

IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY
AT DAR ES SALAAM

CONSOLIDATED APPEAL CASES NO 23, 24 AND 25 OF 2015-16

BETWEEN

M/S JV OF MBH POWER LIMITED AND

SHREEM ELECTRIC LIMITED.....APPELLANT

AND

RURAL ENERGY AGENCY (REA).....RESPONDENT

CORAM

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

SECRETARIAT

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

FOR THE APPELLANT

- | | | |
|------------------------|---|---------------------------|
| 1. Mr. James A. Bwana | - | Advocate, Bwana Attorneys |
| 2. Mr. Thulascedas T.N | - | Project Manager |
| 3. Mr. Rachit Shah | - | Authorized Signatory |

FOR THE RESPONDENT

1. Mr. Lutengano Mwakahehya - Director General
2. Mr. Prosper Msellem - Director of Planning Policy & Research
3. Mr. Bengiel Msofe -Director Technical Services
4. Mr. George Nchwali -Director of Finance and administration
5. Mr. Elineema Mkumbo -Projects Identification Manager
6. Mr. Musa Muze - Legal Affairs Manager
7. Mr. Gissima Nyamohanga - Director of Market Development and technologies
8. Ms. Theresia Nsanzugwako - Head of PMU
9. Mr. Willa Haonga - Legal Officer

This decision was scheduled for delivery today 22nd February 2016 and we proceed to do so.

The Appeals at hand were lodged by the M/S JV of MBH Power Limited and Shreem Electric Limited (hereinafter referred to as "the Appellant") against the Rural Energy Agency, commonly known by its acronym REA (hereinafter referred to as "the Respondent").

The three Appeals are in respect of Tender No. AE/008/2014-15/HQ/G/8 Lots 1, 2 and 3 for the provision of the following;

- Lot 1 : 220/33 kV Substation Extension at Mtera Hydropower Plant – Appeal Case No. 23
- Lot 2: Villages Electrification in Iringa and Dodoma Regions – Appeal Case No. 24

- Lot 3: Villages Electrification in Singida, Tabora and Shinyanga Regions – Appeal Case No. 25

According to the documents availed to the Public Procurement Appeals Authority (hereinafter referred to as the Appeals Authority), the Respondent vide its letters with reference Nos. AG/134/157/14/87, AG/134/157/14/88 and AG/134/157/14/89 dated 27th April 2015, respectively invited pre-qualified tenderers, the Appellant inclusive, to participate in the tender.

The deadline for the submission of tenders which was initially set for 12th June 2015 was extended to 26th June 2015, whereby eight (8) tenders were received for Lot 1, twelve (12) tenders for Lot 2 and nine (9) tenders for Lot 3. The Appellant herein submitted tenders for the three lots.

The tenders were subjected to three stages of evaluation, namely; preliminary, technical and detailed evaluation. During the preliminary evaluation, the Appellant's tenders for Lots 1 and 3 were found to be substantially responsive to the Tender Document. However, the Appellant's tender for Lot 2 was disqualified at the preliminary evaluation stage for failure to quote the price for 4W Double Cabin Pickup.

The Appellant's tenders for Lots 1 and 3 were subsequently subjected to technical and detailed evaluation, they were found to be substantially responsive and were subjected to post-qualification analysis which was conducted through physical visitation. During Post-qualification of the two lots, the Evaluation Committee observed that the Appellant's

tenders were non responsive due to poor performance of the ongoing contracts with the Respondent for the electrification of villages in Lindi, Pwani and Morogoro regions. The Evaluation Committee therefore proceeded to post qualify the second lowest ranked tenderers for Lots 1 and 3. After all the above said processes, the Evaluation Committee recommended award of the tender to M/s Sieyuan Electric Co. Ltd. & Urban and Rural Engineering Services Ltd. for Lot 1 and M/S Angelique International Ltd. for Lots 2 and 3 respectively. The Tender Board at its meeting held on 26th August 2015 approved the recommendations.

On 11th December 2015, the Respondent issued the Notice of Intention to Award the tender for Lot 1 to M/S Sieyuan Electric Co. Ltd. & Urban and Rural Engineering Services Ltd. at contract price of TZS 107,339,866/- and USD 4,318,150.00; Lot 2 to M/S Angelique International Ltd. at a contract price of TZS 5,441,240,242.56 and USD 8,736,884.09 and Lot 3 to M/S Angelique International Ltd. at a contract price of TZS 175,836,528/- and USD 7,471,576.04. The letters informed all unsuccessful bidders the reasons for their disqualification. The Appellant had been disqualified from Lots 1 and 3 for not only having pending works and poor performance in ongoing contracts with the Respondent but also for failure to quote the price for the 4W Double Cabin Pickup for Lot 2 .

Dissatisfied, the Appellants by their letters with Ref. No. MBH/REA/TZN/LOT-1/195, MBH/REA/TZN/LOT-2/196 and MBH/REA/TZN/LOT-3/197 dated 18th December 2015, applied for administrative review to the Respondent's Accounting Officer challenging his disqualifications in all three Lots.

Upon the receipt of the complaints from the Appellant, on 23rd December 2015, the Respondent through their letters with Ref. Nos. AG.134/157/15/18; AG.134/157/16/20 and AG.134/157/17/24 respectively, informed the Appellant that the Respondent had suspended the procurement proceedings pending re-evaluation and determination of the complaints. The Respondent did not issue a written decision in response to the complaints within fourteen days as required by the Public Procurement Act No. 7 of 2011 (hereinafter referred to as "the Act").

Having received no decision from the Respondent's Accounting Officer, on 18th January 2016, the Appellant lodged this Appeal.

At the hearing of the Appeals which were then consolidated, the Respondent raised a Preliminary Objection (hereinafter referred to as "P.O.") to wit, that the Appeal has been filed prematurely; hence it should be struck out. Consequently, the Appeals Authority deemed it prudent to determine the P.O. before dealing with the merits of the Appeal.

SUBMISSIONS BY THE RESPONDENT ON THE P.O.

In support of his P.O. the Respondent submitted that the law allows a tenderer to lodge his appeal to the Appeals Authority after receiving the written decision of the Accounting officer. In this Appeal, the Appellant wrote an application for administrative review to the Respondent on 18th December 2015 and the said letter was received on 21st December 2015. The Respondent further stated that upon receipt of the Appellant's

complaint, the Respondent's Accounting Officer suspended the procurement process pursuant to Section 100(1) of the Act and acting under section 36 (4) of the Act, he directed the Tender Board to review and to establish if post qualification was conducted in accordance with law and also to assess if offering the contract to the 2nd lowest evaluated bidder would not trigger cost escalation. The Respondent added that as he was dealing with the Appellant's complaint, he received a letter dated 6th January 2016 from Public Procurement Regulatory Authority (hereinafter referred to as "PPRA") indicating that there was a complaint lodged against them and that the said letter required him to submit some of the information relating to the disputed tender. After they had submitted the required information to PPRA, on 21st January 2016 the Respondent received another letter from the Appeals Authority notifying them on the existence of this Appeal. Thus, the Respondent was yet to issue its decision when the Appellant lodged the Appeal to the Appeals Authority. He stressed that the Appellant ought to have waited for the Respondent to issue its decision before lodging the appeal to this Authority. Therefore the Appeal has been lodged prematurely; hence the same should be struck out.

APPELLANT'S REPLIES ON THE P.O.

In reply to the Respondent's submission on the P.O., the Appellant submitted that, they had lodged an application for administrative review to the Respondent and the same was not determined within fourteen days as per Section 96(6) of the Act. The Appellant's Appeal to this Appeals Authority has been lodged pursuant to Section 97 of the said Act.

The Appellant argued further that, the Respondent's process of handling Appellant's complaint contravened the law, since the Respondent used Section 36(4) of the Act while the right provision was Section 96(2) of the Act. Section 36(4) can be applied when there is no complaint, but once complaint is lodged the same has to be handled in accordance with Section 96 of the Act. Thus, the Respondent's process of handling Appellant's complaint was nullity in the eyes of the law as they used the wrong provisions of the law.

The Appellant contended further that, Preliminary Objections are to be raised on pure points of law, to the contrary, the Respondent's P.O. is based on facts and law. The Appellant prayed that the P.O. be dismissed.

ANALYSIS BY THE APPEALS AUTHORITY ON THE P.O.

Having heard the oral submissions by the parties, the Appeals Authority is of the view that, the P.O. is based on the issue whether the Appeal is properly before it.

In the course of resolving the above framed issue the Appeals Authority revisited Section 96(6) and (7) of the Act which provides as follows;

96(6) "The accounting officer shall within fourteen days after submission of the complaint or dispute deliver a written decision which shall:-

- (a) State reasons for the decision; and
- (b) If the complaint or dispute is upheld in whole or in part indicate the corrective measures to be taken

96(7) Where the accounting officer does not issue a decision within the time specified in subsection (6), the tenderer submitting the complaint or dispute to the procuring entity shall be entitled immediately thereafter to institute proceedings under section 97 and upon institution of such proceedings, the competence of the accounting officer to entertain the complaint or dispute shall cease" (Emphasis supplied)

The above quoted provisions clearly indicate that an Accounting Officer is required to issue its written decision within fourteen days and in the event of failure to do so, the complainant is allowed to file an appeal to this Appeals Authority. The Appellant lodged its complaint to the Respondent on 21st December 2015. The Respondent through its letter dated 23rd December 2015, suspended the procurement process and informed the Appellant that they will be notified the results after re-evaluation and due consideration of the issues raised. As at the date of hearing of this Appeal the Respondent was yet to issue his written decision. Counting from the date the Appellant lodged his complaint, the fourteen days within which the Respondent ought to have issued its decision expired on 5th January 2016. The Appeals Authority observed that, the Appellant lodged his Appeal to this Appeals Authority on 18th January 2016, that is within fourteen working days after the lapse of the statutory period within which the Respondent ought to have issued its decision.

From the facts of this Appeal, it is crystal clear that the Respondent had failed to comply with requirement of Section 96(6) of the Act. Furthermore, the Appeals Authority is of the settled view that the Appellant's Appeal to this Appeals Authority is in accordance with Sections 96(7) and 97(1) & (2) (a) of the Act.

As correctly argued by the Appellant, the Respondent's process of handling the complaint contravened the law since the Respondent after receipt of the Appellant's complaint ought to have handled it in accordance with procedures provided under Section 96 of the Act read together with Regulation 106 of the Public Procurement Regulations (GN No. 446 of 2013, hereinafter referred to as "GN No 446 of 2013"). In his submissions, the Respondent indicated to have relied on the provisions of Section 36(4) of the Act in addressing the complaints raised by the Appellant. The Appeals Authority wishes to point out that Section 36(4) is applicable where the Accounting Officer disagrees with the decision of the Tender Board prior to the issuing of Notice of Intention to Award and not otherwise. Thus, the Respondent's acts in this regard, had contravened the law.

Furthermore, the Appeals Authority is of the firm view that, all subsequent proceedings conducted after the lapse of fourteen days within which the Respondent ought to have issued its decision are a nullity in the eyes of the law. From the documents submitted it has been noted that, the Respondent's Tender Board after reviewing the Appellant's complaint ordered re-evaluation of the tenders which was completed on 11th January 2016. The Re-evaluation report recommends amongst others rejection of all tenders and that is why the Respondent

applied for approval of rejection of the tenders from PPRA on 14th January, 2016. It has already been stated above that the Respondent's time limit to handle Appellant's complaint expired on 5th January 2016. According to Section 96(7) of the Act, the Respondent's mandate to entertain complaints ceased after the lapse of the said fourteen days. That means, all subsequent acts done by the Respondent in relation to the disputed tender after lapse of fourteen days are contrary to the law.

Therefore, the Appeals Authority finds the Appeal to have been lodged within time as required by the law and not as contended by the Respondent. Thus, the P.O. so raised is hereby dismissed.

Having determined on the P.O. as shown above, the Appeals Authority proceeded to determine the appeal on its merits. The Appeals Authority by virtue of powers conferred unto it by Rule 5(1) (a) of the Public Procurement Appeals Rules, 2014, G.N.No.411/2014 (hereinafter referred to as the GN.No. 411/2014), decided to determine the remaining part of the Appeals by way of review of documents.

APPELLANT'S GROUNDS OF APPEAL – APPEALS NOS. 23 & 25.

These were stated as follows-

1. That, the Respondent erred in law for using post-qualification criteria to disqualify the Appellant who qualified under the pre-qualification process which was conducted in accordance with Clause 25 of the Bid Data Sheet (hereinafter referred to as 'BDS'), Regulation 224(2) of the GN No. 446 of 2013 and Section 53(1) and (2) of the Act.

2. That, the Respondent had erred in law for disqualifying the Appellant's tender which was submitted in a Joint Venture, based on un-proved allegations against MBH Power Limited (one of the partners in JV). The Respondent had failed to consider that as a Joint Venture the Appellant had more capacity than a single entity.
3. That, they doubt if their disqualification was lawful and the intended award is cost effective.
4. Finally the Appellant prayed for the following reliefs;
 - i) The contract be awarded to them; or
 - ii) The Respondent be ordered to re-evaluate the tender;
or
 - iii) Payment of damages to them as follows;
 - a. 25% of the contract amount as loss of business and trust amounting to TZS. 2 billion exclusive of local taxes.
 - b. Payment of 5% of contract amount as compensation of loss incurred in relation to purchasing the rejected tenders, preparing tender documents and participating in the tender process to the tune of TZS. 400,000,000/-.
 - iv) Payments of legal consultant and Appeal filing fees of contract amount to the tune of TZS. 80,000,000/-
 - v) Any other costs which the Appeals Authority may deem fit to grant.

The Appellant's grounds of Appeal in relation to Appeal No. 24 is that, the Respondent had contravened Section 72 of the Act, Regulations 4, 203 and 204 (2) of GN No 446 of 2013 and Clauses 16.1 & 33.4(a) of ITB since failure to quote the price of Double Cabin 4WD was not a sufficient reason for disqualification.

Therefore, the Appellant prayed for the following reliefs

- i) The award be made to the Appellant at a contract price of TZS 814,818,838.80 and USD 9,635,323.90
- ii) The Respondent be ordered to re-evaluate the tenders
- iii) Payment of 25% of contract amount as loss of business which is equal to 5.29 Billion
- iv) Payment of 5% of contract amount as compensation of costs incurred in relation to preparation of the rejected tender which is equal to TZS 1.0 Billion.
- v) Payment of Appeal filling fees and Legal fees to the tune of TZS. 200,000,000/-.
- vi) Any other costs which the Appeals Authority may deem fit to grant

REPLIES BY THE RESPONDENT.

Respondent's replies to the grounds on all three Appeals were put as follows;

1. That, it is true that on 21st December 2015, they received complaints from the Appellant objecting the intention to award the tender for Lot 1 to M/S Sieyuan Electric Co. Ltd. & Urban and Rural Engineering Services Ltd. and Lots 2 and 3 to M/s Angelique

International Limited. As a result of the complaint, the Respondent's Accounting Officer suspended its intention to award the tender and returned the matter to the Tender Board for review of its decision.

2. That, the Tender Board at its 3rd extra ordinary meeting held on 7th January 2016, deliberated the recommendations by the Accounting Officer and ordered re-evaluation of all bids in all lots. That, after re-evaluation of all bid as directed by the Tender Board, the Evaluation Committee found all bids to be non responsive and recommended for rejection of all tenders. The Tender Board at its meeting held on 13th January 2016, resolved to reject the bids in terms of Section 59 (2) of the Act and re-advertise the same pursuant to Section 59(3) of the Act, upon approval by the Public Procurement Regulatory Authority (PPRA). That, the Respondent's Accounting Officer vide his letter with ref. No. AG/143/01/12 dated 14th January 2016, sought for approval of rejection of tenders from the PPRA.
3. That, after Post qualification it was established that, the Appellant will not be able to efficiently and effectively implement the project since his performance in the ongoing contracts does not conform to the terms and conditions of the contract. Thus, providing additional projects will cause delay of the projects.
4. Finally, the Respondent prayed for the dismissal of the Appeal and requests this Appeals Authority to issue any other relief, it deems appropriate and just to grant.

ANALYSIS BY THE APPEALS AUTHORITY

In dealing with this Appeal therefore, the Appeals Authority having gone through the tender proceedings including various documents submitted by both parties, it is of the view that the Appeal has been centred on two main issues calling for determination; and these are:-

1. Whether the Appellant was fairly disqualified
2. To what relief (s), if any, are parties entitled to

Having framed the above issues, the Appeals Authority proceeded to resolve them seriatim as follows;

1. Whether the Appellant was fairly disqualified.

In resolving this issue, the Appeals Authority observed that, the Appellant's tenders for lots 1 and 3 were disqualified during post qualification process after the Evaluation Committee had observed that the lead partner in the Joint Venture M/s MBH Power Limited was among the contractors with the poorest performance in the ongoing contracts in tender No. AE/008/2012-13/HQ/G/15 for the electrification of villages in Lindi, Morogoro and Pwani regions respectively. It was noted further that, the Appellant's tender for lot 2 was disqualified during preliminary evaluation for failure to quote price for 4WD Double Cabin Pick up, contrary to Instructions To Bidder (ITB) Clause 16.

The Appeals Authority revisited the Evaluation Report, the Tender Document as well as the applicable law and observed that Clause 36 of the ITB provided for post qualification of tenderers if the same has been specified in the Bid Data Sheet (BDS). The Clause reads;

Clause 36.1 "if specified in the Bid Data Sheet Post qualification, shall be undertaken.

The Appeals Authority further revisited Clauses of the Bid Data Sheet (BDS) and observed that Clause 25 provides for the post qualification of the tenderers. However, the said clause was restrictive only to the bidder's change of status from the time of pre-qualification and not otherwise. The proviso reads;

Clause 25. Post qualification will not be undertaken (unless the Bidder's status has changed from pre-qualification).

(Emphasis Added).

The Appeals Authority reverted to the Evaluation Report and observed that the post qualification conducted by the Respondent does not refer to the bidder's change of status from the pre-qualification stage. Rather, it refers to the ongoing contracts. It is the Appeals Authority's view that the Respondent used wrong criteria to post qualify the Appellant in this tender. It is so because, he ought to have post qualified the bidder, based on the criteria provided for in the Pre-qualification stage, as contained in their Pre-qualification Evaluation namely; general supply experience; similar supply experience; financial capabilities; personnel capabilities; equipment capabilities and litigation history since it is at that juncture when his status was first known and assessed as a Joint Venture. Furthermore, all these aspects were also required to be reflected in the Tender Document. This proposition is in line with Section 53 (4) and (5) of the Act which reads as follows;

S.53 (4) A procuring entity shall require a tenderer who has submitted a lowest evaluated tender in the case of procurement or highest evaluated tender in the case of

disposal by tender to demonstrate again its qualifications before the award of contract is confirmed.

- (5) *The criteria and procedures to be used in subsection (4) shall be the same as those used in the pre-qualification proceedings set out in Section 52 of this Act and shall be specified in the tendering documents prepared by the procuring entity. (Emphasis Added).*

It is therefore the Appeals Authority's firm view that the criteria used in the Respondent's post qualification evaluation were not those contained in the pre-qualification process.

The Appeals Authority is further of the considered view that, if the Respondent was aware of the poor performance in ongoing contracts by the Appellant's lead partner, he ought not to have pre-qualified the JV for this tender for the said reasons. To the contrary, the Respondent evaluated them and indeed had found them eligible and capable to execute other works; thus, inviting them to tender. In view of the above findings, it is the Appeals Authority's considered view that the Appellant's disqualification for lots 1 and 3 was not proper and was therefore unfairly disqualified.

With regard to the Appellant's disqualification for Lot 2, the Appeals Authority revisited Clause 16 relied upon by the Respondent to disqualify the Appellant. It was noted that some of the sub-clauses required bidders to give break down of their prices, such as Clause 16.3 while others did not. The Appeals Authority observed further that, the prices

for this tender were to be quoted for the entire facilities on a "single responsibility" to cover all bidder's obligations provided for in the tender document as per Clause 16.1; and that where no price list has been indicated by the bidder in certain aspects, the same would be presumed to be covered by the prices for other items. The same information has been provided for under Item 8 to the preamble of the price schedules included in the Respondent's price schedules list. The effect of the said exclusion was that the Respondent would not have to pay for such an item.

For purposes of clarity the said Clause 16.1 and Item 8 to the preamble to the price schedules are reproduced as hereunder;

Clause 16.1" *Unless otherwise specified in the Technical Specifications, Bidders shall quote for the entire facilities on a "single responsibility" basis such that the total bid price covers all the Contractor's obligations mentioned in or to be reasonably inferred from the bidding documents in respect of the design, manufacture, including procurement and subcontracting (if any), delivery, construction, installation and completion of the facilities. This includes all requirements under the Contractor's responsibilities for testing, pre commissioning and commissioning of the facilities and, where so required by the bidding documents, the acquisition of all permits, approvals and licenses, etc.; the operation, maintenance and training services and such other items and services as may be specified in*

the bidding documents, all in accordance with the requirements of the General Conditions of Contract. Items against which no price is entered by the Bidder will not be paid for by the Procuring Entity when executed and shall be deemed to be covered by the prices for other items."

Item 8. Items left blank will be deemed to have been included in other items. The TOTAL for each Schedule and the TOTAL of the Grand Summary shall be deemed to be the total price for executing the Facilities and sections thereof in complete accordance with the Contract, whether or not each individual item has been priced.

(Emphasis Added)

In view of the above findings, it is the Appeals Authority's firm view that Appellant's disqualification based on this criterion during the preliminary evaluation was in contravention of the Respondent's own Tender Document and Regulation 203 (1) of GN.NO.446/2013 which reads;

Reg. 203(1) The tender evaluation shall be consistent with the terms and conditions prescribed in the tender documents and such evaluation shall be carried out using the criteria explicitly stated in the tender documents.

Accordingly, the Appeals Authority's conclusion with regard to the first issue is that the Appellant was unfairly disqualified.

2. To what relief(s), if any, are parties entitled to;

The Appeals Authority took cognizance of the Appellant's prayers contained in his Appeals as well as the Appeals Authority's findings on the first issue. The Appeals Authority cannot grant the prayer to award the tender to them since those powers have been conferred to respective tender boards. Furthermore, as the Appellant was eliminated at the preliminary evaluation stage in lot No. 2, it is difficult to ascertain whether he would have been substantially responsive to the requirements of the Tender Document at the end of the evaluation process. In addition, the Respondent's evaluation of tenders has been shown to be vitiated by irregularities. In this regard therefore, the Appeals Authority upholds the Appeal and quashes the Respondent's intention to award the tender to the bidders indicated therein.

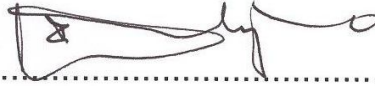
Consequently the Appeals Authority orders the Respondent to do the following;

- i. To re-evaluate the tenders afresh with a new independent evaluation team with exclusion of members of the teams in the first and the second evaluations.
- ii. Compensate the Appellants a sum of TZS. 600,000/ being Appeal filing fees.

It is so ordered.

Right of Judicial Review as per Section 101 of the PPA/2011 explained to parties.

This Decision is delivered in the presence of the Appellant and the Respondent with their counsels this 22nd February, 2016.



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

CHAIRMAN

MEMBERS:

1. MRS. ROSEMARY A. LULABUKA



2. MR. LOUIS ACCARO

