

IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY
AT DAR ES SALAAM
APPEAL CASE NO 27 OF 2016-17

BETWEEN

M/S CLEBEN INVESTMENT COMPANY LTD.....APPELLANT

AND

MPANDA URBAN WATER SUPPLY

AND SANITATION AUTHORITY.....RESPONDENT

DECISION

CORAM

- | | |
|------------------------------|-------------------|
| 1. Ms. Monica P. Otaru | - Ag. Chairperson |
| 2. Mrs. Rosemary A. Lulabuka | - Member |
| 3. Eng. Francis T. Marmo | - 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

Mr. Shukuru Elias - Authorized Representative

FOR THE RESPONDENT

1. Mr. Jones Sendodo - Advocate, Victory Attorneys & Consultant
2. Mr. Nikodemus Komu - Procurement Consultant
3. Mr. Justine Wambali - Financial Manager

This Decision was scheduled for delivery today, 25th April, 2017 and we proceed to do so.

The Appeal at hand was lodged by M/S CLEBEN INVESTMENT COMPANY LIMITED (hereinafter referred to as “the Appellant”) against MPANDA URBAN WATER SUPPLY AND SANITATION AUTHORITY commonly known by its acronyms MUWASA (hereinafter referred to as “the Respondent”).

The Appeal is in respect of Tender No. MPN/UWSA/2015/16/W/01- Lot 1 for Supply of Pipes and Construction of Gravity Main from Kanonge Springs to Manga Intake 13.2 KM Long (hereinafter referred to as “the Tender”).

According to the documents submitted to the Public Procurement Appeals Authority (hereinafter referred to as “the Appeals Authority”), as well as the oral submissions during the hearing, the facts of the Appeal may be summarized as follows:

The Respondent, through Nipashe, Mwananchi, Daily News and the Guardian newspapers, all dated 9th June 2016, invited tenderers to participate in the Tender, submission of which was due on 8th July 2016.

Thirteen (13) firms submitted their tenders which were subjected to evaluation. The evaluation was conducted in three stages, namely; Preliminary, Detailed and Post-qualification Evaluation. At the Preliminary evaluation stage, eight (8) tenders including that of the Appellant were disqualified for being non responsive to the Tender Document. The remaining five (5) tenders were subjected to detailed evaluation, price comparison and post qualification. After completion of the evaluation process the Evaluation Committee recommended Award of the Tender to M/s Millenium Master at a contract price of TZS. 514,508,164.00 VAT inclusive which was approved by the Tender Board meeting held on 27th July 2016.

On 21st February 2017, the Respondent issued a "Notice of Intention to Award the Tender" to the tenderers, attaching the summary of the Evaluation Report, which indicated that the Appellant's tender was disqualified for his failure to disclose litigation history, as well as not signing on the erased prices in the Bills of Quantity (BoQ).

Dissatisfied with its disqualification, on 25th March 2017, the Appellant applied for administrative review on the ground that his tender was unreasonably disqualified since he had the lowest price of all other tenderers. Thus, by having the lowest quoted price he should have been considered for Detailed Evaluation stage and the award of the Tender. He

contended further that the proposed successful tenderer did not qualify for the award of the tender since at the tender opening ceremony; it was evident that he did not state his bid validity period as well as the bid security amount. On 13th March 2017, the complaint was dismissed for lack of merits.

Aggrieved by the Respondent's decision, on 22nd March 2017, the Appellant lodged this Appeal.

SUBMISSIONS BY THE APPELLANT

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

- i. That, the Appellant's tender was unreasonably disqualified while he qualified for preliminary evaluation.
- ii. That, the correction (sic.) of errors made by the Evaluation Committee regarding his BoQ were unnecessarily made as numbers were clearly seen and do not make any confusion.
- iii. That, they provided the information regarding litigation Clause but it was overlooked by the Evaluation Committee.
- iv. That, the Appellant had the lowest quoted price compared to that of the proposed successful tenderer; therefore he was entitled for the Award of the Tender.

Finally the Appellant prayed for the following orders:-

- i. To uphold the Appeal;

- ii. To nullify the Intention to Award the Tender to the proposed successful tenderer;
- iii. To award the Tender to the Appellant or in the alternative re-evaluation of the Tender; and
- iv. Any other reliefs the Appeals Authority deems fit to grant.

REPLY BY THE RESPONDENT

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

- i. That the corrections made by the Appellant in his BoQ were not initialed as required, this was unjustifiable and intended to mislead the Evaluation Committee.
- ii. That, the Respondent has never informed the Appellant that he was disqualified because of information on the litigation history.
- iii. That, the Appellant did not state whether his quoted price of TZS. 492,582,080.00 was VAT inclusive or exclusive contrary to the requirement of Clause 14.3 of the ITB and Item 20 of the Preamble to the BoQ. Therefore, his disqualification is justifiable.

Finally, the Respondent prayed for the following orders:-

- i. To dismiss the Appeal for lack of merits;
- ii. To allow the Respondent to proceed with the Intention to Award the Tender;

- iii. To declare that the Appellant failed to comply with the requirements of the Tender Document; and
- iv. The Appellant to compensate the Respondent for costs of the Appeal.

ANALYSIS BY THE APPEALS AUTHORITY

During submissions the Appellant admitted that they did not complain about litigation history during administrative review, as such, by virtue of Section 88(4) of the Public Procurement Act, No. 7 of 2011, as amended, (hereinafter referred to as “the Act”) together with Rule 13(5) of the Public Procurement Appeals Rules, GN.No.411 of 2014, this ground is hereby rejected by the Appeals Authority. As such, there are two main issues calling for determination, and these are:-

1. Whether the Appellant’s disqualification is justifiable;
2. What relief(s), if any, are the parties entitled to.

Having framed the above issues, the Appeals Authority proceeded to resolve them as herein below;

1. Whether the Appellant’s disqualification is justifiable

In resolving this issue, the Appeals Authority revisited the Tender Document in which Terms of Reference were provided, the Evaluation report vis-a-vis the Act and the Public Procurement Regulations, GN.No. 446 of 2013 (hereinafter referred to as GN.No.446/2013). In the course

of doing so, the Appeals Authority observed that the Appellant's tender was disqualified at the preliminary evaluation stage on the sole ground that he did not initial or sign on the corrected, altered or erased prices in the BoQ.

To verify the legality of the Appellant's disqualification on this ground, the Appeals Authority revisited the Tender Document and observed that Clause 19.3 of the ITB requires bidders to initial their documents after doing either alteration, corrections or additions. The Clause reads;

“the bid shall contain no alterations or additions, except those to comply with instructions, issued by the Procuring Entity, or as necessary to correct errors made by the Bidder, in which case such corrections shall be initialled by the person or persons signing the bid”. (Emphasis Added)

The Appeals Authority revisited the Appellant's submitted tender and observed five alterations made on some price units in the BoQ. Three out of the five alterations were not initialed, contrary to the requirement of the above quoted clause. The three unsigned were in the list made under D and E items of the BoQ.

When asked by the Members of the Appeals Authority regarding this glaring waywardness, the Appellant was adamant and unbending. He vehemently insisted that the numbers in his BoQ are readable and what is seen as corrections emanated from much emission of ink making the numbers look re-written. The Appeals Authority does not agree with the Appellant's proposition in this regard. We are satisfied that the Appellant has failed to comply with the requirement of the Tender Document cited

above. Therefore, his assertion that his bid was unreasonably disqualified is impaired.

With regard to the Appellant's contention that his tender was the lowest, the Appeals Authority is of the firm view that much as the Appellant was disqualified at the Preliminary Evaluation stage hence his bid price could not have been compared with the proposed successful tenderer's. Comparison of tenders is a final stage to determine the lowest tender price from bidders who have been found to be substantially responsive to the Tender Document in preceding stages. Therefore, his assertions that he had the lowest price compared to the proposed successful tenderer and that he was entitled for the Award of the contract are baseless.

In view of the above findings, the Appeals Authority's conclusion with regard to the first issue is in the positive, that the Appellant's disqualification is justifiable.

2. What relief(s), if any, are the Parties entitled to.

In resolving this issue, we took cognizance of our findings and conclusion on the first issue above and prayers by the parties. In doing so, the Appeals Authority observes that since the Appellant's disqualification was justifiable, his prayers cannot be granted.


With regard to the prayers by the Respondent, the Appeals Authority upholds them. The Appeal is hereby dismissed in its entirety for lack of merits. The Respondent is allowed to proceed with other stages of the Tender including issuance of the letter of acceptance.

It is so ordered.

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 25th April, 2017.


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MS. MONICA P.OTARU
Ag. CHAIRPERSON

MEMBERS:

- 1.ENG. F.T. MARMO 
- 2. MRS R. A. LULABUKA 