

IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY

AT DAR ES SALAAM

APPEAL NO. 24 OF 2018-19

BETWEEN

M/S MFI DOCUMENT SOLUTIONS LIMITED.....APPELLANT

AND

MINISTRY OF WATER.....RESPONDENT

RULING

CORAM

- | | | |
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| 1. Hon. Justice (rtd) Sauda Mjasiri | - | Chairperson |
| 2. Dr. Leonada Mwagike | - | Member |
| 3. CPA Fredrick Rumanyika | - | Member |
| 4. Mr. Ole-Mbille Kissioki | - | Secretary |

SECRETARIAT

- | | | |
|------------------------|---|---------------|
| 1. Ms. Florida Mapunda | - | DST |
| 2. Ms. Violet Limilabo | - | Legal Officer |

FOR THE APPELLANT

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| 1. Mr. Henry S. Massaba | - | Advocate, MA advocates |
| 2. Mr. Sunil Kumar Chaubey | - | Business Development/Head of sales |
| 3. Mr. Sandip Roy | - | Business Development Manager
Product Specialist |
| 4. Mr. Ashraph Titu | - | Legal Officer, MA Advocates |

FOR THE RESPONDENT

- | | | |
|---------------------------|---|--|
| 1. Mr. Simon S. Nkanyemka | - | Legal counsel |
| 2. Ms. Ziada Msangi | - | Director of Procurement
Management Unit |
| 3. Mr. Godbless Mtei | - | Supplies Officer |
| 4. Mr. Desmond Mayo | - | ICT Officer |

This Appeal was lodged by M/s MFI Document Solutions Limited (hereinafter referred to as "the Appellant") against the Ministry of Water (hereinafter referred to as "the Respondent"). The Appeal is in respect of Tender No. ME -011/2017-18/G/26 for Supply of Office Data Management Tools and Equipment (Including ICT Equipment). The Tender had four Lots and this Appeal specifically relates to Lot No. 2 - Supply of Printers (hereinafter referred to as "the Tender").

After going through the records submitted by the parties to the Public Procurement Appeals Authority (hereinafter referred to as "the Appeals Authority"), the circumstances surrounding the Appeal can be summarized as follows:-

The Respondent through the Daily News newspaper dated 26th June 2018 advertised the Tender pursuant to the Public Procurement Act of 2011, as amended (hereinafter referred to as "the Act") and the Public Procurement Regulations, Government Notice No. 446 of 2013, as amended (hereinafter referred to as "G.N. No. 446 of 2013"). The deadline for submission of tenders was initially set for 16th July 2018, but it was later on extended to 20th July 2018. By the deadline thirteen (13) firms responded to this Tender and among them six tendered for Lot No. 2.

The submitted tenders were subjected to evaluation which was conducted into three stages, namely; Preliminary, Detailed and Post Qualification Evaluation. After completion of the evaluation process M/s Canocity was recommended for the award of the tender subject to successful negotiation.

The Tender Board through circular resolution approved recommendations of the Evaluation Committee which included the need to conduct negotiation with the proposed successful bidders. Negotiation with regard to Lot No.2 was conducted on 16th October 2018 whereby parties agreed on all the items that were tabled for discussion. Having obtained the

necessary approvals, the Respondent issued a notice of intention to award on 7th November 2018. The said notice informed the Appellant that the Tender was intended to be awarded to M/s Canocity at the contract sum of TZS 607,024,263.03. The Appellant was further informed that its tender was disqualified for failure to submit the required Bid security as specified under Clause 21.1 of the Bid Data Sheet (BDS).

Dissatisfied with the tender results, on 13th November 2018, the Appellant filed an application for administrative review to the Respondent challenging the proposed award of Tender to M/s Canocity on the ground that the firm failed to comply with technical specifications. On 15th November 2018, the Respondent issued its decision regarding the Appellant's application for review whereby the same was rejected. The Appellant then lodged this Appeal on 26th November 2018.

SUBMISSIONS BY THE APPELLANT

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

1. That, the intention to award issued by the Respondent contravened Clause 14.7 and 14.8 of the Instruction to Bidders (ITB) and Clause 41.1 of the BDS. Further, the intention to award contravened Regulation 225(1) and (2) of GN. No. 446 of 2013 as amended.
2. The Respondent's Tender Board and the review committee had deliberately ignored the law for failure to observe the fact that the specifications which were provided in the Tender Document were not available in the market. Hence, the entire Tender was flawed as it could not have resulted to a responsive tenderer.
3. That, the drastic reduction of price after the tender evaluation signified that the Respondent all along had intended to favour M/s Canocity in this Tender process and was ready to compromise the quality of the required goods.

4. That, since the Tender process had been marred by irregularities the Appellant prayed for the following order:-
 - The entire Tender process be scrapped and the same be re-started afresh.

REPLY BY THE RESPONDENT

The Respondent's submissions on the grounds of Appeal may be summarized as follows:-

1. That, the evaluation process was conducted by considering all the criteria that were clearly stipulated in the Tender Document. The evaluation of tenders was conducted in accordance with Regulation 211 of GN. No 446 of 2013.
2. Regarding the Appellant's assertion that M/s Canocity failed to comply with technical requirements, the Respondent submitted that the said bidder complied with all technical specifications and indeed quoted superior specifications which were to the advantage of the procuring entity (Respondent).
3. The Respondent strongly disputed the Appellant's argument regarding the availability of the technical specifications for this Tender in the market. The Respondent submitted that, the technical specifications were readily available in the market and for that reason M/s Canocity complied with the tender requirements. The Appellant's argument on this point that the Respondent was unethical lacked substantial proof.
4. Regarding reduction of price in favor of M/s Canocity, the Respondent submitted that the quantities of the items to be supplied for Lot No.2 were reduced for the purpose of meeting the available

budget pursuant to Regulation 225(1)(b) of GN. No. 446 of 2013. Thus there was justification for the reduction of price.

5. Finally, the Respondent prayed for dismissal of the Appeal for lack of merits.

At the hearing of this Appeal during the framing up of issues, the Appeals Authority was of the considered view that, there was a point of law for determination before hearing the appeal on merit. This was in relation to the legal status of the Tender. The Appeals Authority noted that the bid validity period had long expired and no extension of time was in place. In that respect, the Appeals Authority called on learned counsel to address it as to *whether or not there was a valid tender for consideration after the lapse of the bid validity period.*

SUBMISSIONS BY THE RESPONDENT

The counsel for the Respondent started to address the Appeals Authority on this point and submitted that the bid validity period had expired on 28th October 2018. However, at that time the evaluation process had already been completed. Only approvals of the Tender Board were being awaited. Having been guided by the Members of the Appeals Authority on the requirement of the law that tenders are required to be valid up to the time of award and extension of time if so required must be done prior to the expiry of the original period of effectiveness. The Respondent conceded that the Tender had expired even before the award. The Respondent conceded further that it had not extended the bid validity period for this Tender.

SUBMISSIONS BY THE APPELLANT

On his part, the Appellant's counsel submitted that, since the Respondent had already conceded to have contravened Section 71 of the Act and Regulation 191 of GN No. 446 of 2013 which governs the bid validity period; it goes without saying that there is no valid Tender in place. Furthermore, the Appellant argued that, the Respondent failed to

substantiate that efforts were made to extend the bid validity period before it expired. Therefore it is undisputed that there is no valid tender in place; thus the tender process should be re-started afresh.

ANALYSIS BY THE APPEALS AUTHORITY

The main issue for consideration and decision is *whether or not there is a valid tender after the lapse of the bid validity period.*

Counsel for both the Appellant and the Respondent readily conceded that the bid validity for the Tender under consideration had already expired.

It is evident from the record of appeal that according to Clause 20.1 of the Bid Data Sheet, the bid validity period for the Tender was ninety days (90) from the date of tender opening, that is, 20th July 2018. Counting from the tender opening date, the bid validity period expired on 18th October 2018. The Respondent never requested for extension of the bid validity period on the bids; instead, it proceeded to issue the notice of intention to award on 7th November 2018 and awarded the Tender on 22nd November 2018 as if the Tender was still valid.

Having considered the legal position, the Appeals Authority is of the settled view that the requirements under Section 71 of the Act and Regulation 191(3) and (4) of GN.No.446 of 2013 are very clear. It is a mandatory requirement for a procuring entity to finalize all procurement processes within the bid validity period provided for in the Tender Document. Extension of time may be sought by a procuring entity prior to the expiry of the original period of effectiveness.

"Section 71: The procuring entity shall require tenderers to make their tenders and tender securities including tender securing declaration valid for the periods specified in the tendering documents, sufficient to enable the procuring entity to complete the comparison and evaluation of the tenders and for the

appropriate tender board to review the recommendations and approve the contract or contracts to be awarded whilst the tenders are still valid”.

“Regulation 191(3): The period fixed by a procuring entity shall be sufficient to permit evaluation and comparison of tenders, for obtaining all necessary clearances and approvals, and for the notification of the award of contracts and finalise a contract but the period shall not exceed one hundred and twenty days from the final date fixed for submission of tenders.

(4) In exceptional circumstances, prior to expiry of the original period of effectiveness of the tenders, a procuring entity may request tenderers to extend the period for an additional specified period of time”. [Emphasis Added]

The Appeals Authority is of the firm view that, it is a requirement under the law that a procuring entity should finalize its proceedings and award the Tender within the specified bid validity period. It should be noted that while the law permits extension of time under Regulation 191(4), the same is not automatic. The law allows extension of time if there are exceptional circumstances and the Respondent is required to request the said extension from tenderers. Extension of time was neither requested nor granted in respect of this Tender.

The Appeals Authority therefore is of the considered view that, where the law clearly provides for a certain act or acts to be done; there should be total compliance.

In view of what is stated hereinabove, the Appeals Authority is of the firm view that there exists no valid tender for consideration after the lapse of the bid validity period.

What relief (s), if any, are the parties entitled to

Given the Appeals Authority's findings on the point of law, that there is no valid tender after the expiry of the bid validity period, the Appeal has no basis and is hereby dismissed. As the point of law was raised *suo motu* by the Appeals Authority, each party is to bear its own costs.

Order accordingly.

This Ruling 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 Ruling is delivered in the presence of the parties this 19th December 2018.



HON. JUSTICE (rtd) SAUDA MJASIRI
CHAIRPERSON

MEMBERS:

1. DR. LEONADA MWAGIKE 
2. CPA FREDRICK RUMANYIKA..... 