

**IN THE**  
**PUBLIC PROCUREMENT APPEALS AUTHORITY**  
**AT DAR ES SALAAM**  
**APPEAL CASE NO. 03 OF 2019-2020**  
**BETWEEN**  
**M/S WASION GROUP (TANZANIA) LIMITED.....APPELLANT**  
**AND**  
**TANZANIA ELECTRIC SUPPLY COMPANY LIMITED.....RESPONDENT**

**RULING**

**CORAM**

1. Hon. Justice (rtd) Souda Mjasiri - Chairperson
2. Eng. Stephen Makigo - Member
3. CPA Fredrick Rumanyika - Member
4. Ms. Florida Mapunda - Ag.Secretary

**SECRETARIAT**

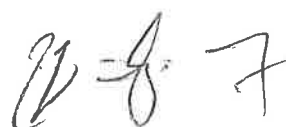
1. Mr. Hamisi O. Tika - Legal Officer

**FOR THE APPELLANT**

1. Ms. Victoria Ngowi - Advocate, KKB Attorneys
2. Wang Yue (Carol Wang) - Deputy Managing Director

**FOR THE RESPONDENT**

1. Mr. Mohamed Issa - Secretary Delegated Tender Board
2. Mr. Florence Kahatano - Principal Legal Officer



3. Mr. African Chuwa - Planning Engineer
4. Mr. Josiah B.Itegeleke - Zonal Safety Technician
5. Mr. Hussein Shekalaghe - Regional Supplies & Transport officer

This Appeal was lodged by M/s Wasion Group (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/SZN/G/32 for the Supply of Meters for South Zone under Framework Agreement (hereinafter referred to as "**the Tender**").

The Tender was conducted through Restrictive National 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 the Daily News newspaper dated 10<sup>th</sup> October 2018, invited eligible registered local manufacturers to participate in the Tender. The Tender had three Lots, namely; Lot 1 Lindi, Lot 2 Mtwara and Lot 3 Ruvuma. The deadline for the submission of tenders was initially set for 25<sup>th</sup> October 2018, but it was later on extended to 15<sup>th</sup> November 2018. Five tenders including the Appellant's were received in respect of all Lots.



Tenders were then subjected to evaluation which was conducted into three stages namely; preliminary, technical and detailed evaluation. During Preliminary Evaluation two tenderers were found to be non-responsive to the terms and conditions of the Tender Document, hence were disqualified. The remaining three tenders, the Appellant's inclusive were subjected to Technical Evaluation and all were found to be responsive. The Tenders were then subjected to price evaluation and ranking. After completion of that process M/s Baobab Energy Systems Ltd emerged to be the first ranked bidder for Single Phase Meters 10-60A for all the three Lots. The Appellant also emerged to be the first ranked bidder for Three Phase Meters 20-100AVAT in all the three Lots. Both firms were recommended for award of the Tender subject to successful negotiations.

The Tender Board through Circular Resolution No.47/12/2019 approved the recommendations of the Evaluation Committee. Furthermore, the Tender Board through Circular Resolution No. 52/01/2019 approved the negotiation plan.

The Respondent through a letter dated 14<sup>th</sup> January 2019 reference PA/001/2018-19/SZN/G/32 informed the Appellant of its intention to visit its plant. The said letter was sent to the Appellant via email. On 24<sup>th</sup> July 2019 the Respondent issued the Notice of Intention to award the Tender to M/s Baobab Energy Systems Ltd for Single Phase Meter and M/s Inhemeter Tanzania Ltd for Three Phase Meter. The same letter informed the Appellant that it has not been considered for award of the Tender due to the reason

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that it had refused the Respondent's officials to inspect its factory premises during negotiation process.

Dissatisfied with the given reason on 29<sup>th</sup> July 2019, the Appellant submitted its application for administrative review to the Respondent's Accounting Officer. On 9<sup>th</sup> June 2019, the Respondent issued its decision rejecting the application. Aggrieved further, on 19<sup>th</sup> August 2019, the Appellant filed this Appeal.

### **SUBMISSIONS BY THE APPELLANT**

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

1. That, the reason given by the Respondent that led to the disqualification of the Appellant from the Tender process is baseless and unjustifiable. It is not true that the Appellant refused to co-operate with the Respondent when the Respondent visited its factory premises. The Appellant had no knowledge that the Respondent would have visited its factory and it had never refused the calls or emails from the Respondent.
2. That, the Appellant is a local manufacturer incorporated and licensed in mainland Tanzania since June 2018. The firm is capable of production and it is eligible in terms of legal, technical and financial capabilities for the Tender. Therefore, as per the procurement law and its regulations the Appellant met all the criteria required for this Tender.
3. Finally, the Appellant prayed for the following orders: -



- i. A declaration that there was unfairness in the process of awarding the Tender as the Appellant was the original lowest evaluated bidder;
- ii. Award made to M/s Baobab Energy Systems Limited and M/s Inhemeter Tanzania Limited be nullified;
- iii. The Appellant be re-instated in the Tender process;
- iv. The Respondent be ordered to re-evaluate all the tenders and re-negotiate reasonably;
- v. Compensation to the tune of TZS 6,000,000,000/-;
- vi. Interest at the commercial rate of 22% from March 2019 until the date of the award;
- vii. Legal fees to the tune of TZS 10,000,000/-;
- viii. Filing fees and other costs amounting to TZS 500,000/-; and
- ix. Any other reliefs the Appeals Authority may deem fit and fair to grant.

### **REPLY BY THE RESPONDENT**

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

1. That, the Appellant was disqualified from the Tender process for failure to co-operate with the Respondent. The Respondent through a letter dated 14<sup>th</sup> January 2019 informed the Appellant that, its team intends to visit the plant on 17<sup>th</sup> January 2019 as part of the process towards completion of



tender process. The said letter was sent to the Appellant via email address [bokun.wu@wasion.com](mailto:bokun.wu@wasion.com) which has been used for various correspondences.

The Respondent expounded further that, the purpose of the visit was to negotiate on issues pertaining to quality assurance of the meters produced, delivery assurance, compliance with legal, technical and financial capabilities. However, the Appellant failed to co-operate with the Respondent in various instances; such as, unreplied email, unattended phone calls and also when the Respondent visited the factory it was denied access to the plant.

2. That, the mode of communicating the letter dated 14<sup>th</sup> January 2019 to the Appellant, was the same that was used for other correspondences. Thus, the Appellant cannot argue that the email was not received. Furthermore, the same email was used to communicate the notice of intention to award which was received by the Appellant.
3. In relation to Appellant's reliefs sought, the Respondent submitted as follows:-
  - i. Much as the Appellant had quoted the lowest price, the same does not render it eligible for award. The Appellant ought to have complied with other checks and balances before being awarded the Tender.
  - ii. With regard to nullification of award made to M/s Baobab Energy Systems Limited and M/s Inhemeter Tanzania Limited, the Respondent submitted that the same should not be nullified as the Appellant denied itself the right of winning by escaping the procedure for verification.



- iii. With regard to re-instatement of the Appellant into the Tender process, the Respondent submitted that the Appeals Authority should not be used to justify illegal acts of bidders who are not willing to follow the tendering procedures for their own benefit. Thus, the Appellant should not be reinstated in the Tender process.
- iv. Regarding re-evaluation of Tenders, the Respondent submitted that the Appeals Authority should not order for re-evaluation as the process is costly. Further to that, the Appellant denied itself the chance of negotiation and evaluation at its premises.
- v. With regard to compensation of TZS 6,000,000,000/- the Respondent submitted that the same is unjustifiable and the Appellant is seeking self-enrichment while there is no loss occasioned on their part. And if there is any loss incurred the same has been caused by itself.
- vi. The legal fees requested are also illegal and unjustifiable. All costs should be borne by the Appellant.

Finally, the Respondent prayed for dismissal of the Appeal with costs.

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 both parties to address it as to "*whether or not there was a valid tender for consideration*".



### **SUBMISSIONS BY THE APPELLANT**

The learned counsel for the Appellant submitted that, much as the bid validity period for this Tender was one hundred and twenty days (120), it had not received any letter from the Respondent which requested for extension of the bid validity period. Thus, counting from the Tender opening date, it is obvious that, the Tender had already expired. The Appellant argued further that, since there is no valid Tender in place, it goes without saying that even the notice of intention to award which had resulted to this Appeal is invalid. The Appellant concluded by submitting that since there is no valid tender in existence, this Appeal lacks any leg to stand on.

### **SUBMISSIONS BY THE RESPONDENT**

The learned counsel for the Respondent conceded that the bid validity period for this Tender was one hundred and twenty (120) days and the same had already expired as there was no extension that was done. Therefore, there is no valid Tender and no valid Appeal before this Appeals Authority.

### **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.

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According to Clause 19 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, 15<sup>th</sup> November 2018. Counting from the tender opening date, the bid validity period expired on 15<sup>th</sup> March 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 24<sup>th</sup> July 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 not requested. Since the Tender had expired way back in March 2019, all the subsequent acts done by the Respondent thereafter were 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.



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

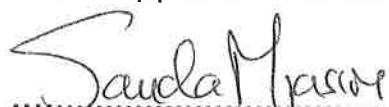
Given the Appeals Authority's findings on the point of law, that there is no valid tender after the expiry of the bid validity period, the Appeal has no basis and is hereby dismissed. As the point of law was raised *suomotu* by the Appeals Authority, each party is to bear its own costs.

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 presence of the Respondent and in the absence of the Appellant this 12<sup>th</sup> September 2019.



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

**CHAIRPERSON**

**MEMBERS:**

**1. ENG. STEPHEN MAKIGO**.....

**2. CPA FREDRICK RUMANYIKA**.....