

**IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY
AT DAR ES SALAAM.**

APPEAL CASE NO. 06 OF 2015-16

BETWEEN

M/S FIRE BRAND TECHNOLOGIES.....APPELLANT

AND

EASTERN AFRICA STATISTICAL

TRAINING CENTRE..... RESPONDENT

DECISION

CORAM

- | | | |
|-------------------------------------|---|-----------|
| 1. Hon. Vincent K.D Lyimo, J. (rtd) | - | Chairman |
| 2. Eng. Francis T. Marmo | - | Member |
| 3. Ms. Monica P. Otaru | - | Member |
| 4. Mr. Louis P. Accaro | - | Member |
| 5. Mr Ole-Mbille Kissioki | - | Secretary |

SECRETARIAT

- | | | |
|---------------------------|---|-------------------------|
| 1. Mrs. Toni S. Mbilinyi | - | Principal Legal Officer |
| 2. Ms. Violet S. Limilabo | - | Legal Officer |

FOR THE APPELLANT.

1. Mr. Venance Loshya - Managing Director – Fire Brand Technologies
2. Mr. Benedicto Mahela - Legal Officer/Advocate

FOR THE RESPONDENT.

1. Prof. I. Ngarinda - Rector
2. Mr. Pascal H. Mushi - Head of Finance

This decision was scheduled for delivery today 5th October 2015, and we proceed to deliver it.

This is an appeal by M/S FIRE BRAND TECHNOLOGIES (hereinafter referred to as “the Appellant” against the EASTERN AFRICA STATISTICAL TRAINING CENTRE (hereinafter called “the Respondent”).

The said Appeal is in respect of Tender No. PA/081/2014-2015/G/01 for Supply of Various ICT Equipment for Administration Department for the Eastern Africa Statistical Training Center (hereinafter referred to as “the tender”).

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

On 15th April 2015, the Respondent by way of restrictive tendering method invited eleven firms to submit bids, the subject matter of this appeal. Eight

(8) prospective bidders collected the Tender Document. The deadline for submission of the tenders was 23rd April 2015, whereby seven (7) tenders were received from the following firms as follows -

S/No.	Tenderers Name	Quoted price in TZS (VAT Inclusive)
1.	M/s Fire Brand Technologies	172,883,000.00
2.	M/s Status Investment Ltd.	239,840,000.00
3.	M/s Climate Consult (T) Ltd.	243,555,137.28
4.	M/s Dubai Trading Co. Ltd	190,862,000.00
5.	M/s Computech ICS (T) Ltd.	\$ 133,591.92
6.	M/s Simply Computers Ltd.	194,309,356.96
7.	M/s Computer Connections Ltd	244,998,073.80

The tenders were thereafter subjected to evaluation which was conducted in three stages, namely; preliminary evaluation, detailed evaluation and price comparison. At the preliminary evaluation stage, the tenders were checked for substantial responsiveness and compliance with the eligibility criteria. All seven (7) tenders were found to be responsive to the

requirements of the Tender Document, thus they were subjected to detailed evaluation.

During detailed evaluation stage, the tenders were checked for compliance with technical specifications whereby five (5) tenders were found to be non-responsive and were disqualified for failure to comply with some of the requirements of technical specifications. The remaining two (2) tenders by M/s Fire Brand Technologies and M/s Simply Computers Ltd were subjected to price comparison and ranking. The tender by M/s Fire Brand Technologies was ranked the first followed by M/s Simply Computers Ltd. hence the Evaluation Committee recommended award of the tender to M/s Fire Brand Technologies.

As a result, the Respondent's PMU recommended award of the tender to M/s Fire Brand Technologies at a contract price of TZS. 172,883,000.00 (VAT Inclusive).

Two weeks later, the Respondent's Tender Board, at its extra ordinary Tender Board Meeting held on 26th May 2015, revisited the proceedings of both the Evaluation Committee and Respondent's Procurement Management Unit (PMU) and concluded that Clause 13.3 (b) of the Tender Data Sheet (hereinafter referred to as "BDS") had not been considered by the Evaluation Committee. In the upshot, the Tender Board disapproved the recommendation for award of the Tender to M/s Fire Brand Technologies and ordered the PMU to arrange for re-evaluation of the tender by considering all criteria provided for under the Tender Document.

In compliance with the Tender Board's instructions, the Evaluation Committee re-evaluated the tender and subsequently recommended award of the tender to M/s Simply Computers Ltd., at a contract price of TZS. 186,421,741.30 (VAT exclusive).

The Respondent's Tender Board at its meeting held on 14th July 2015, approved the award to M/s Simply Computers Ltd. and on 16th July 2015, the Respondent informed all the tenderers including the Appellant of its intention to award the tender to M/s Simply Computers Ltd. at a contract price of TZS. 186,421,741.30, vide its letter Ref. No. FBT/TENDER/VOL.II/2015.

Dissatisfied with the Respondent's notice of intention to award the tender to Ms/ Simply Computers Ltd without being given the reason for disqualification the Appellant by its letter Ref. No. FBT/TENDER/VOL.II/2015 dated 28th July 2015 sought from the Respondent reasons for its disqualification.

In response thereto the Respondent on 5th August 2015 by its letter Ref. No. STC/3/146/Part 1/29 informed the Appellant that it had been disqualified for failure to comply with Clause 13.3 of the Instructions To Bidders (hereinafter referred to as "ITB") and Clause 13 of the BDS which required that the bidder must have two (2) years' experience of supplying goods of similar nature within the United Republic of Tanzania by contracts of a similar or larger size.

Still dissatisfied with the reasons given, the Appellant by its letter Ref. No. FBT/TENDER/VOL.III/2015 dated 17th August 2015 filed an application for administrative review. In that application, the Appellant contended that Clause 13 of the BDS which demanded a bidder to have experience of supplying goods of similar nature within Tanzania by contracts of similar or large size is too general and could imply the amount of the past contracts performed by a tenderer should be of similar or large size to the quoted amount of the tender submitted. The Appellant asserted that it had complied with the requirement by attaching contracts of large size to the tune of TZS. 310,508,939.00 compared to its quoted price of TZS. 172,883,000.00.

The Respondent by its letter Ref. No. STC/4/146/Part I/33 dated 21st August 2015 communicated its decision to the Appellant by dismissing the complaint for lack of merits.

Aggrieved by the Respondent's decision, on 26th August 2015 the Appellant lodged this Appeal.

SUBMISSIONS BY THE APPELLANT

In this appeal, the learned counsel for the Appellant centered his submissions on the interpretation of the words 'contracts of similar nature', and 'similar or large size' and the same can be summarized thus-

The Appellant disputes the Respondent's interpretation of the words contracts of a **"similar nature"** and **"similar or larger size"** and argued that the interpretation was implicitly designed to look at the value of individual contracts performed by the tenderer, and not the comparison of aggregated figures. The Appellant submitted that he had attached contracts of similar nature and large size to the tune of TZS. 310,508,939.00 compared to his quoted price of TZS. 172,883,00.00. According to the Appellant's learned counsel, the Respondent's views were wrong because by looking at individual contracts one could not automatically establish the two years' experience stipulated in the BDS.

The learned counsel further submitted that, the phrase 'similar or large size' may imply similar or large size when comparing specifications, quality, and/or similar or large size on previous contracts' value in aggregate. He insisted that the wording of Clause 13 of the BDS was too general to respond to any of the basis for similarity or large sized contracts previously performed by a tenderer.

The learned counsel submitted further that Clause 32 of the BDS which amended Clause 32.4 (h) of the ITB contains the criteria for evaluation and that the Appellant had complied with the requirements. He asserted that the Respondent used a criterion alien to the provisions of Clause 13 Part C of the BDS which deals with preparation of the bids contrary to Regulations 203 (1) and 206 (1) of the Public Procurement Regulations of 2013 (hereinafter referred to as "GN. 446 of 2013").

He submitted further that, if the Respondent required certainty of turnover on the amount of previous contracts performed in order to establish the minimum experience of bidders, the criteria under Clause 13 of the BDS should have been very specific as required by Regulations 184 (1) (d), 184(2), 203 (1) and 206 (1) of GN 446 of 2013. The Appellant concluded his submissions by asserting that his tender was the lowest evaluated tender, hence entitled for the award of the tender in terms of Regulation 203 (2) of GN. 446 of 2013.

Finally the Appellant prayed for the following reliefs:

- (i) Declaration that the reason for the Appellant's disqualification was null and void.
- (ii) The Notice of Intention to award of this tender be declared null and void and if the tender has been awarded then the award be cancelled.
- (iii) The evaluation process of this tender be repeated by an Independent Evaluation Committee basing on the criteria provided for in the bidding documents and be awarded to the lowest valuated tenderer.
- (iv) Suspension of awarding process pending the decision of this Appeal or judicial review if any.
- (v) Compensation of the total cost of Tanzania shillings Five million only (Tshs. 5,000,000/=) which includes intention to appeal fees, appeal fees, representation fees and transport charges.
- (vi) Compensation of the total cost of Tanzania shillings ten million (10,000,000/=) which includes forecasted and expected profit for this tender, and

(vii) Any other reliefs that this Appeal Authority deems fit to grant.

REPLIES BY THE RESPONDENT

In response to the Appellant's contentions, the Respondent disputed all submissions and argued that the Appellant had wrongly interpreted the provisions of the BDS.

First, the words used in the Tender Document –'similar nature or larger size' were designed to look at the value of individual contracts performed by respective tenderer in previous years. He denied there was ambiguity in the Tender Document otherwise the Appellant was obliged to seek clarifications from the Respondent as provided under Clauses 8 of the BDS and 8.1 of the ITB. The Respondent asserted that the amount of TZS 310,508,939.00 indicated by the Appellant did not reflect or amount to 'similar nature or larger size' as specified by Clause 13.3 (b) of the ITB. The Respondent insisted that the requirement was designed for comparing the kind of goods or services delivered (goods of similar nature) and the corresponding quantities (similar or larger), which by implication looks at the value for individual contracts performed by a bidder within at least the past two years. The Respondent then referred to Section VI on the Schedule of Requirements and asserted that the Appellant had not met those requirements. He pointed out that the Appellant in the previous three (3) years, had supplied total 17 computers under a Call off Order 2014/2015/08 by the Treasury Registrar and 19 Computers under a Call off

Order by the Commissioner of Insurance. The total number of computers so supplied did not comply with the criterion of similar or larger size. The Respondent showed that the past contracts disclosed by the Appellant were small size contracts performed by using LPOs and Call off Orders. Even if all LPOs and Call off Orders for the past three years were added together, the criterion of similar or larger size would not have been met.

Submitting on the applicability of Clause 32 of the BDS, the Respondent argued that the said Clause is applicable only if Clause 13 of the BDS has been complied with. He said that since the Appellant did not comply with the provisions of Clause 13 of the BDS, then Regulations 203 (1) and 206 (1) of GN.446 were not applicable.

The Respondent submitted further that nowhere in the Tender Document tenderers were required to submit the annual turnover of their companies operations. Clause 13 requires the tenderers to disclose their strength to handle large size contracts, the basis being past performance on similar contracts. He contended that Regulations 184 (1) (d), (2), 203 (1), and 206 (1) of GN. 446 of 2013 were fully observed in the preparation of the Bid Document. He said that ITB Clause 32.4 (h) of the Tender Document shows the criteria for evaluation and 32.5 (h) outlines other factors to be used in the evaluation and their evaluation method or reference to the Technical specifications.

Finally the Respondent prays for dismissal of the Appeal for lack of merits.

ANALYSIS BY THE APPEALS AUTHORITY

In determining this appeal, the Appeal Authority is of the view that there are two triable issues namely;

1.0 Whether the Appellant was fairly disqualified; and

2.0 To what reliefs, if any, are the parties entitled to.

Having identified the issues in dispute the Appeals Authority proceeded to resolve them as follows -

1.0 Whether the Appellant was fairly disqualified

In resolving this issue the Appeals Authority considered the parties contention with regard to the interpretation of the words 'of similar nature and similar or larger size' as enshrined under Clause 13 of the BDS which modified Clause 13.3 (b) of the ITB.

The Appeals Authority revisited the Tender Document and observed that, tenderers were shortlisted from selected suppliers who had framework contract from the Government Procurement Services Agency (GPSA) to supply various ICT equipment through the Restrictive method under GN. 446 of 2013. It was observed further that, tenders were required to be evaluated in various stages as provided under Clauses 28, 29, 30, and 32.

The Appeals Authority reviewed the evaluation report and the Minutes of the Respondent's Tender Board meetings. The Appeals Authority has observed that initially, the Appellant was recommended for award of the tender by both the Evaluation Committee and the Respondent's PMU on

13th May 2015. As indicated herein above, the Respondent's Tender Board at its Extra-Ordinary Meeting held on 26th May 2015, reviewed the Evaluation Committee's proceedings and disapproved award recommendation and ordered the PMU to conduct re-evaluation of the tender on the grounds that the Evaluation Committee had not considered Clause 13 of the BDS. The PMU thus reconvened the Evaluation Committee which upon re-evaluating the said tenders recommended the award of the contract to M/s Simply Computers Ltd. The Appellant was disqualified at the detailed evaluation stage for failure to comply with Clause 13 of the BDS.

To ascertain whether the Appellant's disqualification was justified in the second evaluation process, the Appeals Authority revisited Clause 13.3 of the ITB which was modified by Clause 13 of the BDS which reads as follows-

"13.3. (b) of the ITB. The Tenderer has the financial, technical and production capability necessary to perform the contract, meets the qualification criteria specified in Tender Data Sheet".

And Clause 13 of the BDS reads:

"The qualification criteria required from Tenderers in ITT Clause 13.3 (b) is modified as follows:

Has at least 2 years of experience of supplying goods of similar nature within the Republic of Tanzania by contracts of a similar or larger size".

From the above quoted provisions, the Appeals Authority observed that, while tenderers were required to show their financial, technical and production capability, the same was modified by Clause 13 of the BDS which did not specify how tenderers would be evaluated to determine their responsiveness on the financial, technical and production capability. When the Respondent was asked on the purpose of the said modification its responses were that the said modification were intended to assist respective bidders to determine the financial capability and experience of each tenderer to submit the required hundred (100) Desktop computers, one (01) server, four (04) wireless projectors and four (04) Smart Board/interactive White Boards specified under Section VI of the Tender Document.

The Appeals Authority reviewed the Appellants tender and noted that, the Appellant had quoted the price schedule for the tender in compliance with the schedule of requirements provided under Section VI and complied with Section VII on the Technical Specifications provided in the Tender Document. Further to that, the Appellant had attached the Call Off Orders for supply of ICT to National Blood Transfusion Services of 2013 - USD 64,590.0 Local Purchase Order for supply equipment to Treasury of 2014 - TZS. 25,489,428.43; Local Purchase Order for supply of UPS to the Ministry of Finance of 2014 - TZS. 36,876,400.00 and Call Off Order for supply of Computer Desk Top to Treasury Registrar of 2014 – TZS. 48,704,400.00.

From the above findings and observations, the Appeals Authority is of the view that it was difficult to use Clause 13 of the BDS to determine

tenderers' responsiveness by showing that they had attached a copy of previous contracts tallying with the required number of ICT equipment provided under Section VI or which was within the amount quoted by the tenderer while at the same time they had complied with schedule of requirements and technical specifications. Instead, if the Respondent needed to determine tenderer's financial and production capability, he would have stated clearly that they require evidence of two (2) contracts of similar nature and specific value by specifying the amount required to be met by tenderers. In addition, the Respondent should have provided for the production of specific evidence of production capability by submitting annual turnover of a particular amount or audited statement of a particular amount. The modification of the BDS by Clause 13 was unnecessary.

The Appeals Authority also took cognizance of the Appellant's submission during the hearing that Part E of the BDS provided for opening and evaluation of tenders and that the Respondent had used alien criterion of Clause 13 of the BDS to disqualify him because no such requirements had been provided for evaluation. The Appeals Authority revisited the Tender Document and noted that during the preliminary evaluation stage, the Respondent was only required to evaluate the tender to determine responsiveness and compliance with eligibility criteria as per Clause 28, technical evaluation as per Clause 29, correction of errors in terms of Clause 30 and commercial evaluation of tenders in terms of Clause 32.4 of the ITB which was amended by Clause 32 of the BDS. For purpose of clarity Clause 32.4 of the ITB and 32 of the BDS are reproduced hereunder.

32.4 ITB “ in evaluating the Tenders, the evaluation committee will, in addition to the Tender price quoted in accordance with sub-Clause 15.1, take account of one or more of the following factors as specified in the Tender Dada Sheet, and quantified in sub-Clause 32.5”

And Clause 32 of the BDS stipulates:-

“ Criteria for evaluation. - Criteria for Tender evaluation.

ITT Clause 32.4 (a), (b) and (c)

Other specific criteria are;

- (i) Eligibility of the bidder (Registration certificates/incorporation certificate, TIN/VAT certificate where applicable and relevant Business licence;
- (ii) Properly filled Bid Securing Declaration
- (iii) Bid Validity period not less than 120 days;
- (iv) Specific Power of Attorney in acceptable format
- (v) Declaration of anti-Bribery Policy (Integrity);
- (vi) Compliance in price schedule requirements;
- (vii) Manufacture Authorization and
- (viii) Compliance in delivery requirement/ schedule”.

It will be noted that, Clause 13.3 (b) of the ITB was modified by Clause 13 of the BDS by inserting the provision for two years experience which is not one of the evaluation criteria.

From the above findings the Appeals Authority is of the firm opinion that the Respondent contravened Regulations 203 GN. 446 of 2013 which provide as follows;

“Reg. 203. - 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”

It was further observed that, the Respondent floated the tender by using Restrictive method of procurement by selecting shortlisted tenderers from GPSA, as per Clause 4 and 5 of the Invitation to Tender. The Respondent was obliged to comply with the procedure of using restrictive method provided for under Regulation 152 (1) (a) (b) and (4) of GN. 446 of 2013 which requires the procuring entity to use restrictive method where the goods to be procured is of the specialized nature and can be obtained from reputable or potential tenderers with a view of competing on the price. In this appeal, since the Respondent used restrictive method and the goods to be procured were of specialized nature, by selecting those tenderers the Respondent was aware that those tenderers were capable to offer the goods to be procured and the only remaining task was to evaluate them to determine their responsiveness, technical compliance and price comparison.

It was not fair for the Respondent to disqualify the Appellant who offered to supply the goods at the lowest evaluated price and award the tender to the highest evaluated tenderer while all tenderers had complied with eligibility and technical requirements.

The Appeals Authority noted further that the minutes of the secretariat of the Procurement and Management Unit (PMU) of 13th May 2015, shows that the PMU was seeking Tender Board approval of re-evaluation report. The same report at Clause 7.3 on the Results of Preliminary evaluation shows that Bidder No. 1 M/s Sky Modern Investment was found substantially responsive to the requirements, thus qualified for detailed evaluation. M/s Sky Modern Investment was not among the shortlisted tenderers. At the same time, the Evaluation Committee had recommended award of contract to the Appellant. Further, the Appeals Authority has observed that there is no explanation which is forthcoming from the Respondent to show what transpired between 13th May 2015 and 26th May 2015 to warrant the holding of the Extra-Ordinary Tender Board Meeting which ordered the PMU to conduct re-evaluation of the tender as mentioned above. This is evidence of in-fighting by the Respondent's Evaluation Committee and the PMU, which in turn is evidence of conflict of interest, denying the Accounting Officer value for money.

From the above findings and observations the Appeals Authority is of the settled view that, the Appellant was unfairly disqualified.

2.0 To what reliefs, if any, are the parties entitled to.

Having resolved the issues in dispute the Authority considered the prayers by the parties.

To start with the Appeals Authority considered the Appellant's prayer that Appellant's disqualification was null and void. The Appeals Authority has established in the first issue that, the Appellant was unfairly disqualified.

With regard to the second prayer to declare the notice of intention to award the tender to M/s Simply Computers Ltd null and void. The Appeals Authority has established in the first issue that, the criteria used to award the tender to M/s Simply Computers Ltd was not properly set and was not part of evaluation criteria. The Appeals Authority hereby nullifies the said award of the tender to M/s Simply Computers Ltd.

As observed, the criteria for evaluating financial and production capability were not important upon using the restrictive method. Alternatively, the same should have been properly modified to depict what tenderers were required to submit to prove their capability. The Appellant's prayer for re-evaluation cannot be upheld. The Appeals Authority orders the Respondent to re-tender in compliance with the law.

No order is made in regard to the prayer for suspension of the proceedings since the Respondent has suspended the procurement process pending determination of the Appeal.

Regarding the Appellant's prayer for compensation of TZS. 5,000,000.00 (including notice of intention to Appeal, Appeal filing fees, representation fees and transport charges), the Appeals Authority hereby orders the Respondent to compensate the Appellant a sum of TZS. 1,200,000.00 based on the following breakdown.

- TZS. 200,000.00 – being Appeal filing fees
- TZS. 1,000,000 – legal fees and transport charges

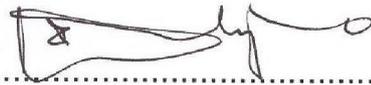
The Appellant's prayer for compensation of TZS. 10,000,000.00 for forecasted and expected profits is denied because in this case, the Respondent will re-tender and the Appellant has the opportunity to participate in the process if he so wishes.

From the above findings and conclusions, the Appeals Authority nullifies the tender process and orders the Respondent to re-tender afresh in compliance with the law and its Regulations.

The decision of this Authority is binding upon the parties and may be executed in any court of competent jurisdiction in terms of Section 97 (8) of the Act of 2011.

The right of Judicial Review as per Section 101 of the Act of 2011 explained to Parties.

This Decision is delivered in the presence of the Respondent and in the absence of the Appellant though notified this 5th October, 2015.



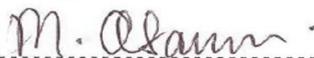
JUDGE (rtd) V.K.D. LYIMO
CHAIRMAN

MEMBERS:

1. ENG. F. T. MARMO



2. MS. M. P. OTARU



3. MR. L. P. ACCARO

