

IN THE PUBLIC PROCUREMENT APPEALS AUTHORITY

APPEAL CASE NO. 17 OF 2020-21

BETWEEN

M/S AQUA POWER TANZANIA LIMITED

(T/A TURBINE TECH)APPELLANT

AND

TANZANIA ELECTRIC SUPPLY COMPANY LIMITED....RESPONDENT

DECISION

CORAM

- | | |
|-------------------------------------|-----------------|
| 1. Hon. Justice (rtd) Souda Mjasiri | - Chairperson |
| 2. Mr. Rhoben Nkori | - Member |
| 3. Ms. Ndeonika Mwaikambo | - Member |
| 4. Ms. Florida Mapunda | - Ag. Secretary |

SECRETARIAT

- | | |
|------------------------|------------------------|
| 1. Ms. Agness Sayi | - Senior Legal Officer |
| 2. Ms. Violet Limilabo | - Legal Officer |

FOR THE APPELLANT

- | | |
|-----------------------|--------------------------------------|
| 1. Dr. Gachao Kiuna | - Director |
| 2. Mr. Walter Nyaki | - Local Representative |
| 3. Ms. Neema Shauri | - Finance and Administration Officer |
| 4. Mr. Michael Lugina | - Lawyer |



FOR THE RESPONDENT

1. Mr. Thadeo Mwabulambo - State Attorney
2. Mr. Abdallah M. Awadh - Principal Procurement Officer
3. Mr. Abdallah Chikoyo - Ag. Project Manager
4. Mr. Adil Errouzi - Technical Advisor K-1 Ext

The Appeal was lodged by M/s Aqua Power Tanzania Limited (T/A Turbine Tech) (hereinafter referred to as "**the Appellant**") against 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/001/2020-21/HQ/W/34 for Execution of the Remaining Construction Works including Supply, Installation, Testing and Commissioning of the Natural Gas Based 185MW Power Plant Project – Kinyerezi I Extension (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 the Appeal may be summarized as follows: -

The Tender was conducted using International Competitive Tendering Method through Tanzania National e-Procurement System (TANePS) as 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**").



On 4th September 2020 the Respondent through TANEPS invited qualified bidders to participate in the Tender. The deadline for submission of tenders was initially set for 28th September 2020, but it was later on extended to 9th October 2020. Four (4) tenders including that of the Appellant were received on the deadline for submission. Thereafter tenders were opened through TANEPS.

Tenders were then subjected to evaluation which was conducted into four stages namely; preliminary, technical, financial and post-qualification. At the preliminary evaluation stage two tenders were disqualified for failure to comply with the requirements of the Tender Document. The remaining tenders including that of the Appellant were subjected to technical evaluation and both were found to be responsive. Tenders were then subjected to arithmetic correction of errors and price comparison. After completion, the tender by M/S CSI Energy Group (Tanzania) Ltd was ranked the first followed by the Appellant's bid. M/S CSI Energy Group (Tanzania) Ltd was post-qualified and found to have complied with the requirements of the Tender Document.

The Evaluation Committee recommended award of the Tender to it at the contract price of Tanzanian Shillings One Hundred Twenty One Billion Five Hundred Thirty Seven Million Seven Hundred Forty Four Thousand Nine Hundred Fifty Two and Twenty Five Cents (TZS 121,537,744,952.25) only VAT Inclusive.



The Tender Board at its meeting held on 30th October 2020 approved the award as recommended by the Evaluation Committee subject to successful negotiations. Negotiations took place on 14th to 16th November 2020.

On 17th November 2020, the Respondent issued the Notice of Intention to award the contract to all tenderers who participated in the Tender process. The Notice informed them that the Respondent intended to award the contract to M/S CSI Energy Group (Tanzania) Ltd. The Notice also informed the Appellant that it was not recommended for award as it quoted a higher price of Tanzanian Shillings One Hundred Twenty Two Billion Three Hundred Sixty Eight Million Six Hundred Thirty Four Thousand Seven Hundred (TZS 122,368,634,700.00) only compared to the price quoted by M/S CSI Energy Group (Tanzania) Ltd of Tanzanian Shillings One Hundred Twenty One Billion Five Hundred Thirty Seven Million Seven Hundred Forty Four Thousand Nine Hundred Fifty Two and Twenty Five Cents (TZS 121,537,744,952.25) only.

The Appellant being dissatisfied with the Respondent's decision, applied for administrative review to the Respondent on 23rd November 2020. The Respondent did not respond to the Appellant's complaint. On 2nd December 2020 the date it ought to have issued the decision, it informed the Appellant that it would work on its complaint. On 8th December 2020, the Appellant filed this Appeal.

SUBMISSIONS BY THE APPELLANT

The grounds of Appeal as stated in the Appellant's Statements of Appeal as well as oral submissions may be summarized as follows: -



1. That, the Appellant filed this Appeal in compliance with Section 97(2)(a) of the Act upon being dissatisfied with the Respondent's failure to issue a decision with respect to its complaint within the time prescribed by the law.
2. That, the Respondent intends to award the Tender to M/S CSI Energy Group (Tanzania) Ltd while it has not complied with the requirements of the Tender Document. The proposed successful tenderer failed to comply with a requirement to submit a Manufacturer's Authorization, thus contravening Clauses 12(1)(c), 29.1(d), 29.3, 29.5, 29.6, 29.7 and 33.1 of the Instructions To Tenderers (hereinafter referred to as "ITT").

The Appellant expounded its argument by stating that, all bidders were required to submit a Manufacturer's Authorization for the four major equipment of the project which includes Gas Turbine, Turbine Chiller, Grid Control System and Power Transformer. A Manufacturer's Authorization was one of the mandatory documents as it serves as a security for the equipment. It assures the procuring entity (Respondent) that the equipment would be able to perform its intended functions. In order for a Manufacturer's Authorization to be valid the same ought to have been issued by the manufacturer or authorized service providers. In this tender the proposed tenderer failed to comply with a Manufacturer's Authorization requirement as shown hereunder;

a) Gas Turbines

The manufacturer of this equipment is GE Packed Power LLC which was also a tenderer in this Tender. The manufacturer was



not ready to issue a manufacturer's authorization, thus tenderers opted to seek it from its authorized service providers namely MTU, IHI and TCT. The proposed tenderer attached to its tender a letter from MTU which indicated that it would provide support services. A commitment to provide support services cannot serve as Manufacturer's Authorization or warranty. Furthermore, the MTU letter is not addressed to the proposed bidder as it is addressed to M/S CSI Energy Group while the proposed tenderer is M/S CSI Energy Group (Tanzania) Ltd. The attached Manufacturer's Authorization from Doosan Turbomachinery Service is not valid for this Tender as it has been issued by a company which is not among the authorized service providers of GE Packed Power LLC. According to the Appellant, a full guarantee and warranty from MTU was attached to its Tender.

b) Grid Control System

The Grid Control System available at the project site was manufactured by EFACEC POWER SOLUTIONS, SGPS, S.A (EFACEC), thus the Manufacturer's Authorization ought to have been issued by the same company. The proposed tenderer attached to its tender a Manufacturer's Authorization for supply of new equipment from EFACEC. The Grid Control System is at the project site. No new equipment was to be supplied instead the proposed successful tenderer ought to have submitted a Manufacturer's Authorization for the existing system. The Appellant has attached to its tender a Manufacturer's Authorization



(revalidation of expired warranties) for the existing equipment. According to the Appellant a full guarantee and warranty from (EFACEC) was attached to its tender.

c) Turbine Air inlet Chillers

The Chillers available at the project site were manufactured by Stellar Energy. Thus, it was expected that the Manufacturer's Authorization be issued by the same company in accordance with the format provided in the Tender Document. The proposed tenderer had attached to its tender a Manufacturer's Authorization from Stellar Energy which did not comply with the format provided in the Tender Document.

d) Power Transformers

The transformers located at the project site have been supplied by EMCO an Indian Company which is under insolvency proceedings. It was difficult to get a Manufacturer's Authorization from a third party which would be willing to step into the shoes of a bankrupt company. Thus, a Manufacturer's Authorization provided by the proposed successful tenderer ought to have stated that the same is for the available transformers. The attached Manufacturer's Authorization of the proposed successful tenderer does not provide a specific description as the authorization is general.

3. That, it was a mandatory requirement for tenderers to submit a Manufacturer's Authorization for each of the four major equipment. The said requirement was provided under Clause 12(c) and 14.3(a) of the



ITT. The proposed successful tenderer failed to comply with such a requirement, thus its tender ought to have been disqualified.

4. That, the Respondent erred in law for intending to award the Tender to the proposed successful tenderer who is not the lowest evaluated tenderer. The Respondent's conduct in this regard contravened Section 74(1) of the Act and Clauses 33.3(a), 33.3(e), 33.4(a), 33.5, 35.1, 36.1, 36.4 and 37.7 of the ITT.
5. That, the Respondent should have invited both the proposed successful bidder and the Appellant to negotiate with them and make a comparison on common basis. Thus failure to do so contravened Section 76(1) of the Act and Clauses 35 to 38 of the ITT.
6. Finally, the Appellant prayed for the following orders: -
 - i. A declaration that the proposed successful tenderer's bid was not substantially responsive for its failure to comply with the requirement of the Tender Document;
 - ii. A declaration that the Appellant's bid was substantially responsive;
 - iii. The Respondent be compelled to award the Tender to the Appellant as it was the lowest evaluated bidder;
 - iv. The Respondent be compelled to negotiate with the Appellant within fourteen (14) working days on the terms that have already been negotiated with the proposed bidder;
 - v. The Respondent to produce documents that were submitted by the proposed bidder including a Manufacturer's Authorization, Bid



Security and credit arrangement to the Appeals Authority to allow it to verify the authenticity of those documents and whether the said documents are the same as those uploaded in the TANEPS;

- vi. Declare the proposed successful tenderer ineligible to participate in a public financed project for a period of Ten (10) years due to the deviation that was purposely committed.

REPLY BY THE RESPONDENT

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

1. That, tenders were evaluated through TANEPS in compliance with the requirements provided in the Tender Document. All the tenderers were fairly and equally treated.
2. That, the Respondent proposed award of the Tender to the proposed successful tenderer after being determined to be the lowest evaluated tenderer. The proposed successful tenderer complied with the requirement of submitting a Manufacturer's Authorization for the four major equipment of the project. The submitted Manufacturer's Authorization were:-
 - a) Gas Turbines – The submitted Manufacturer's Authorization was from MTU.
 - b) Grid Control System – The submitted Manufacturer's Authorization was from EFACEC.
 - c) Turbine Air inlet Chillers - The submitted Manufacturer's Authorization was from Stellar Energy.



d) Power Transformers - The submitted Manufacturer's Authorization was from CG Powers and Industrial Solution Ltd.

3. That, the Manufacturer's Authorization requirement was provided in the Tender Document but it was further modified under Item 16 of Responses for Clarifications No. 7 and Item 32 of Responses for Clarifications No. 4. Both Responses allowed tenderers to submit a Manufacturer's Authorization from either the manufacturer or authorized third party. The proposed successful tenderer complied with such a requirement.
4. That, the proposed successful tenderer and the Appellant both reached the price comparison stage. After ranking, the proposed successful tenderer emerged to be the first, thus it was subjected to post qualification and thereafter recommended for award.
5. Finally, the Respondent prayed for the following orders:-
 - i. That there was no breach that was committed by the Respondent;
 - ii. A declaration that the Tender process was conducted in compliance with the requirements of the Tender Document and M/S CSI Energy Group (Tanzania) Ltd was proposed for award after being determined as the lowest evaluated bidder;
 - iii. That, there is no need to compel the Respondent to negotiate with the Appellant as it was not the lowest evaluated tenderer;
 - iv. To dismiss the Appeal in its entirety;



- v. A declaration that the Appellant is ineligible to participate in public procurement for a period of ten (10) years for interfering with the procurement process.

ANALYSIS BY THE APPEALS AUTHORITY

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

- 1. Whether the award of the Tender to the proposed successful tenderer was proper in law; and**
- 2. What reliefs, if any, are the parties entitled to.**

Having identified the issues, the Appeals Authority proceeded to determine them as hereunder: -

- 1. Whether the award of the Tender to the proposed successful tenderer was proper in law**

In resolving this issue the Appeals Authority considered the parties' submissions whereby the Appellant contended that the proposed successful tenderer did not qualify for award of the tender as it failed to submit a Manufacturer's Authorization for the four major equipment of the project as required in the Tender Document. The Respondent on its part was certain that the proposed successful tenderer qualified for award as it submitted the required Manufacturer's Authorization for the existing major equipment of the project namely: Gas Turbine, Turbine Chillers, Grid Control System and Power Transformers.



In order to substantiate the validity of the parties' argument, the Appeals Authority revisited the Tender Document and observed that Clauses 12.1(c) and 14.3(a) required tenderers to submit a Manufacturer's Authorization. The said Clauses are reproduced hereunder for ease of reference:-

Clause 12(1) "The Tender prepared by the Tenderer shall constitute the following components:-

(c) Documentary evidence established in accordance with ITT 14.3(a) that the Tenderer has been authorized by the manufacturer to supply the goods into the United Republic of Tanzania, where required and where the supplier is not the manufacturer of those goods."

Clause 14.3 "The documentary evidence of the Tenderer's qualifications to perform the contract if its Tender is accepted shall establish to the PE's satisfaction:-

(a) that, in the case of a tenderer offering to supply goods under the contract which the tenderer did not manufacture or otherwise produce, the Tenderer has been duly authorized by the goods' manufacture or producer to supply the goods in the United Republic of Tanzania."



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The Appeals Authority observed further that, a Manufacturer's Authorization requirement was modified/amended through Item 32 of Responses for Clarifications No. 4 issued on 25th September 2020 and Item 16 of Responses for Clarification No. 7 issued on 5th October 2020. The said Responses were issued by the Respondent in response to various issues raised by the tenderers before the deadline for submission of tenders. It read as follows:-

Item 32 of Responses for Clarifications No. 4

"Can we as Contractor provide two (2) years manufacturer warranty if the Manufacturer of the major equipment is no longer available?"

"Yes the contractor may provide warranty in case the Manufacturer is no longer available. Moreover, the contractor shall be responsible for warranty revalidation and management of Defect liability period including performance guarantee as shown in the schedule of requirement".

Item 16 of Responses for Clarification No. 7

"Equipment Warranty and Guarantee"

"Any Third Party authorized by the equipment manufacturer can issue warranty and guarantee".

In addition to the above, the Appeals Authority observed that, Section IX of the Tender Document provided a format of various forms including that of a Manufacturer's Authorization (Form No. 6). One of the Paragraphs contained in the said Form was that, a Manufacturer was required to

extend full Guarantee and Warranty as per Clause 28 of the General Condition of Contract (GCC).

Having established that it was mandatory for tenderers to submit a Manufacturer's Authorization, the Appeals Authority revisited the proposed successful tenderer's tender document and observed that it was attached with a Manufacturer's Authorization and commitment letters from various vendors/manufacturers. Specifically, for the four major equipment namely; Gas Turbine, Turbine Air inlet Chillers, Grid Control System and Power Transformers. The proposed successful tenderer attached a Manufacturer's Authorization and commitment letters from MTU, Doosan Turbomachinery Services, EFACEF, Stellar Energy and CG Power and Industrial Solutions Limited. In order to establish if the attached documents were in conformity with the tender requirement, each one of them is reviewed as hereunder:-

a) Gas Turbines

In complying with the Manufacturer's Authorization requirement, the proposed successful tenderer submitted a letter from MTU indicating that it would provide support services in respect of the commissioning of Gas turbines, maintenance services, trouble shooting services, spare parts and training services.

Having reviewed the record of Appeal, we observed that MTU is among the service providers of General Electric International Incorporation (GE) which manufactured the Gas Turbines located at the project site. However on reviewing MTU's letter it is evident that the said letter did not extend full guarantee and warranty as required.



The Appeals Authority observed further that, the proposed successful tenderer had attached a Manufacturer's Authorization from Doosan Turbomachinery Services. Having reviewed it, we observed that the Manufacturer's Authorization issued was for the equipment manufactured by Doosan Turbomachinery Services and not for the Gas Turbine located at the project site, manufactured by General Electric International Incorporation (GE).

Therefore, from the documents availed to the Appeals Authority it is evident that the proposed successful tenderer failed to comply with requirement of submitting a Manufacturer's Authorization with regard to Gas Turbines.

b) Turbine Air inlet Chillers

The proposed successful tenderer had attached to its tender a Service Provider's Authorization Form instead of a Manufacturer's Authorization from Stellar Energy which manufactured Turbine Air inlet Chillers for Kinyerezi 1 Extension. The Appeals Authority observed further that the Service Provider's Authorization Form lacked full guarantee and warranty. The said Form indicated that it would provide support on specialized services for successful completion of the project.

Therefore, it is evident that the proposed successful tenderer failed to provide a Manufacturer's Authorization in respect of Turbine Air inlet Chillers.



c) Grid Control System

The proposed successful tenderer had attached to its tender a Manufacturer's Authorization from EFACEC which is a manufacturer of the Substation Automation System supplied at Kinyerezi 1 Extension. The attached Manufacturer's Authorization did not indicate that it is for the existing system located at the project site.

The Appellant claimed to have a more detailed Manufacturer's Authorization for Grid Control System from EFACEC. However, after reviewing the Manufacturer's Authorization, it is evident that the same did not provide for warranty or guarantee for the existing system. The wording of the authorization indicated clearly that EFACEC was not ready to provide a warranty or guarantee until after verification to its satisfaction of the conditions of the existing system taking into consideration that the initially provided warranty had already expired. Therefore, the Appellant has no valid Manufacturer's Authorization with regard to Grid Control System.

d) Power Transformers

The existing transformers at Kinyerezi 1 Extension were manufactured and supplied by EMCO an Indian Company which is bankrupt and could not have issued a Manufacturer's Authorization for this Tender. The record of Appeal indicates that the proposed successful tenderer attached to its tender a Manufacturer's Authorization from CG Powers and Industrial Solutions Ltd. The Authorization was specifically for equipment manufactured by them and not for the existing transformers located at the



project site. Therefore, there was no warranty or guarantee provided as required by the Tender Document.

From the above analysis the Appeals Authority finds that, the proposed successful tenderer failed to comply with a Manufacturer's Authorization requirement with regard to Gas Turbine, Turbine Air inlet Chillers, Grid Control System and Power Transformers. Therefore, its tender ought to have been disqualified.

Regulations 203(1) and 206(2) of the Regulations requires tender evaluation to be consistent with the terms and conditions provided in the Tender Document and if the tender is not responsive the same should be rejected. The Regulations read: -

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 document."*

Reg. 206(2) *"where a tender is not responsive to the tender document, it shall be rejected by the procuring entity and may not subsequently be made responsive by correction or withdrawal of the deviation or reservation".*

In relation to the Appellant's contention that the Respondent contravened the law for its failure to issue the decision within the time limit prescribed



by the law. The Appeals Authority agrees with the Appellant that the Respondent contravened the law as stipulated under Section 96(6) of the Act. However, such omission did not prejudice the Appellant whatsoever as it exhausted the review mechanisms provided under Sections 96(7) and 97(2)(a) of the Act by submitting this Appeal to the Appeals Authority.

From the above findings the Appeals Authority concludes the first issue in the negative, that the award of the Tender to the proposed successful tenderer was not proper in law.

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

Given the Appeals Authority's findings hereinabove that the award of the Tender to the proposed successful tenderer was not proper in law, the Appeals Authority hereby nullifies the award proposed to the successful tenderer and orders the Respondent to restart the Tender process. The Appeal is allowed to that extent.

Each party is to bear its own costs.

It is so ordered.

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.



3-11-20

This Decision is delivered in the presence of the parties this 23rd day of December 2020.

HON. JUSTICE (RTD) SAUDA MJASIRI


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CHAIRPERSON

MEMBERS:

1. MR. RHOBEN NKORI 
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2. MS. NDEONIKA MWAIKAMBO 
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