

IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY
AT DAR ES SALAAM
APPEAL CASE NO. 49 OF 2018-19

BETWEEN

M/S PETROFUEL TANZANIA LTD.....APPELLANT
AND
TANZANIA ELECTRIC SUPPLY
COMPANY LIMITEDRESPONDENT

RULING

CORAM

- | | | |
|--------------------------------------|---|---------------|
| 1. Hon. Justice (Rtd), Souda Mjasiri | - | Chairperson |
| 2. Dr. Leonada Mwangike | - | Member |
| 3. Mr. Rhoben Nkori | - | Member |
| 4. Ms. Florida Mapunda | - | Ag. Secretary |

SECRETARIAT

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

FOR THE APPELLANT

- | | | |
|----------------------------|---|----------------------------|
| 1. Mr. Abdon Rwegasira | - | Advocate, Law Care Chamber |
| 2. Mr. Bavoo Junus | - | Advocate, Jab Attorneys |
| 3. Mr. Satish Kumar | - | Chief Executive Officer |
| 4. Mr. Jonesia Bartholomeo | - | Legal Officer |



- 5. Mr. Malick Hamza - Intern, Law Care Chambers
- 6. Ms. Rahma Msangi - Intern, Law Care Chambers

FOR THE RESPONDENT

- 1. Mr. Elias Mkumbo - Legal Officer
- 2. Ms. Canisia Mlowe - Procurement Officer
- 3. Ms. Beatrice Sosthenes - Procurement Officer
- 4. Ms. Grace Ngahyoma - Procurement Officer

This Appeal was lodged by M/s Petrofuel Tanzania Limited (hereinafter referred to as "**the Appellant**") against the 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/001/2018-19/HQ/G/37(Lot 1-9) for Supply of Fuel for Grid and Isolated Power Stations under Framework Contract-Part A (hereinafter referred to as "**the Tender**").

The Tender was conducted through National Competitive Bidding method 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 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:-



On 3rd October 2018, the Respondent through a tender advert published in the Daily News newspaper invited eligible tenderers to participate in the Tender. The deadline for submission of tenders was set for 26th October 2018; whereby six tenders were received.

Tenders were then subjected to evaluation which was conducted into three stages namely; Preliminary, Technical and Detailed Evaluation. After completion of evaluation and other internal processes award was approved to M/s Tanga Petroleum Company Limited for Lots 1 and 5, M/s GBP Tanzania Limited for Lots 3 and 6 and the Appellant Lot 8.

On 13th May 2019, the Respondent issued the Notice of Intention to Award the Tender to all bidders who participated in the Tender. The said notice was received by the Appellant via email on 21st May 2019 that the Respondent intends to award Lots 1 and 5 to M/s Tanga Petroleum Company Limited, Lots 3 and 6 to M/s GPB Tanzania Limited, and Lot 8 to the Appellant.

Aggrieved, on 27th May 2019, the Appellant lodged its request for administrative review to the Respondent's Accounting Officer challenging the award made to M/s Tanga Petroleum Company Limited. The Respondent did not respond to the complaint lodged within the statutory stipulated time, thus the Appellant lodged this Appeal on 18th June 2019.



SUBMISSIONS BY THE APPELLANT

The Appellant's grounds of Appeal as deduced from the Appeal record may be summarized as follows:-

1. That, the Respondent's Tender Board disregarded an imperative fact that M/s Tanga Petroleum Company Limited is not one of the importers of fuel in the country, and therefore its commitment, reliability, assurance and capability to supply 13,947,615 liters for Lots 1 and 5 is highly questionable.

The Appellant expounded that, it had done its own due diligence analysis and discovered that M/s Tanga Petroleum Company Limited has never imported petroleum products and is not registered as a fuel importer with the Petroleum Bulk Procurement Agency (PBPA). It went on arguing that in order for a company to be able to supply a huge volume of fuel like what has been awarded to M/s Tanga Petroleum Company Limited, the firm should not only be registered with PBPA but also should have been engaged in the direct importation of fuel in Tanzania. Since M/s Tanga Petroleum Company Limited has never been the importer of fuel in Tanzania, the Appellant doubts if it would be able to supply such a huge volume of fuel.

2. That, the Respondent's Tender Board did not take cognizance of the fact that M/s Tanga Petroleum Company Limited quoted an excessively high price in Lot 5 compared to the price quoted by



the Appellant. It expounded that, Lot 5 was for Tunduru District and the required volume of diesel is 2,052,276 liters. For that particular Lot the Appellant quoted TZS 4,864,422,583.30, however, the Respondent intends to award the said Lot to M/s Tanga Petroleum Company Limited whose quoted price is TZS 6,380,958,707.51. The price quoted by M/s Tanga Petroleum Company Limited was higher by TZS 1,696,536,124.21 compared to the price quoted by the Appellant.

The Appellant argued that the Respondent's act in this regard contravened principles of equality of opportunity, fairness and the need to obtain the best value for money as stipulated under Section 4A (3) (a) (b) and (c) of the Act. The Appellant submitted further that, it could have been judicious for the Respondent to take into consideration the fact that having recommended M/s Tanga Petroleum Company Limited for award of Lot 1 which has a bigger volume, the same firm should not have been recommended for award of Lot 5.

3. That, the Respondent failed to determine the Appellant's application for administrative review within the statutory stipulated time.

Finally, the Appellant prayed for the following orders:-

- i) The Respondent's intention to award Lot 1 to M/s Tanga Petroleum Company Limited be annulled;



- ii) The Respondent be ordered to proceed and act in a lawful manner;
- iii) The Respondent's intention to award with respect to Lot 5 be annulled and in lieu thereof the Appellant be declared a winner;
- iv) The Respondent be ordered to pay reasonable compensation in respect of costs of this Appeal; and
- v) Any other remedy as the Appeals Authority shall deem just to the Appellant.

REPLY BY THE RESPONDENT

The Respondent's reply to the grounds of Appeal is summarized as follows:-

1. That, evaluation process for this Tender was conducted diligently as per the laid down procedures to ensure fairness and equal treatment to all parties. During evaluation each tender was treated fairly based on its contents, as a result the Appellant's tender was found to be substantially responsive with respect to Lot 8. The Respondent added further that, when conducting this Tender it observed the requirement of the law on the need to obtain the best value for money.
2. That, regarding the argument that M/s Tanga Petroleum Company Limited has not been registered as importer of fuel, the Respondent stated that such registration was not among the qualification criteria provided for in the Tender Document.



Thus, evaluators could not have used such a criterion as a basis for disqualification of M/s Tanga Petroleum Company Limited.

The Respondent added further that M/s Tanga Petroleum Company Limited possesses a License for wholesale of Petroleum Products from Energy and Water Utilities Regulatory Authority (EWURA). The firm also had several contracts for supply of fuel with the Respondent, and in such contracts it has successfully demonstrated its competence and reliability to supply the required volume.

3. That, regarding the highest price quoted by M/s Tanga Petroleum Company Limited for Lot 5, the Respondent stated that the awarded contract price for Lot 5 was erroneously stated in the Notice of Intention to Award. The total recommended price for the said Tenderer under Lot 5 was TZS 6,380,958,707.50 for both Tunduru and Liwale Districts. Mistakenly the Notice of Intention to Award indicated that M/s Tanga Petroleum Company Limited had been awarded Lot 5, Tunduru District for TZS 6,380,958,707.50. The total price quoted by the Appellant for Lot 5 (Liwale and Tunduru Districts) was TZS 6,776,020,618.20 which is higher compared to the price quoted by the proposed successful tenderer. Thus, the Appellant could not have been recommended for award of Lot 5.



The Respondent added further that, the Tender Document allowed tenderers to be awarded a maximum of three Lots. Therefore, award did not depend on the volume or big share; thus, the Appellant's argument in this regard does not hold water.

4. That, the Respondent conceded that it had received the Appellant's application for administrative review but it could not have issued its decision within the stipulated time limit due to complexity and sensitivity of the Tender. The Respondent's decision was issued after the Appellant had already lodged the Appeal.

Finally, the Respondent prayed for dismissal of the Appeal.

At the hearing of this Appeal during the framing up of issues, the Appeals Authority was of the considered view that, there was a point of law for determination before hearing the appeal on merit. This was in relation to the legal status of the Tender. From the record of the Appeal, the Appeals Authority noted that the bid validity period had expired and there was no evidence indicating that the same was extended. The Appeals Authority therefore, invited learned counsels to address it as to "*whether or not there was a valid tender for consideration*".



SUBMISSIONS BY THE APPELLANT

The Appellant submitted that, from the sequence of events tenders were opened on 26th October 2018 and the bid validity period for this Tender was 120 days. At the time the Notice of Intention to Award was issued the Tender had already expired and there was no extension that was done. The Appellant submitted that the award has to be made whilst the Tender is still valid. After expiry of the stipulated bid validity period any subsequent acts thereafter are null and void in the eyes of the law. Therefore, the Appellant prayed that the Tender be cancelled and the Respondent be ordered to re-advertise the same in accordance with the law.

SUBMISSIONS BY THE RESPONDENT

The learned counsel for the Respondent conceded that the bid validity period for this Tender was 120 days and the same had expired since 24th February 2019. He went on stating that, tenders were opened on 26th October 2018, thus, counting from that particular date, the Tender had expired even before the Notice of Intention to Award was issued. He therefore prayed for dismissal of the Appeal as it lacks a leg to stand on, as it originates from a Tender that had already expired.

ANALYSIS BY THE APPEALS AUTHORITY

The main issue for consideration and decision is *whether or not there is a valid tender for consideration.*



Counsel for both the Appellant and the Respondent readily conceded that the bid validity for the Tender under consideration had already expired.

According to Clause 20 of the Tender Data Sheet (TDS), the bid validity period for the Tender was one hundred and twenty days (120) from the date of tender opening, that is, 26th October 2018. Counting from the tender opening date, the bid validity period expired on 23rd February 2019. The record of Appeal indicates that the Respondent never requested for extension of the bid validity period on the bids; instead, it proceeded to issue the Notice of Intention to Award on 21st May 2019 as if the Tender was still valid.

The Appeals Authority revisited Section 71 of the Act and Regulations 191(3), (4) and 232(2) of GN.No.446 of 2013 which provides guidance on the requirement of the bid validity period. For purposes of clarity the said provisions are reproduced herein below:-

Section 71: *"The procuring entity shall require tenderers to make their tenders and tender securities including tender securing declaration valid for the 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***”.

Regulation 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.*

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

Regulation 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 or the highest evaluated, as the case may be, and meets the required financial and managerial capability, legal capacity, experience and resource to carry out the contract effectively’.*

[Emphasis Added]

From the above quoted provisions, it is crystal clear that a procuring entity is required to finalize its procurement processes including award of Tenders within the specified bid validity period. It should be



noted further that while the law permits extension of time under Regulation 191(4), the same is not automatic. The law allows extension of time if there are exceptional circumstances and the Respondent is required to request the said extension from tenderers. In this Tender extension of time was neither requested nor granted. Since the Tender had expired way back in February 2019, all the subsequent acts done by the Respondent thereafter are null and void.

In view of what is stated hereinabove, the Appeals Authority is of the firm view that there exists no valid tender for consideration after the lapse of the bid validity period; hence, there is a need for re-tendering.

What relief (s), if any, are the parties entitled to

Given the Appeals Authority's findings on the point of law, that there is no valid tender after the expiry of the bid validity period, the Appeal has no basis and is hereby dismissed. As the point of law was raised *suo motu* by the Appeals Authority, each party is to bear its own costs.

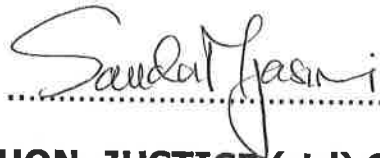
Order accordingly.

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 26th July 2019.



HON. JUSTICE (rtd) SAUDA MJASIRI

CHAIRPERSON

MEMBERS:

1. DR. LEONADA MWAGIKE



2. MR. RHOBEN NKORI

