

IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY
AT DAR ES SALAAM

APPEAL CASE NO. 20 OF 2016-17

BETWEEN

M/S GECI ESPANOLA S.A.....APPELLANT

AND

TANZANIA CIVIL AVIATION AUTHORITY.....RESPONDENT

DECISION

CORAM

- | | | |
|--------------------------------------|---|-----------|
| 1. Hon. Vincent K.D. Lyimo, J. (rtd) | - | Chairman |
| 2. Mrs. Rosemary A. Lulabuka | - | Member |
| 3. Ms. Monica P. Otaru | - | Member |
| 4. Mr. Ole-Mbille Kissioki | - | Secretary |

SECRETARIAT

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

FOR THE APPELLANT

1. Mr. Octavianus Mushukuma - Advocate – KAMU Attorneys
2. Ms. Leticia R. Msechu - Advocate – Sarc Law Chambers
3. Mr. Ferrao Makombe Joan - GECI Espanola- Africa Representative
4. Mr. Mshenga A. Nasseb - GECI Espanola- Tanzania Representative

FOR THE RESPONDENT

1. Mr. Valery L. Chamurungu - Corporate Secretary
2. Mr. Yoswam M. Nyongera - Head Procurement Management Unit(PMU)
3. Mr. Hamis R. Mussa - Principal Procurement Officer
4. Mr. Shukuru A. Nziku - Senior Air Controller
5. Mr. Kriston N. Nwala - Principal Air Navigation Engineer

OBSERVER

Ms. Jackline Silaa - Associate – ATZ Law Chambers

The Decision of this Appeal was scheduled for delivery today 24th March 2017, and we proceed to deliver it.

The Appeal was lodged by M/s GECI ESPANOLA S. A. (hereinafter referred to as “the Appellant”) against TANZANIA CIVIL AVIATION AUTHORITY commonly known by its acronyms TCAA (hereinafter referred to as “the Respondent”).

The Appeal is in respect of Tender No. AE/028/2016-2017/HQG/01 for Manufacturing, Supply, Installation, Testing and Commissioning of Four (4)

Collocated Primary Surveillance S-Band Radar (PSR) with Monopulse Secondary Surveillance Radar System (MSSR) Mode- S Capable for Julius Nyerere International Airport (JNIA), Kilimanjaro International Airport (KIA), Mwanza Airport and Songwe Airport (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 facts of the Appeal may be summarized as follows:

The Respondent invited tenderers to participate in the Tender through advertisement in the Daily News and Mwananchi newspapers dated 14th September 2016, East African newspaper dated 17th September 2016, TCAA website on 14th September 2016 and PPRA website/TPJ Vol.23 on 20th September 2016. The deadline for submission of the tenders was initially set for 13th October 2016 then extended to 27th October 2016 whereby six (6) firms submitted their tenders.

Tenders were subjected to evaluation which was conducted in three stages namely; preliminary evaluation, detailed evaluation and post qualification. Five (5) tenders, the Appellant’s inclusive, were disqualified at the preliminary evaluation stage. The remaining tender was subjected to detailed evaluation and post qualification. Upon completion of the evaluation process the Evaluation Committee recommended award of the contract to M/s Thales Air Systems Parc Tertiaire SILIC 3 at the contract price of Euro 22,351,248.00 and TZS. 3,671,608,308.00 (VAT Exclusive) subject to negotiations and specific physical verification.

The Tender Board at its meeting held on 17th November 2017 approved the award of contract as recommended, whereby on 20th to 22nd December 2016 negotiations were conducted. On 28th December 2016, the Tender Board approved the pre-contract negotiations and award recommendations.

On 7th February 2017, the Respondent notified the Appellant of its disqualification and intention to award the Tender to M/s Thales Air Systems Parc Tertiaire SILIC 3.

Dissatisfied with its disqualification, the Appellant applied for administrative review to the Respondent through a letter dated 14th February 2017. On the following day the Respondent dismissed the Appellant's complaints for lack of merits.

Aggrieved by the Respondent's decision, on 23rd February 2017, the Appellant lodged this Appeal.

SUBMISSIONS BY THE APPELLANT

The Appellant filed four (4) main grounds of Appeal as follows:-

1. That, the Appellant was not served with Addendum No. 3 that varied the number of students from 29 to 33 students, claiming that there was no evidence that the alleged e-mail was either sent by the Respondent or received by the Appellant.

The Appellant submitted that, the fact that Addendum No. 3 was served through usual email address that has been used to serve

other documents to the Appellant does not guarantee that the said document was received by the Appellant. Thus the Respondent was required to use reliable mechanism to ensure that the said Addendum has been served on the Appellant taking into consideration the sensitivity of the Tender. Therefore, the Respondent's act lacks transparency and has an ill motive against the Appellant.

2. That the Appellant described scope of work and controller working positions configurations pursuant to Clause 31.3 (a) and (b) of Section III of the Technical Specification as provided for in the Tender Document.

The Appellant submitted that the Respondent could have sought for clarification from the Appellant with regard to scope of work and controller working position configuration. Therefore, the Respondent's failure to seek for clarification amounts to unfair treatment of the Appellant's tender.

3. That the Respondent unfairly disregarded UHD display offered by the Appellant given the fact that the specifications offered by the Respondent had no minimum requirements and therefore did not bar the Appellant from offering displays which surpassed the requirements and without affecting the tender prices.
4. That it's tender had the lowest quoted price amounting to USD 18,877,997.00 and TZS 1,309,156,999.80 compared to the proposed

successful tenderer who had quoted EURO 22,351,248.00 and TZS 3,671,608,308.00 which was expensive by 25% equivalent to TZS 14.3 Billion.

The Appellant submitted that awarding the Tender to the highest tenderer is uneconomical and goes against the Government's policy of value for money. Therefore, the Respondent has no any justification to disqualify the Appellant's tender while it has complied with all the requirements of the Tender Document.

Finally, the Appellant prayed for the following Orders:-

- i. To declare that the Appellant complied with the requirements of the Tender Document;
- ii. To declare that the Appellant complied with all technical specifications and was the lowest tenderer thus entitled the award of the tender;
- iii. The Respondent to pay the Appellant a sum of USD 20,000.00 incurred by them as legal fees;
- iv. The Respondent to pay the Appellant a sum of USD 5,000.00 being travelling, accommodation and incidental costs incurred by the Appellant;
- v. The Respondent to pay TZS 200,000.00 being Appeal filing fees; and
- vi. Any other reliefs this Appeals Authority deems fit to grant.

REPLIES BY THE RESPONDENT

In its replies to the Appellant's grounds of Appeal, the Respondent submitted as follows:-

1. That on the 1st ground, Addendum No. 3 was served on the Appellant through its representatives' official e-mail addresses on Thursday 13th October 2016 at 4:23pm and the same was delivered to cgener@geciweb.com, cgarrote@geciweb.com, jmakombe@geciweb.com.

The Respondent submitted further that the same e-mail addresses were used to send other Addenda, clarifications of Tender and notice of intention to award the contract which were received by the Appellant. Thus the Appellant's failure to quote 33 students contravened the requirements of the Tender Document. The Respondent added further that Regulation 12(1) and (3) of the Public Procurement Regulations, GN. No. 446/2013 (hereinafter referred to as GN. No.446/2013) does not provide for requirement of acknowledgement from bidders provided that, such information is duly served on all bidders.

2. With regard to the 2nd ground, the Respondent submitted that, the Appellant's tender was contrary to requirements of Clause 31.3 (a) and (b) of Section III of the Tender Document. That the Respondent evaluated the tender pursuant to Regulation 203 of GN. No. 446/2013 and that the Appellant's tender was fairly disqualified for

failure to comply with technical requirements pursuant to Regulation 205 (c) of GN. No. 446/2013.

Furthermore, the Respondent stated that, specifications provided in the Tender Document were self explanatory.

3. With regard to the 3rd ground, the Respondent argued that, Technical Specifications provided in the Tender Document stated clearly that LCD Air Situation displays were required due to various reasons and that failure to comply with the requirement was contrary to Clauses 3.1, 3.2, 3.3, 7.1, 7.2, 7.3, 11.1, 11.2, 11.3, 15.1, 15.2, 15.3 and 32.3.2 of the Tender Document.
4. In relation to the 4th ground, the Respondent submitted that, the Tender Document provided a provisional sum of TZS. 3.5 billion for civil and electrical works which was changed by the Appellant at the tendering stage while the same was not subject to change. That value for money principle applies to substantially responsive bids and not bids which have been considered non-responsive.

Finally the Respondent prayed for the following Orders:-

- i. Dismissal of the Appeal for lack of merits;
- ii. Costs to the tune of TZS 10,000,000.00/-; and
- iii. Any other order the Appeals Authority may deem just to grant.

ANALYSIS BY THE APPEALS AUTHORITY

Before embarking on the Analysis of this Appeal, we have one observation to make. On 21st March 2017 when the matter was called for hearing the Appellant's Counsel submitted that some of the Appellant's experts from Japan have not yet arrived. The Appellant's representative from Africa, one Mr. Ferrao Makombe Joan insisted that, the said experts are the ones who are more conversant with the Technical Specifications so he prayed for adjournment for two weeks. The Members of the Appeals Authority informed the Learned Counsel and his client that those experts who are being relied upon in respect to specifications would do little to change the record of Appeal. That at this stage the Appeals Authority does not sit as Evaluation Team, since it does not have such mandate.

Secondly, this Appeal was earlier set for hearing on 16th March 2017 but was rescheduled for 21st March 2017 on the ground that Counsel for the Appellant were supposed to attend Annual General Meeting of the Tanganyika Law Society in Arusha. As the Appeals Authority is also processing other Appeals if this Appeal is adjourned for two weeks as prayed by Learned Counsel such appeal adjournment would disrupt the whole process of the Appeals scheduled pursuant to Section 97(7) of the Public Procurement Act (hereinafter referred to as "the Act"). In view of constrains behind the hearing of the Appeal, we drew the attention of the Learned Counsel and his client to the provision of Rule 28 of the Public Procurement Appeals Rules GN. No. 411/2014, whereby an Appeal may be determined by review of documents without presence of the parties.

Understandably, the Learned Counsel and his client consented to the Appeals Authority to proceed accordingly. That being said, the matter has been determined by way of review of documents.

The Appeals Authority is of the view that there are two triable issues, namely:-

1. Whether the Appellant's tender was fairly disqualified; and
2. What reliefs, if any, are the parties entitled to.

The Appeals Authority proceeds to determine them as follows;

1. Whether the Appellant's tender was fairly disqualified;

According to the Evaluation Report, the Appellant was disqualified at the preliminary evaluation stage for the following reasons;

- i. Failure to quote 33 students as provided for in Addendum No. 3;
- ii. Failure to describe the scope of work and controller working position;
and
- iii. Quoting UHD display instead of LCD display contrary to the requirements of the Tender Document.

To ascertain the validity of the above grounds for the disqualification of the Appellant's tender, the Appeals Authority revisited the Tender Document, the Evaluation Report, the Appellant's Tender as well as the applicable law. In so doing, the Appeals Authority observed that Section V of the Tender Document required tenderers to quote for 29 students;

however, the said number was increased to 33 via Addendum No. 3 that was sent to tenderers via e-mails. The Appellant quoted 29 students, claiming that they were not served with Addendum No. 3.

To ascertain whether the said Addendum No. 3 was served on the Appellant, the Appeals Authority revisited the Appellant's tender and observed that it contained two names as contact persons in case of clarification and these were; Daniel Jimenez Randell with e-mail address djr@geciwb.com and Javier de Lucas e-mail address jdelucas@geciweb.com.

On 13th October 2016, the Respondent sent Addendum No. 3 to the Appellant through the following e-mail addresses Cristiner Gener Laquidain cgener@geciweb.com, Joao Makombe jmakombe@geciweb.com and Carlos Garrote cgarrote@geciweb.com, all of these are known to the Appellant. The Appeals Authority observed as a fact that on various occasions the Respondent and the Appellant were communicating in respect to this Tender as follows; on 5th October 2016 the Respondent received e-mail from Cristiner Gener Laquidain with e-mail address cgener@geciweb.com acknowledging the receipts of the Minutes for Pre-Tender site Meeting, on 10th October 2016, the Respondent sent e-mails regarding Addendum No. 2 through e-mail addresses cgener@geciweb.com, charrote@geciweb.com and jmakombe@geciweb.com which the Appellant acknowledged to have received. On 22nd November 2017 Cristiner Gener Laquidain sent e-mail to the Respondent via cgener@geciweb.com regarding banks clarification.

Although the three persons are not listed as contact persons in Appellant's tender, there is evidence of communication in respect of this Tender. The Appellant is estopped from denying having received Addendum No. 3, his denial is an afterthought.

Further, as to whether the Respondent was required to establish or ensure that the Appellant has been duly served with Addendum No. 3 through other means instead of merely relying on the e-mail communication, the Appeals Authority does not buy the Appellant's contention. The Respondent was not duty bound to confirm delivery of Addendum No. 3 as electronic communication is among the acceptable means of communication between the procuring entity and the tenderer, provided that the records of communication can be confirmed as per Regulation 12 of GN. No. 446/2013.

The Appeals Authority considered the second ground of the Appellant's disqualification on failure to describe scope of work and controller working position. The Appeals Authority revisited Clause 31 of the Technical Specifications which provide for executive control suits minimum requirements. Clauses 31.2, and 31.3 (a) and (b), guide on the requirements of executive controller position, assistant position and operational supervisor console. The Appellant in his Statement of Appeal stated that the controller working position was interchangeable and have identical configurations. The Appeals Authority disagrees with the Appellant on the ground that the Tender Document clearly stipulated that each position had its own requirements and works independently. Thus the

Appellant's act of quoting all three positions with the same requirements contravened the Tender Document.

On the third ground of the Appeal that he quoted UHD instead of LCD contrary to Clauses 3.1, 3.2, 3.3, 7.1, 7.2, 7.3, 11.1, 11.2, 11.3, 15.1, 15.2, 15.3 and 32.3.2 of the Tender Document. These Clauses were couched in mandatory terms that tenderers were required to supply LCD displays with minimum specifications provided in the Tender Document and not otherwise.

The Appellant in his Statement of Appeal admitted that he proposed to supply virtually the same product with superior specifications without altering the Tender price. We are of the view that in case of any ambiguity, the Appellant ought to have sought for clarification pursuant to Regulation 13(1) (a) of GN. No. 446/2013. The proposed offer to supply UHD instead of LCD display is a counter offer which was properly rejected.

Reverting to the fourth ground of the Appeal, the Appeals Authority did not consider the same, for the reason that it was a new matter that was not submitted for administrative review pursuant to Section 97 (1), (2) (a) and (b) of the Act as amended.

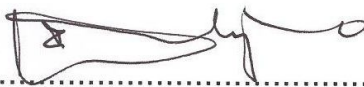
For the foregoing reasons, the Appeals Authority is of the firm view that the Appellant was fairly disqualified.

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

In determining the prayers, the Appeals Authority took cognizance of its findings made above, that is, the Appellant was fairly disqualified. The Appeals Authority rejects all the prayers by the Appellant and hereby upholds the Respondent's prayer that the Appeal be dismissed for lack of merits. With regard to prayer by the Respondent for costs amounting to TZS.10,000,000.00, the Appeals Authority cannot grant the same since the Respondent applied to the Public Procurement Regulatory Authority for a Certificate to continue with the procurement process which was granted and due to that he did not lose anything as the process was on going and the Respondent resides in Dar es Salaam. The Appeal is hereby dismissed in its entirety and each Party to bear own costs.

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 Appellant and the Respondent this 24th March, 2017.



.....
VINCENT K.D. LYIMO, J. (RTD)

CHAIRMAN

MEMBERS:

1. MRS. ROSEMARY A. LULABUKA



2. MS. MONICA P. OTARU

