMISSIONS BY THE RESPONDENT**

The Respondent's counsel in his submission stated that according to him, registration as Electrical Contractor class III and above was a vital requirement for the tender; hence, tenderers were assessed in order to substantiate if they have complied with such a requirement. He added further that, in assessing eligibility of bidders due consideration was given to tenderers who are registered as Electrical Contractors class III as





contained in the Invitation to tender. The aspect of a bidder being eligible or capable of being registered in the same class was not considered.

However, after taking into account the requirements under the law in relation to the contents of the Tender Document, the Counsel for the Respondent conceded that it failed to comply with the law by evaluating the tenders based on the criterion which was not provided for in the Tender Document and which was only stated in the Invitation to tender. He also conceded that contractor's registration requirement that a contractor should be registered or capable of being registered as electrical contractor class III and above was not a clear criterion.

Therefore, he prayed for the nullification of tender proceedings for the Respondent to re-tender after taking into consideration the requirements under the law.

### **SUBMISSIONS BY THE APPELLANT**

On its part, the Appellant submitted that, it noted some discrepancies in relation to the registration requirement prior to submission of tenders and it sought for clarification. Amongst the items that were to be clarified were in relation to the requirement of registration as an electrical contractor while the project purely related to solar. Further, the Appellant wanted to be enlightened as to how the Respondent would be able to assess a tenderer who is eligible/capable of being registered as class III contractor. In response to the clarification sought, the Respondent maintained its position as contained in the Invitation to tender.





The Appellant submitted further that, since the Respondent had conceded that the criterion was not clearly stated in the Invitation to tender and not included in the Tender Document, it had no objection to the Respondent's prayer for re-tendering.

### **ANALYSIS BY THE APPEALS AUTHORITY**

Taking cognizance of the fact that both parties have conceded that evaluation criterion in relation to registration of contractors was not clearly stated and the same was not included in the Tender Document, the Appeals Authority is of the firm view that the Respondent contravened the requirements of Sections 70(2) and 72(1) of the Act which state as follows:-

*Sec.70(2) "The tender document shall be worded so as to permit and encourage competition and such document shall set forth clearly and precisely all information necessary for a prospective tenderer to prepare tender for the goods, services and works to be provided".*

*Sec.72(1) "The basis for tender evaluation and selection of the successful tenderer shall be clearly specified in the tender document".*

The above quoted provisions entail that tender requirements should be worded in such manner that would be clear and precise. Further, evaluation criteria should be clearly stipulated in the Tender Document. In this Tender the criterion in relation to contractors' registration was not clearly specified and was ambiguous and was not included in the Tender document as the basis for evaluation of the tenders. The Contractor's



registration criterion which was the basis for the Appellant's disqualification was only contained in the Invitation to tender. According to Clause 8.1 and 8.3 of the ITT, Invitation to tender is not among the documents which form the Tender Document. For purposes of clarity Clause 8.3 is reproduced as follows:-

***"The Invitation to Tenders (Section I) issued by the Procuring Entity (PE) is not part of the tendering documents.***

*In case of discrepancies between the Invitation for Tender and the Tendering Documents listed in ITT 8.1 above, the said tendering documents will take precedence".*

(Emphasis provided).

Given the above requirements under the law and the Respondent's own concession that tender requirements were not clearly specified and were not included in the Tender Document, the Appeals Authority hereby order the Respondent to re-tender in accordance with the law. The Appeals Authority hereby allow the Appeal to that extent. Each party is to bear its own 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 Appellant and the Respondent this 11<sup>th</sup> day of October 2019.



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**HON. JUSTICE (rtd) SAUDA MJASIRI**  
**CHAIRPERSON**

**MEMBERS:**

1. DR. LEONADA MWAGIKE  .....

2. ADV. ROSAN MBWAMBO  .....