

IN THE  
PUBLIC PROCUREMENT APPEALS AUTHORITY  
AT DAR ES SALAAM  
APPEAL NO. 26 OF 2018-19

BETWEEN

M/S GROUP SIX INTERNATIONAL LIMITED.....APPELLANT

AND

DAR ES SALAAM CITY COUNCIL.....RESPONDENT

DECISION

CORAM

- |                                     |   |             |
|-------------------------------------|---|-------------|
| 1. Hon. Justice (rtd) Sauda Mjasiri | - | Chairperson |
| 2. Eng. Stephen Makigo              | - | Member      |
| 3. Adv. Rosan Mbwambo               | - | Member      |
| 4. Mr. Ole-Mbille Kissioki          | - | Secretary   |

SECRETARIAT

- |                        |   |               |
|------------------------|---|---------------|
| 1. Ms. Florida Mapunda | - | DST           |
| 2. Mr. Hamisi Tika     | - | Legal Officer |
| 3. Ms. Violet Limilabo | - | Legal Officer |

FOR THE APPELLANT

- |                             |   |                                    |
|-----------------------------|---|------------------------------------|
| 1. Mr. Rico Mzeru           | - | Advocate, Aymak Attorneys          |
| 2. Mr. Atumpalege Mwakyembe | - | Procurement Consultant             |
| 3. Ms. Zhang Lushuang       | - | Representative, Group Six Int. Ltd |

FOR THE RESPONDENT

- |                         |   |                |
|-------------------------|---|----------------|
| 1. Mrs. Sipora Liana    | - | City Director  |
| 2. Mr. Jumanne Mtinangi | - | City Solicitor |

- |                          |   |                                |
|--------------------------|---|--------------------------------|
| 3. Mr. Minael H. Mshanga | - | Senior Human Resources Officer |
| 4. Ms. Vumilia Tigwela   | - | City Procurement Officer       |
| 5. Ms Grace Omot         | - | Legal Officer                  |
| 6. Mr. Fadhil Izumbe     | - | Accountant                     |
| 7. Mr. Yassin Mrinogo    | - | Architect                      |

The Appeal was lodged by M/s Group Six International Limited (hereinafter referred to as "the Appellant") against the Dar es Salaam City Council (hereinafter referred to as "the Respondent"). The Appeal is in respect of Tender No. LGA/018/2017/2018/W/10 for the proposed Construction of the Dar es Salaam City Council Bus Terminal to be built at Mbezi Luis Area-Dar es Salaam (hereinafter referred to as "the Tender").

After going through the records submitted by the parties to the Public Procurement Appeals Authority (hereinafter referred to as "the Appeals Authority"), the background of the Appeal can be summarized as follows:-

The Tender was conducted through the Public Procurement Act of 2011, as amended (hereinafter referred to as "the Act") and the Public Procurement Regulations GN. No 446 of 2013 as amended (hereinafter referred to as "the Regulations").

The Tender started with a pre-qualification process advertised on 23<sup>rd</sup> and 24<sup>th</sup> March 2018. Twelve tenderers responded to the invitation and they were subjected to evaluation. After its completion, the following firms were shortlisted:-

- i) M/s CRJE (East Africa) Limited
- ii) M/s Group Six International Limited
- iii) M/s Hainan International Limited

The shortlisted tenderers were issued with the Tender Document and the deadline for submission of tenders was set for 24<sup>th</sup> July 2018. On the deadline provided all three bidders submitted their tenders. The tenders

were then subjected to Evaluation which was conducted into three stages namely; Preliminary, Detailed and Post qualification Evaluation. During the preliminary evaluation, all three bidders were found to have complied with Tender requirements and were therefore subjected to detailed evaluation. When the tenders were ranked afterwards, the Appellant emerged the lowest evaluated bidder and was therefore subjected to Post-qualification.

During Post-qualification, the Evaluation Committee observed that, the Appellant's tender lacked resource capacity on the service coordinator (mechanical). Thus, its bid was disqualified and the second lowest evaluated bidder M/s Hainan International Limited was subjected to Post-qualification. The firm was found to have complied with all the tender requirements; thus, it was recommended for the award of the Tender. The recommendations of the Evaluation Committee were approved by the Tender Board through its meeting held on 19<sup>th</sup> October 2018.

On 17<sup>th</sup> December 2018, the Respondent informed all tenderers, including the Appellant, its intention to award the Tender to M/s Hainan International Limited. The said letter informed the Appellant that its tender was disqualified as it lacked resource capacity on service co-coordinator (mechanical). Dissatisfied with the reasons provided, the Appellant submitted an application for review to the Respondent on 21<sup>st</sup> December 2018. On 24<sup>th</sup> December 2018, the Respondent issued its decision dismissing the Appellant's application for review. Aggrieved further, the Appellant lodged its appeal to the Appeals Authority on 27<sup>th</sup> December 2018.

### SUBMISSIONS BY THE APPELLANT

The Appellant's submissions may be summarized as follows:-

1. That, the Appellant's company possessed the requisite resources and personnel as indicated in the pre-qualification document as well as in the tendering stage. All personnel indicated in the Appellant's bids

were its employees and are well skilled to perform the work envisaged in the contract.

2. That, the Appellant disputes its disqualification as the same was based on the information submitted during pre-qualification. While the two processes are separate; and each involves a different function. As its tender was found to be responsive during pre-qualification and was shortlisted as per Regulation 121 of GN No. 446 of 2013, it was not proper for its tender to be disqualified at the tendering stage based on the pre-qualification information.
3. That, the Respondent's act of disqualifying its tender was not proper in the eyes of the law, since the criterion used was not provided for in the Tender Document but was specified in the pre-qualification document. In supporting its argument on this point the Appellant relied on Regulation 224(2) of GN. No 446 of 2013 which categorically requires post-qualification criteria to be specified in the Tender Document.

The Appellant emphasized that, the Respondent's evaluation process contravened Regulation 203(1) of GN. No 446 of 2013 which requires evaluation to be carried out using criteria explicitly provided for in Tender Document. The criterion regarding service coordinators was not amongst the requirements for this Tender. Thus, neither Eng. Shangari's name nor his CV appeared in the Appellant's tender.

4. That, Regulation 206 of GN. No 446 of 2013 disallows evaluation of tenders based on extrinsic evidence. The Respondent's act of disqualifying its tender based on the information provided for during pre-qualification was not proper since that process had already been completed. Its information was not supposed to be used during the tendering process. Thus, the pre-qualification information was

extrinsic to the main Tender and the same ought not to have been used to disqualify the Appellant's tender.

5. That, the Respondent erred in law by concluding that the Appellant had presented false information regarding Eng. Julius Shangari. It argued that the said engineer is its employee since it has an employment agreement with him. The said agreement provides that he would be performing the Appellant's tasks upon being engaged. Eng. Julius Shangari, however denied such engagement after being threatened during the post-qualification meeting.
6. That, the Respondent conducted a due diligence process without according the Appellant a right to be heard prior to disqualification of its Tender. It stated that, much as Section 53 of the Act allows the Respondent to conduct due diligence; the same ought to have been conducted with adherence to the principles of natural justice. Thus, the Respondent's act of proceeding to disqualify the Appellant without according it the right to be heard contravened the principles of natural justice.
7. Finally, the Appellant prayed for the following orders:-
  - a) It be reinstated in the Tender process as the lowest bidder and be awarded the Tender; and
  - b) All costs be paid by the Respondent.

#### REPLY BY THE RESPONDENT

The Respondent's submissions may be summarized as follows:-

1. That, the Appellant was disqualified for submitting false information in respect of Eng. Julius Shangari in the capacity of service coordinator (mechanical). During post qualification meeting held on 6<sup>th</sup> September 2018, Eng. Shangari denied to have been employed by

the Appellant. He also denied that the signature contained in the CV attached to the Appellant's pre-qualification document was his. The Respondent submitted further that the signature contained in the engineer's CV was different from the one signed by him at the post-qualification meeting held on 6<sup>th</sup> September 2018. Thus, the Appellant had submitted false information.

2. That, the Respondent disputes the Appellant's argument in relation to Regulations 203 and 206 of GN. No. 446 of 2013; as the evaluation of tenders was conducted as per the requirement of the law as well as the stipulated criteria. There was no recourse to extrinsic evidence as contended by the Appellant. The Respondent submitted further that, during post-qualification the Appellant's pre-qualification information was assessed for purposes of verification pursuant to Regulation 224(8) of GN. No. 446 of 2013.
3. With regard to the Appellant's argument that the Respondent ought not to have post-qualified the Appellant using pre-qualification information. The Respondent submitted further that, Regulation 224(8) of GN. No 446 of 2013 allows them to do so. Furthermore, paragraph 4 of the Appellant's application letter for pre-qualification dated 13<sup>th</sup> April 2018 authorized the procuring entity to verify the information provided in the Appellant's pre-qualification documents. Thus, the Appellant unconditionally allowed the Respondent to verify its information. It was therefore proper to post-qualify the Appellant using the pre-qualification information, including communicating directly with Eng. Shangari.
4. That, the Respondent disputed the Appellant's argument that it was not accorded a right to be heard. The Appellant was duly served with the notice of intention to award which accorded it the right to raise its grievances in respect of its disqualification by filing an administrative review which could have resulted in a different decision.

5. Finally, the Respondent prayed for the following orders:-

- i. Confirmation of the Appellant's disqualification in this Tender;
- ii. Dismissal of the Appeal; and
- iii. The Appellant to pay costs.

#### ANALYSIS BY THE APPEALS AUTHORITY

The Appeals Authority having gone through the Tender proceedings including various documents and the submissions by the parties during the hearing of the appeal is of the view that the Appeal is centred on two main issues, which were agreed upon by the parties. The said issues are stated as follows:-

- Whether the Appellant's disqualification is justified; and
- What reliefs, if any, are the parties entitled to.

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

##### 1.0 Whether the Appellant's disqualification is justified

In resolving this issue the Appeals Authority observed that there are three contentious issues regarding the Appellant's disqualification, namely;

- i) The Respondent used pre-qualification information to disqualify the Appellant when conducting post-qualification;
- ii) The Appellant did not lack a service coordinator (mechanical) and did not submit false information; and
- iii) The Appellant was not accorded the right to be heard after post qualification.

With regard to the Respondent's act of conducting post qualification based on the documents provided during pre-qualification, the Appeals Authority

made reference to Regulations 124 and 224(8)(b) which provides as follows:-

*Reg.124 "The verification of the information provided in the submission for pre-qualification shall be confirmed through a post-qualification process before the notice to award the tender is communicated to the tenderers, and award may be denied to a tenderer who is assessed to have no capability or resources to successfully perform the contract."*

*Reg.224(8) "Where a tenderer has been pre-qualified, a full post-qualification may not be necessary, but the pre-qualification information submitted shall be verified and an award may be denied to the lowest evaluated tenderer if he is judged to no longer meet the pre-qualification requirements and criteria, the procuring entity shall consider;*

*b)any information which has become available since the pre-qualification submission, which in the procuring entity's judgement, materially affects the capacity of a tenderer to perform the contract".*

It is evident from the above mentioned provisions that procuring entities can verify information provided by the tenderers during pre-qualification. The Appeals Authority also observed that the Appellant through its application letter dated 13<sup>th</sup> April 2018 (paragraph 4) submitted to the Respondent during pre-qualification, allowed for the verification of the statements, documents and information submitted in relation to the pre-qualification. Therefore the Respondent had the mandate to verify any information provided in the pre-qualification document.

In view of the requirements under the law and the authorization provided by the Appellant, the Appeals Authority hereby finds the Respondent's act of verifying the Appellant's information provided during pre-qualification to be proper and in accordance with the law.

In relation to the Appellant's lack of service coordinator (mechanical), the Appeals Authority revisited the pre-qualification document issued by the Respondent and observed that under Clause 4.12 of the Particular Instructions to Applicant (PITA), tenderers were required to submit currently signed CVs of their technical personnel. The Appellant's pre-qualification document contained CVs of technical personnel, including that of Eng. Julius Shangari, which was for the position of service coordinator (mechanical). The Appellant claimed the said engineer was its employee. In the course of hearing of the Appeal, the Appellant readily conceded that Eng. Shangari was not its employee but has been engaged on specific assignments. When asked by the Members of the Appeals Authority if there is an engagement letter of the said Eng. Shangari for this tender, the Appellant conceded that there is no such letter.

With regards to the Respondent's claim that the Eng. Shangari's signature has been forged since it differed with the one used during the post-qualification meeting held on 6<sup>th</sup> September 2018. The Appeals Authority is of the view that as no forensic hand writing expert witness was called and no analysis of the full handwriting details was made, the Appeals Authority is not in a position to conclude whether or not Engineer Shangari's signature was forged. However, what is significant is the misrepresentation made by the Appellant that Engineer Shangari was its employee. The Appellant failed to call Engineer Shangari during the hearing of the appeal in order to clarify the position, only a video clip was attached to the Appellant's statement of the Appeal.

With regard to the Appellant's argument that they were not accorded a right to be heard since by the time they were served with the notice of intention to award, the Respondent had already made a decision to disqualify them. The Appeals Authority is of the considered view that this argument has no basis. After completion of evaluation and approval of the award by the Tender Board, the Appellant was informed about the Respondent's intention to award the Tender to M/s Hainan International Limited and the reason for its disqualification. According to Section 96 of

the Act read together with Regulations 105 and 106 of GN No. 446 of 2013, a tenderer who is dissatisfied with its disqualification from the Tender process is allowed to challenge such a decision by submitting a complaint to the accounting officer of a respective procuring entity. According to Section 96(6) of the Act, the accounting officer after reviewing the complaint may either dismiss or uphold part or the whole complaint and order corrective measures to be taken. The Appellant had the opportunity to challenge the reasons given for its disqualification and indeed it exercised such right through its application for administrative review. The Appellant was required when lodging its complaint to the Respondent to provide evidence to substantiate that no misrepresentation was made regarding Eng. Shangari. However, the Appellant failed to do so hence the Respondent's accounting officer retained its earlier position.

Therefore, given the surrounding circumstances and the position of the law, the Appeals Authority is of the settled view that the Appellant was accorded a right to be heard in accordance with the law as the required procedures were complied with.

From the above findings, the Appeals Authority is of the settled view that, the Appellant's disqualification was justified. Thus, the first issue is answered in the affirmative. The Appeals Authority finds the Appeal has no merit.

## 2.0 What reliefs, if any, are the parties entitled to.

Given our findings on the first issue that the Appeal has no merit, 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.

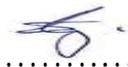
The Right of Judicial Review as per Section 101 of the Act is explained to the parties.

This Decision is delivered in the presence of the parties this 17<sup>th</sup> January 2019.



HON. JUSTICE (rtd) SAUDA MJASIRI  
CHAIRPERSON

MEMBERS:

1. ENG. STEPHEN MAKIGO.....

2. ADV. ROSAN MBWAMBO .....