

IN THE PUBLIC PROCUREMENT APPEALS AUTHORITY

APPEAL CASE NO. 22 OF 2020-21

BETWEEN

M/S S.E.C (EAST AFRICAN) COMPANY LIMITED..... APPELLANT

AND

BANK OF TANZANIA..... RESPONDENT

RULING

CORAM

- | | |
|-------------------------------------|-----------------|
| 1. Hon. Justice (rtd) Souda Mjasiri | - Chairperson |
| 2. Eng. Stephen Makigo | - Member |
| 3. Ms. Ndeonika Mwaikambo | - Member |
| 4. Ms. Florida Mapunda | - Ag. Secretary |

SECRETARIAT

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

FOR THE APPELLANT

- | | |
|-----------------------------|-----------------------------|
| 1. Mr. Kamal Abdul | - Advocate |
| 2. Mr. Gabriel Makundi | - Engineer |
| 3. Mr. Cilmerdon Labastilla | - Engineer/ Lift Consultant |
| 4. Mr. Ntuli W. Mwankusye | - Marketing Director |



FOR THE RESPONDENT

1. Mr. Daniel Nyakiha - State Attorney
2. Ms. Violeth Luhanjo - Senior Legal Officer
3. Mr. Baraka Mageche - Procurement Officer
4. Eng. Constantino Kamundi - Assistant Manager
Technical Services
5. Mr. Julius W. Sige - Procurement Officer
6. Mr. Justin D. Shetui - Legal Officer
7. Mr. Shaban M. Kalembe - Legal Officer

The Appeal was lodged by **M/s S.E.C. (East African) Company Limited** (hereinafter referred to as "**the Appellant**") against the **Bank of Tanzania** commonly known by its acronym **BOT** (hereinafter referred to as "**the Respondent**").

The Appeal is in respect of Tender No. PA/082/2019-2020/HQ/G/17 for Supply, Installation, Testing and Commissioning of Passenger Lifts at BOT Head Office (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 using National 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 14th April 2020, the Respondent through TANEPS invited qualified tenderers to submit their tenders. The deadline for submission was set for 5th May 2020. Five (5) tenderers, the Appellant inclusive submitted their tenders which were opened publicly through TANEPS.

Tenders were then subjected to evaluation which was conducted into three stages namely; preliminary, detailed and financial comparison. During preliminary evaluation four tenders were disqualified including that of the Appellant. Specifically, the Appellant's tender was disqualified for three reasons namely; it offered to supply lifts from China instead of USA and European Countries as specified in the Special Conditions of Contract, the width specified for door size was 1200mm while the required one was 1250mm and the shaft width specified was 2600mm while the required one was 2520mm. The remaining tender by M/s Derm Elevators Limited was subjected to the remaining stages of evaluation. After completion of the evaluation process, the Evaluation Committee recommended award of the Tender to M/s Derm Elevators Limited at the contract price of Tanzanian Shilling One Billion One Hundred Thirty Million Seven Hundred Twenty Nine Thousand Four Hundred Seventy Cents Fifty Four only (1,130,729,470.54) VAT inclusive.



The Tender Board at its meeting held on 23rd December 2020 approved the award as recommended by the Evaluation Committee.

On 15th January 2021, the Respondent issued the Notice of Intention to award the Tender to all tenderers who participated in the Tender process. The Notice informed the tenderers that award has been proposed to M/s Derm Elevators Limited. The Notice also informed the Appellant that, its tender was disqualified for offering to supply a lift from China instead of USA and European countries as required under Clause 1 of the Special Conditions of Contract. The Appellant also failed to comply with technical specifications as specified in the Tender Document. The said notice was received by the Appellant on 22nd January 2021.

Dissatisfied with reasons given for its disqualification, on 27th January 2021, the Appellant applied for administrative review to the Respondent. On 10th February 2021, the Respondent informed the Appellant that the Tender has been suspended and an investigation has been instituted, the findings/decision thereof would be communicated accordingly. However, no decision was issued by the Respondent.

Aggrieved, on 16th February 2021, the Appellant filed this Appeal to the Appeals Authority.

GROUND OF APPEAL

The grounds of appeal as stated in the Appellant's Statement of Appeal may be summarized as follows: -



1. That, the Appellant disputes its disqualification for the reason that it offered to supply lifts from China instead of USA and European Countries as stated under Clause 1 of the SCC. The Appellant submitted that, most Multi-National companies all over the world have a number of factories located in China including the famous lifts brands like Mitsubishi Electric, Otis, Kone and Schindler. These factories enjoy a low price of raw materials and labour force. Thus, significant reduction of production costs; hence, low price of end products while maintaining high quality of the products as per the ISO regulations.
2. That, most European lifts utilize a large number of finished products from China, so it is impossible to find 100% Otis lift which has been made using European components only. Materials packed and shipped to Tanzania as European products are sold at significantly high prices, although most parts are secured from China or other Asian Countries. According to the Appellant that will be a complete misuse of Tanzanian Taxpayers money as purchasing materials directly from China could have reduced the costs.
3. That, the Appellant had the lowest quoted price of TZS. 751,446,250/= VAT inclusive compared to the price quoted by M/s Derm Elevators Ltd of TZS. 1,130,729,470.54 VAT inclusive. The Appellant's price was lower by TZS. 380,282,220.54 VAT inclusive. Therefore, the Respondent should rethink on the price difference for the products of the same quality and technical specifications.



4. That, all lifts companies in the world manufacture their products in accordance with the British Standard BS5655 or European Norm EN-81. Shanghai Mitsubishi Lifts and Escalators Co. Ltd constantly maintain up to date EU Certificate of Conformity (Module H) for Quality Management System and the Lifts Directives issued by Lloyd's Register LRQA.
5. That, if the Appellant's tender will not be considered for the benefits of the Tanzanian taxpayers, then the Respondent or other regulatory body in Tanzania should carry out a thorough inspection and/or investigation of the lift materials to be supplied by the proposed successful tenderer on its arrival at the site to satisfy itself that they are of 100% European origin.
6. Finally the Appellant prayed for the following orders:-
 - i. That, award of the Tender to M/s Derm Elevators Limited was not proper;
 - ii. That, award should be made to any one from eligible countries;
 - iii. That, the Respondent to remove or change the clause of country of origin in the Tender Document to be more competitive and fair;
 - iv. The Appeals Authority to take mandatory action according to the Act;
 - v. That the Appellant and all lift companies in the world complies with European norms EN-81 and its products are produced in compliance with International standards which have no difference with those produced from American or European countries;



- vi. That, most of the construction activities which are completed and ongoing in Tanzania use materials, products and goods originating from China.

REPLY BY THE RESPONDENT

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

1. That, the Appellant was fairly disqualified for offering to supply lifts from China contrary to the requirement of Clause 1 of the SCC which required tenderers to supply lifts from USA and European Countries.
2. That, the Appellant was further disqualified for failure to comply with technical specifications provided in the Tender Document, namely:-
 - a) The specification of door size provided by the Appellant did not comply with technical specification given under the Tender Document. The Appellant specified door size of 1200mm whilst specification in the Tender Document was 1250mm;
 - b) The specification of shaft width provided by the Appellant did not comply with technical specification indicated in the Tender Document. The Appellant specified shaft width of 2600mm whilst specification in the Tender Document was 1250mm.

Based on Clause 29.7(b) of the Instructions To Tenderers (ITT) the Respondent rejected the Appellant's tender as it failed to comply with the major technical requirements.



3. Finally, the Respondent prayed for dismissal of the Appeal as the Appellant failed to comply with the requirements of the Tender Document.

ISSUES

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

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

The Appeals Authority informed the parties that, there was a point law for determination before hearing the Appeal on merit. This was in relation to the Bid Validity Period for the Tender. According to the record of Appeal, the Bid Validity Period for the tender had expired and its extension was sought after the initial specified time had lapsed. The Appeals Authority therefore, invited the parties to address it as to ***whether there is a valid Tender after expiry of the Bid Validity Period.***

SUBMISSIONS BY THE RESPONDENT

The Respondent submitted that the Bid Validity Period for this Tender was One Hundred and Twenty (120) days and the tender opening took place on 5th May 2020. Counting from the date of tender opening, One Hundred and Twenty (120) days lapsed on 1st September 2020. However, the



Respondent requested extension of the Bid Validity Period from all tenderers by its letter dated 30th November 2020. The said request for extension was accepted by tenderers. The Respondent further argued that the fact that tenderers accepted to extend the Bid Validity Period, the Tender was still valid.

Upon bringing to its attention the requirement of the law, the Respondent reluctantly conceded that the Bid Validity Period for the Tender had already expired and the request for extension thereof was made after the lapse of the Bid Validity Period. The Respondent therefore concluded by stating that, there is no valid tender as the Bid Validity Period had already expired and thus all subsequent acts were null and void.

SUBMISSIONS BY THE APPELLANT

The Appellant submitted that Clause 18 of the ITT and Clause 14 of the Bid Data Sheet (BDS) provided that the Bid Validity Period for this Tender was One Hundred and Twenty (120) days, which expired on 1st September 2020 as correctly pointed out by the Respondent. However, extension was sought by the Respondent on 30th November 2020 after the expiry of the initial Bid Validity Period. Thus, at the time extension of Bid Validity Period was sought the Tender had already expired. Therefore, there is no valid Tender in place and the award made to the proposed successful tenderer was not proper in law.



ANALYSIS BY THE APPEALS AUTHORITY

On the point of law, the issue for consideration is ***whether there is a valid Tender after the expiry of the bid validity period.***

According to Clause 14 of the TDS, the Bid Validity Period was One Hundred and Twenty (120) days from the deadline for submission of tenders which was on 5th May 2020. Counting from 5th May 2020 the Bid Validity Period of One Hundred and Twenty (120) days had expired on 1st September 2020. The record of Appeal indicates that the Respondent had requested three extensions of the Bid Validity Period. The first extension was requested by a letter dated 30th November 2020, the second extension was requested by a letter dated 29th December 2020 and the last extension was sought by a letter dated 22nd February 2021.

From the above facts, it is clear that the request for extension of the Bid Validity Period and responses thereof were all made after the expiry of the Bid Validity Period.

The Appeals Authority revisited Section 71 of the Act read together with Regulations 191(3) and 231(2) of the Regulations which provide as follows:-

Sec.71 "The procuring entity shall require tenderers to make their tenders and tender securities including tender securing declaration valid for 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."

Reg. 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."

Reg. 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 evaluated or the highest evaluated, as the case may be, and meets the required financial and managerial capability, legal capability, experience and resources to carry out the contract effectively."

(Emphasis Added)



The above quoted provisions elucidate that the Tender process should be completed within the Bid Validity Period. To the contrary, the Respondent proceeded with the Tender process even after the expiry of the Bid Validity Period on 1st September 2020.

Furthermore, the Appeals Authority observed from the record of Appeal that, the Respondent requested for extension of the Bid Validity Period on 30th November 2020 while the provided Bid Validity Period expired on 1st September 2020. The Appeals Authority finds the Respondent to have contravened Regulation 191(4) of the Regulations which requires procuring entities to request for extension of the Bid Validity Period prior to the expiry of the initial period. The provision reads as follows:-

Reg. 191(4)"In exceptional circumstances, prior to the expiry of the original period of the effectiveness of tenders, a procuring entity may request tenderers to extend the period for an additional specified period of time."

(Emphasis added)

Based on the cited provisions of the law that award of tenders and finalization of contracts is to be done within the Bid Validity Period and that if the period specified is not sufficient, extension of time should have been sought prior to the expiry of the initial period. The Appeals Authority finds the Respondent's act of proceeding with the tender process after expiry of



the Bid Validity Period and without any extension thereof to be improper. That is to say, the Respondent's acts after the expiry of the Bid Validity Period on 1st September 2020 were null and void.

Therefore, the Appeals Authority concludes the issue in the negative that there is no valid tender after expiry of the Bid Validity Period. Given the circumstances, the Appeals Authority would not delve into the merits of the Appeal. The Appeals Authority hereby dismiss the Appeal and nullify the whole tender process.

As the point of law was raised *suo motu* by the Appeals Authority, each party is ordered 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 parties this 19th day of March 2021.

HON. JUSTICE (RTD) SAUDA MJASIRI

Sauda Mjasiri

CHAIRPERSON

MEMBERS:

1. ENG. STEPHEN MAKIGO.....*Steph Makigo*.....

2. MS. NDEONIKA MWAIKAMBO.....*Ndeonika Mwaikambo*.....