

IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY
AT DAR ES SALAAM

APPEAL CASE NO 22 OF 2015-16

BETWEEN

M/S M.M. INDUSTRIES LIMITEDAPPELLANT

AND

TANGA URBAN WATER SUPPLY AND
SANITATION AUTHORITY.....RESPONDENT

DECISION

CORAM

- | | | |
|----------------------------|---|-----------------|
| 1. Ms. Monica P. Otaru | - | Ag. Chairperson |
| 2. Eng. Aloys J. Mwamanga | - | Member |
| 3. Eng. Francis T. Marmo | - | Member |
| 4. Mr. Ole-Mbille Kissioki | - | Secretary |

SECRETARIAT

- | | | |
|---------------------------|---|-------------------------|
| 1. Mrs. Toni S. Mbillinyi | - | Principal Legal Officer |
| 2. Ms. Florida R. Mapunda | - | Senior Legal Officer |
| 3. Mr. Hamis O. Tika | - | Legal Officer |
| 4. Ms. Violet S. Limilabo | - | Legal Officer |

FOR THE APPELLANT

- | | | |
|---------------------------|---|---------------------------------|
| 1. Mr. Leonard T. Manyama | - | Advocate, Smile Stars Attorneys |
| 2. Mr. Fred Sanga | - | Clerk, Smile Stars Attorneys |

FOR THE RESPONDENT

- | | | |
|--------------------------|---|-----------------------------------|
| 1. Mr. Alfred Akaro | - | Advocate- AJ Akaro Advocates |
| 2. Mr. Jamal R. Ngereja | - | Head, Procurement Management Unit |
| 3. Mrs. Haika F. Ndalama | - | Chairperson, Tender Board |

This decision was scheduled for delivery today, 05th February 2016, and we proceed to do so.

This Appeal was lodged by M/S M.M. Industries Limited (hereinafter referred to as "the Appellant") against Tanga Urban Water Supply and Sanitation Authority (hereinafter referred to as "the Respondent").

The Appeal is in respect of Tender No. AE/048/2015-16/G/32 for Supply of PVC Pipes and PVC Pipes Fittings -Lot 1 and Supply of PTH Pipes- Lot 2 (hereinafter referred to as "the Tender").

After going through the record of proceedings 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 vide a letter referenced AE/048/2015-16/G/02/02 and dated 2nd October 2015 invited five tenderers who are manufacturers of pipes to participate in the Tender. The Tender was conducted through Restricted Tendering method as specified in the Public Procurement Regulations (GN No 446 of 2013, hereinafter referred to as "GN No 446 of 2013").

The deadline for submission of the Tender was set for 22nd October 2015, whereby four tenders were received from the following firms;

S/ No.	Tenderers Name	LOT 1 – Read out price in TZS (VAT Inclusive)	LOT 2 – Read out price in TZS (VAT Inclusive)
1.	M/s DPI Simba	1,522,787,424.34	534,795,980.32
2.	M/s M.M. Industries Ltd	931,587,987.10	291,784,255.74

3.	M/s Pipes Industries	1,252,211,103.00	453,499,627.24
4.	M/s Plasco Ltd	1,190,769,137.84	418,443,753.00

The tenders were then subjected to evaluation which was conducted in two stages, namely; Preliminary and Detailed Evaluation. During Preliminary Evaluation tenders submitted by M/s Pipes Industries and the Appellant were disqualified for being non-responsive. The remaining tenders were subjected for Detailed Evaluation whereby the tender submitted by M/s PLASCO Ltd was found to be substantially responsive and was subjected to post-qualification analysis. It was then found to be successful thus was recommended for award which was approved by the Tender Board at its meeting held on 23rd November 2015.

On 30th November 2015, the Respondent vide a letter with Reference No. AE/048/2015-16/32/G/09 notified the Appellant, among others, of its intention to award the Tender to M/s PLASCO Ltd giving reasons for its disqualification as failure to attach the Certificate of Incorporation/Business Name Registration.

Dissatisfied with the Respondent's decision, the Appellant vide a letter referenced Misc/2015/017/01/LTM filed an application for administrative review on 8th December 2015, objecting the Notice of Intention to Award as well as the reason given for their disqualification. The application was rejected on 18th December 2015 vide a letter with Reference No. AE/048/2015-2016/G/32/Lot01&02/24.

Aggrieved by the Respondent's decision, on 6th January 2016, the Appellant lodged this Appeal.

SUBMISSIONS BY THE APPELLANT

The Appellant's grounds of Appeal may be summarized as follows;

That, the Respondent had erred in law and in fact for disqualifying them for failure to attach Certificate of Incorporation/Business Name Registration. Much as the counsel for the Appellant conceded that the Certificate of Incorporation was not attached as required, he vehemently argued that the said document could have been made available upon request. The counsel argued further that the Appellant had attached to its bid other documents like Certificates of VAT and TIN as well as the Business License, which cannot be issued to a company if the same is not incorporated, thus the Respondent ought to have impliedly believed that the company had been incorporated even in the absence of the Certificate of Incorporation.

Counsel for the Appellant argued further that, the Respondent erred in law for failure to consider the Appellant's work experience in supply of plastic pipes and PHT pipes with Urban Water Supply and Sanitation Authorities in Ruvuma, Mbeya, Tabora and Morogoro Regions. That, since the Appellant is a manufacturer of pipes and is well known to various government authorities, the Respondent ought not to disqualify them for non-inclusion of the Certificate of Incorporation.

Considering value for money, the counsel for the Appellant cited Sections 34(c) and 63(2) of the Public Procurement Act, Cap 410 of 2011 (hereinafter referred to as "the Act") and submitted that the Respondent should not have awarded the Tender to the highest bidder who is over TZS 300,000,000/- more than the Appellant, while the aim of the Government is to cut short its expenditures and obtain value for money.

Finally the Appellant prayed for the following reliefs;

1. Declaration that the Respondent had failed to conduct the procurement of the disputed tender process as per the requirement of the law;
2. Nullifying the Respondent's decision to disqualify the Appellant's tender;
3. Compensation of TZS 200,000/- being Appeal filing fees and TZS 10,000,000/- being legal fees; and
4. Any other relief(s) the Appeals Authority deems fit to grant.

REPLY BY THE RESPONDENT

The Respondent's reply may be summarized as follows;

That, the Appellant's tender had been fairly disqualified for failure to comply with Clause 11.1(h) of Instruction To Tenderers (hereinafter referred to as "ITT"), read together with Clause 10 of Tender Data Sheet (hereinafter referred to as "TDS"). These clauses provide for mandatory inclusion of Certificate of Incorporation/Business Name Registration, which the Appellant failed to comply with.

That, the Appellant's alleged work experience was rendered immaterial in the absence of the mandatory Certificate of Incorporation/Business Name Registration, since other tenderers also portrayed similar experience. And that, the Appellant's argument that Certificates for VAT and TIN as well as Business License were able to substantiate that the Appellant's company was incorporated, did not hold water as they are not conclusive proof of company's existence.

Counsel for the Respondent also argued that, the Appellant was not the lowest evaluated tenderer since its bid was disqualified for being non-responsive. In order for a tender to be considered responsive, it has to comply with all tender requirements. Thus, having not been evaluated as the lowest tenderer on merits, the Appellant was not the lowest tenderer

per-se, and besides, the prices offered by the successful tenderer were within the Respondent's budget. Therefore, the Respondent prayed for dismissal of the Appeal for lack of merits.

ANALYSIS BY THE APPEALS AUTHORITY

In this Appeal there were two triable issues namely;

- Whether the Appellant was fairly disqualified;
- To what reliefs, if any, are the parties entitled

Having identified the issues the Appeals Authority proceeds to determine them as hereunder;

1.0 Whether the Appellant was fairly disqualified

The Appeals Authority having heard arguments by all parties noted that, the Appellant conceded to have not attached the Certificates of Incorporation/Business name Registration. Having so noted the Appeals Authority deems it proper to determine if the Appellant's disqualification based on his failure to attach the Certificate of Incorporation/ Business Name Registration was proper in the eyes of the law. In order to substantiate if the Appellant's disqualification was justifiable, the Appeals Authority revisited Clause 10 of the TDS which modified Clause 11(h) of the ITT and noted that the Certificate of Incorporation/Business Name Registration was among the mandatory documents that were to be included in the tenders. For purposes of clarity the said provision is reproduced as follows;

"In addition to the documents stated in ITT Clause 11, the following documents must be included with the tender

- A valid and relevant Company Registration Certificate [Certificate of Incorporation] or Business name Registration Certificate bearing Company name with Extract from the Register". (Emphasis supplied)

The Appeals Authority noted further that, Clause 28(3) of the ITT states specifically that a tender which would fail to comply with, amongst others, requirements of Clause 11 of the ITT would have to be rejected. The said clause states as follows;

28.3 "The procuring entity will confirm that the documents and information specified under ITT Clause 11, ITT Clause 12 and ITT Clause 13 have been provided in the Tender. If any of these documents or information is missing or is not provided in accordance with Instructions to Tenderers such tender shall be rejected". (Emphasis supplied)

From the above provisions, the Appeals Authority is of the firm view that, the Certificate of Incorporation/Business Name Registration was among the mandatory documents to be submitted by tenderers and non-compliance with such a requirement amounts to rejection of the Tender.

Furthermore, the Appeals Authority considered the Appellant's arguments that, the Respondent was required to assume that the Appellant's firm is incorporated because some of the documents attached to its tender like VAT and TIN certificates as well as Business Licence prove that the company is incorporated. According to Clause 30 of the TDS which provides for evaluation criteria, the Respondent was required to evaluate tenders by checking amongst others, their responsiveness to the information requested. Thus, the Respondent's duty was only to verify if the tenders submitted contained all the documents and information as required. The Appeals Authority wishes to remind the Appellant that according to Section 72(1) of the Act read together with Regulation 203(1) of GN No 446 of 2013 evaluation of tenders have to be done consistent with the terms and conditions provided for in the Tender Document. From the above, the Appeals Authority observes that, the Respondent was not required to assume the legal status of the Appellant's company during evaluation process.

Moreover, the Appeals Authority revisited Regulation 204(1) and (2)(k) of GN No 446 of 2013 which provides as follows;

204(1)“all tenders shall be checked for substantial responsiveness to the commercial terms and conditions of the tendering documents.

(2) Material deviations to commercial terms and conditions which justify rejection of a tender shall include the following;

(k) failure to submit major supporting documents required by the tendering documents to determine substantial responsiveness of a tender”. (Emphasis added)

From the above quoted provision the Appeals Authority is of the settled view that, it was proper for the Respondent to reject the Appellant’s tender for failure to attach the Certificate of Incorporation/Business Name Registration since such a document was identified to be among the major supporting documents for determination of substantial responsive tender.

Furthermore, the Appeals Authority considered the Appellant’s argument that, the Respondent ought to have requested the Appellant to submit the Certificate of Incorporation/Business Name Registration during evaluation process and observes that, the same would have contravened Regulation 207(1) of GN No 446 of 2013. The said Regulation on one hand, allows procuring entity to request a tenderer to clarify his tender in order to assist in evaluation process, on the other hand it prohibits clarifications aimed at making an unresponsive tenders responsive. Clause 28.2(c) of the ITT is in *pari-materia* with Regulation 207(1). Therefore, there was no room for the Respondent to request the Appellant to submit the Certificate of Incorporation/Business Name Registration since doing that

would have given the Appellant advantage over and above other tenderers something which is clearly against the law.

The Appeals Authority also revisited the Appellant's argument that their lowest price ought to have been the basis for award of the Tender and observes that, price was not the only criterion to be complied with by tenderers. According to Clause 28 of the ITT tenderers were required to comply with eligibility requirements as per Clause 11 of the ITT as well as technical requirements as per Clause 12 of the ITT before being subjected to price comparison. Clause 29.3 of the ITT states clearly that if a tender is not responsive to eligibility or technical requirements, the same has to be rejected. In relation to the Appeal at hand, the Appellant's tender was disqualified at the Preliminary Evaluation stage for failure to comply with eligibility requirements; hence, their tender was not subjected to price comparison. In addition thereto, the Appeals Authority wishes to remind the Appellant the contents of Section 74(1) of the Act which explicitly states that "the lowest submitted price may not necessarily be the basis for selection for award of contract".

The Appeals Authority thoroughly considered the Appellant's arguments in relation to Section 63(2) of the Act that the Respondent's tender process was not conducted in a manner which maximizes competition, efficiency, transparency and value for money for rejecting their tender which was the lowest. The Appeals Authority having reviewed the documents submitted and based on the above analysis is satisfied that the tender process was conducted in accordance with the law.

On the question of the Respondent acting unreasonably and unjustifiably contrary to Section 34(c) of the Act, the Appeals Authority deems it proper to state that, the said provision is not supposed to be read in isolation of other provisions of the law. Much as the Respondent's Tender

Board is required to act reasonably and justifiably in execution of its functions, the Appeals Authority is of the settled view that they should do so in the ambit of the law. Accordingly, the Appeals Authority is satisfied that the Respondent's Tender Board indeed acted in accordance with the law.

On the question of experience raised by the Appellant, the Appeals Authority rejects such argument on the basis that other tenderers have similar experience and in any case that was not the only criterion for the award. Tenderers were required to strictly comply with terms and conditions as provided for in the Tender Document.

All in all, from the above analysis the Appeals Authority is satisfied that the Appellant was fairly disqualified.

To what reliefs, if any, are the parties entitled

In determining the prayers by the parties, the Appeals Authority took cognizance of its findings made on the first issue above, that is, the Appellant has been fairly disqualified and therefore rejects all the prayers by the Appellant and accepts the prayer by the Respondent that the appeal be dismissed for lack of merits. The Appeals Authority hereby dismisses the Appeal in its entirety. Each Party to bear own costs.

This Decision is binding upon the parties and may be enforced in any court of competent jurisdiction in terms of 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 Appellant and the Respondent this 05th February, 2016.

M. Otaru

Ms. MONICA P. OTARU
Ag. CHAIRPERSON

MEMBERS:

1. ENG. F. T. MARMO *F. T. Marmo*

2. ENG. A. J. MWAMANGA *A. J. Mwamanga*