

IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY
AT DAR ES SALAAM
APPEAL NO. 39 OF 2018-19

BETWEEN

M/S NELCOTECH ENGINEERING LIMITED.....APPELLANT

AND

MINISTRY OF EDUCATION, SCIENCE

AND TECHNOLOGY..... 1ST RESPONDENT

REALCOM EQUIPMENT (T) LIMITED2ND RESPONDENT

DECISION

CORAM

- | | | |
|-------------------------------------|---|---------------|
| 1. Hon. Justice (rtd) Sauda Mjasiri | - | Chairperson |
| 2. CPA. Fredrick Rumanyika | - | Member |
| 3. Eng. Stephen P. Makigo | - | Member |
| 4. Ms. Florida Mapunda | - | Ag. Secretary |

SECRETARIAT

- | | | |
|------------------------|---|---------------|
| 1. Mr. Hamisi Tika | - | Legal Officer |
| 2. Ms. Violet Limilabo | - | Legal Officer |

FOR THE APPELLANT

- | | | |
|-------------------------------|---|---------------------|
| 1. Mr. Cosmas Festus Kimaryo | - | Managing Director |
| 2. Mr. Leonard Edward Masanga | - | Project Manager |
| 3. Mr. Anthony Kigombola | - | Director of Finance |

FOR THE 1ST RESPONDENT

1. Ms. Hirtrudice J. Jisenge - Director of Procurement
2. Ms. Anna Kilomo - Legal Officer
3. Mr. Asheri J. Mwakaleja - Supplies Officer

FOR THE 2ND RESPONDENT

- Mr. Benedict Claver Pilli - Managing Director.

The Appeal at hand was lodged by M/s Nelcotech Engineering Limited (hereinafter referred to as "the Appellant") against the Ministry of Education, Science and Technology (hereinafter referred to as "the 1st Respondent") and M/s Realcom Equipment (T) Limited (hereinafter referred to as "the 2nd Respondent"). The Appeal is in respect of Tender No. ME-024/2016-17/HQ/G/48 for the Supply, Installation and Commissioning of LAN Equipment for the Arusha Technical College (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 background of the Appeal can be summarized as follows:-

The 1st Respondent through the Daily News, newspapers dated 13th November 2017, the Tanzania Procurement Journal issue No. 1821-6021 Vol X-No. 35 as well as the 1st Respondent's website, advertised the Tender under the National Competitive Bidding (NCB) specified in the Public Procurement Act of 2011, as amended (hereinafter referred to as "the

Act”) and the Public Procurement Regulations, Government Notices No. 446 of 2013 and No.333 of 2016 (hereinafter referred to as “the Regulations”).

The deadline for the submission of tenders was set for 5th December 2017. By the deadline, seven (7) tenders were received including the Appellant’s.

The tenders were subjected to evaluation which was conducted into four stages, namely; Preliminary Examination (Commercial and Technical responsiveness), financial analysis and Post qualification.

Three bids including that of the 2nd Respondent were disqualified at the preliminary evaluation stage for being non-responsive to the commercial terms of the Tender Document. The 2nd Respondent indicated the delivery point of the procured items to be the Ministry of Education, Dar es Salaam instead of Arusha as provided in the Bid Data Sheet (BDS) and the Particular Conditions of the Contract (PCC)

The four remaining tenders including the Appellant’s were subjected to the technical evaluation stage. Two bids were disqualified at this stage. The two remaining bids, that is, the bid by the Appellant and that by M/s TS Solutions were subjected to price comparison and ranking. The bid by the Appellant was ranked the first; and was therefore subjected to post qualification. It was found to be compliant and was therefore recommended for the award of the Tender at the contract price of TZS. 725,519,251.66 VAT inclusive.

On 16th March 2018, the 1st Respondent’s Tender Board approved the award recommendations to the Appellant. On 18th May 2018, the 1st Respondent submitted the Evaluation Report to the Donor for the “No

objection". After its deliberations, on 11th June 2018 the Donor returned the Evaluation Report to the 1st Respondent raising its concern regarding rejection of the bid by 2nd Respondent and bidder No. 7, who indicated CIP Dar es salaam instead of Arusha. The Donor was of the opinion that the two bidders could have been asked to confirm whether they are ready to deliver goods to Arusha Technical College instead of Dar es Salaam rather than rejecting their bids since the Tender was related to Arusha Technical College and not Dar es Salaam.

It is on record that the Donor's comments were forwarded to the Evaluation Committee for its incorporation. Upon review, the Evaluation Committee disagreed with the Donor's opinion. It was of the view that other bidders in the process had complied with the requirement. Therefore, there was no need of seeking clarification from few bidders who were not compliant. It further argued that seeking clarification from them would lead to unfair competition amongst bidders. It thus, retained its earlier position for fear of violating Clause 28.3 of the Tender Document, which relates to material deviation. The Evaluation Committee concluded that based on Regulations 203(1) and 204 (2) (e) as well as Clause 28.2 of the ITB, the said bidders were non responsive.

It is on record that on 24th July 2018, the 1st Respondent re-submitted the Evaluation Report to the Donor for the "No Objection". On 4th September 2018, the Donor vide its letter with Ref. No. COTZ/LT/HS/2018/09/0001 granted "the No Objection" to the 1st Respondent to award the tender to the Appellant.

On 14th September 2018, the Respondent informed all tenderers of its intention to award the Tender to the Appellant at a contract price of TZS.

725,519,251.66 VAT inclusive. The notice informed the 2nd Respondent that its bid was unsuccessful on the ground that it specified the delivery point (CIP) Dar es Salaam instead of Arusha, contrary to the delivery and completion schedule, Section VI (2) of the Tender Document.

Dissatisfied, the 2nd Respondent on 1st October 2018 filed an application for administrative review to the 1st Respondent's Accounting Officer challenging its disqualification. In the said complaint, the 2nd Respondent raised two grounds. The first was that the price of the proposed bidder, to wit; the Appellant, was higher than its quoted price. The second was that on 1st February 2018, through its letter with Ref. No. RCET/MoE/ RC/1/2/18/01 it clarified to the 1st Respondent that the delivery destination of its consignment was at Arusha Technical College and not Dar es Salaam. The 2nd Respondent did so after it had been asked by the 1st Respondent through its letter with Ref. No. ME-024/2016-17/HQ/G/48/VOL.II/05.

After receipt of the complaint by the 2nd Respondent, the records indicate that bids were re-evaluated by the 1st Respondent. On 10th December 2018, the Re-evaluation Report was tabled to the Tender Board for its deliberations, this time recommending award of the Tender to M/s Realcom Equipment (T) Limited (the 2nd Respondent) at a contract price of TZS. 668,766,151.4 VAT inclusive.

The Tender Board at its meeting held on 3rd January 2019 approved the award recommendations to the 2nd Respondent.

On 12th March 2019, the 1st Respondent informed all the tenderers of its intention to award the Tender to the 2nd Respondent. The Notice informed

the Appellant that its bid was unsuccessful since its bid price was higher than the proposed successful bidder (the 2nd Respondent).

Dissatisfied, on 15th March 2019 the Appellant lodged its complaint to the 1st Respondent's Accounting Officer challenging the proposed award of the Tender to the 2nd Respondent. The Appellant argued that the 2nd Respondent was found to be non-responsive at the earlier Notice of Intention to award issued on 14th September 2018, for indicating CIP-Dar es salaam instead of Arusha contrary to Clause 14.6(b) (i) of the Bid Data Sheet (BDS).

On 26th March 2019, the 1st Respondent issued its decision. The Appellant and other bidders were informed that the procurement under dispute falls under the Donor Fund. And that, upon seeking "No Objection", the Donor observed that some bidders were eliminated in the process for indicating CIP Dar es Salaam instead of Arusha. It was the view of the Donor that in order to obtain value for money, the 1st Respondent could have requested clarification from the disqualified bidders regarding the destination of their goods instead of rejecting them. Based on the opinion, the 1st Respondent wrote to the bidders requesting for clarification on the matter. The bidders, including the 2nd Respondent confirmed that their bids were CIP Arusha and not Dar es Salaam. From that clarification, the 1st Respondent had to re-evaluate the tenders afresh. After the process, the 2nd Respondent was found to be the lowest evaluated bidder, and was therefore, proposed for the award of the Tender after approval by the Tender Board and the "No Objection" from the Donor.

Aggrieved further on 29th March 2019, the Appellant lodged this Appeal.

SUBMISSIONS BY THE APPELLANT

The Appellant's grounds of Appeal as well as the oral submissions during the hearing of the Appeal may be summarized as follows:-

1. That, the award of the tender to the 2nd Respondent is based on price difference while its bid was initially found to be non responsive for failure to comply with delivery schedule provided under Clause 14.6(b)(i) of the BDS. The 2nd Respondent indicated CIP Ministry of Education, Science and Technology, Dar es Salaam instead of Arusha Technical College as indicated in the Bid Data Sheet.
2. That, by indicating CIP Dar es Salaam, the bid price by the 2nd Respondent could not be the same with those who indicated CIP-Arusha Technical College. As this was a competitive bidding, the 2nd Respondent's indication of CIP-Dar es salaam instead of Arusha, entails that its bid was not responsive.
3. That, the award was proposed to it after it had complied with all requirements in the price schedule.
4. That, despite the fact that the project is financed by the Donor, the requirements of the Tender Document needed to be complied with by all bidders. Being a Donor funded project does not oust the use of the Tender Document which it had approved.
5. That, the 1st and 2nd Respondents provided different reasons for the revocation of the proposed award. While the 1st Respondent asserted that the reason for revocation of award was based on the Donor's opinion, the reply by the 2nd Respondent indicated that it was the

complaint lodged to the 1st Respondent which led to the revocation of the Appellant's proposed award.

6. That, according to the experience it has on donor funded projects, the Notice of Intention to award cannot be issued until the "No Objection" has been sought by a respective entity and the same had been granted by the donor. It wondered as to why the Donor granted the "No Objection", to the previous award, if at all it had reservation regarding the bid by the 2nd Respondent.

Finally, the Appellant prayed for the following orders:-

- i. That the award of the Tender be re-instated to it.
- ii. The award to the 2nd Respondent be nullified.
- iii. Any other remedy the Appeals Authority may deem necessary to grant.

REPLY BY THE 1ST RESPONDENT

The 1st Respondent's reply to the grounds of Appeal may be summarized as follows:-

1. That, it has never awarded the tender as contended by the Appellant. What has been done by it is to issue the official communication of Intention to award the tender to all bidders pursuant to Regulation 231 (2) of GN.No. 446 of 2013 as amended.
2. That, after it had issued the first Notice of Intention to award the tender to all bidders on 14th September 2018, M/s MSI and 2nd Respondent

lodged complaints to it on 27th September 2018 and 1st October 2018 respectively.

3. That, apart from the complaints, the Donor advised that the 2nd Respondent and bidder No. 6 (M/s SCI Tanzania Limited) be asked to clarify their bids regarding destination, since the tender clearly stipulated that it was intended for Arusha Technical College and not Dar es Salaam. Based on the price quoted by the above named bidders, the Donor insisted that rejection of their bids was not in favour of the purchaser (the 1st Respondent); since their prices were lower than the Appellant's.
4. That, based on the Donor's advice and the complaints received, the 1st Respondent had to re-evaluate the tenders afresh and come up with the new proposal of awarding the tender to the 2nd Respondent. It then, sought for approval of the Tender Board and "No Objection" of the Donor, and finally issued the second Notice of Intention to award the tender to the 2nd Respondent.

Finally, the Respondent prayed for the timely determination of the Appeal in order to implement this project and achieve value for money.

REPLY BY THE 2ND RESPONDENT

The 2nd Respondent's reply to the grounds of Appeal may be summarized as follows:-

1. That, the 1st Respondent invoking Clause 27 of the ITB, on 29th January 2018 requested the 2nd Respondent to clarify the final destination of its delivery. On 1st February 2018 it clarified that its

quoted bid price was subject to final destination at Arusha Technical College.

2. That, since there is only one Arusha Technical College, it was a typo-error that led its tender to indicate Dar es Salaam instead of Arusha, as it used the template to fill in the tender information.
3. That, the tender was intended for Arusha Technical College and that several documents contained in its bid indicated that the tender was meant for Arusha. These included, letters addressed to the Secretary of the Tender Board, the form of tender, the bid form and the Power of Attorney.
4. That, the price difference between Arusha and Dar es Salaam is minimal. The only aspect causing a difference is shipping.
5. That, the nullification of the first award issued to the Appellant was right since its bid price was extremely high for about 187,346,565.00 compared to its price. This made its bid to be the lowest evaluated.

Finally, the 2nd Respondent prayed for the dismissal of the Appeal.

In its brief rejoinder, the Appellant submitted that this was a competitive tender. It was the responsibility of every bidder to meet the criteria stipulated in the Tender Document. Thus, it was imperative for the 2nd Respondent to comply with the delivery destination since the Tender Document was clear on it. Additionally, the delivery point is different from execution point; and the same have different cost implication. The assertion by the 2nd Respondent that there is only one Arusha Technical College is misconceived. It argued that many institutions bears similar names with their branches though they are located at different places. It

referred the Appeals Authority to the Ifakara Health institute and Tumaini University which have branches in various places in the country but the same are known by its mother name.

With regard to Clause 27 cited by the Respondents; the Appellant argued that the clause allows seeking clarification regarding arithmetic errors but it forbids the change of substance of the tender. The clarification sought by the 1st Respondent to the 2nd Respondent has changed the substance of the tender by the 2nd Respondent by making it responsive while it was not.

Additionally, the clarification was sought prior to the award of the Tender to the Appellant. The evaluators would have taken on board the clarification sought. However, it did not do so because the bid by the 2nd Respondent was non-responsive in terms of Clause 27.

ANALYSIS BY THE APPEALS AUTHORITY

The Appeals Authority having gone through the appeal record, Tender proceedings including various documents and the oral submissions by the parties, is of the view that the Appeal is centred on three main issues calling for determination. These are:-

1. Whether revocation of the Appellant's proposed award is proper in law;
2. Whether the proposal to award the tender to the 2nd Respondent is justified
3. What relief(s), if any, are parties entitled to

Having identified the issues, the Appeals Authority proceeded to resolve them as hereunder:-

1. Whether revocation of the Appellant's proposed award is proper in law;

In resolving this issue, the Appeals Authority revisited the evaluation Report, the Tender Document and the tender proceedings *vis-a-vis* the applicable law.

In the course of doing so, the Appeals Authority observed that, as per the Tender Advertisement dated 13th November 2017, Clause 14.6(i) (a) of the BDS as well as Clause 1.1.6.5 of the Particular Conditions of the Contract (PCC), the Tender under dispute relates to Arusha Technical College. In addition, Clause 14.6(b) (i) of the BDS provided in no uncertain terms that the Incoterm for goods offered for the Tender was intended to be delivered at the Arusha Technical College, Junction of Nairobi Road and Moshi-Arusha Roads.

The Appeals Authority reviewed the Evaluation Report and observed that the Appellant was compliant to the set criteria in the Tender Document and the delivery point. Furthermore, it was considered to be the lowest evaluated bidder after the evaluation process; and was proposed for award of the Tender. The proposal was approved by the 1st Respondent's Tender Board and the Donor granted its "No Objection" after scrutiny. On 14th September 2018, the Notice of Intention to award was issued to all bidders with the proposal to award the Tender to the Appellant. This entails that the Appellant's bid was substantially responsive.

The Appeals Authority observed however that, by necessary implication the proposal to award the Tender to the Appellant was revoked by the 1st Respondent after it had issued the 2nd Notice of Intention to award the Tender to the 2nd Respondent on 12th March 2019.

The Appeals Authority reverted to the Tender proceedings to ascertain the validity of the 1st Respondent's actions and observed that the reasons for revocation of the Appellant's proposed award and the subsequent change of the proposed bidder was the complaint submitted to it by the 2nd Respondent.

In order to substantiate the validity of the 1st Respondent's act, the Appeals Authority revisited Clause 27 of the ITB and observed that the Clause empowers the procuring entity, to wit; the 1st Respondent to seek clarification from a tenderer in order to assist the evaluation process. However, the Clause is restrictive. It forbids clarification that aims at changing the substance of a tender. The Clause reads:-

Clause 27.1 " To assist in the examination, evaluation, and comparison of the bids, and qualification of the Bidders, the Purchaser may, at its discretion, ask any Bidder for a clarification of its bid, allowing a reasonable time for response. Any clarification submitted by a Bidder that is not responsive to a request by the Purchaser shall not be considered. The Purchaser's request for clarification and the response shall be in writing. No change in the prices or substance of the bid shall be sought, offered, or permitted, except to confirm

the correction of arithmetic errors discovered by the Purchaser in the evaluation of the bids, in accordance with ITB 29"

(Emphasis Added)

Based on the above provision, the Appeals Authority revisited the clarification letter and observed that the same was sought by the 1st Respondent on 29th January 2018. The 2nd Respondent responded to it on 1st February 2018. At this moment, the evaluation process of the tenders was underway; and the Tender was yet to be awarded or approved by the respective internal bodies, that is the Tender Board and the Accounting Officer. The Appeals Authority observed further that at this stage the approval of the Donor was yet to be sought. No explanation was provided as to why the 1st Respondent did not consider the clarification it had sought in its evaluation prior to awarding the Tender to the Appellant. The above notwithstanding, the Appeals Authority observed that the clarification sought contravened Clause 27.1 cited above since it materially altered the tender by the 2nd Respondent who had earlier been disqualified for indicating in its bid, CIP Dar es salaam instead of Arusha. We are of the settled view that, the act by the 1st Respondent was making a non-responsive bid by the 2nd Respondent to be responsive contrary to the requirement under Clause 28.3 of the ITB which provides as follows:-

"28.3 A material deviation, reservation, or omissions is one that,

(b) If rectified, would unfairly affect the competitive position of other bidders presenting substantially responsive bids”.

From the wording of the above Clause, the Appeals Authority is of the view that the clarification sought not only affected the competitive position of the Appellant but also that of other bidders who were responsive to the requirements. The 1st Respondent's act was in contravention of Section 4A (3) of the Act, which states that:-

“4A (3) Procuring entities shall, in execution of their duties, undertake to achieve the highest standards of equity, taking into account-

a) Equality of opportunity to all tenderers

b) Fairness of treatment to all parties; and

c) The need to obtain the best value for money in terms of price, quality and delivery, having regards to prescribed specifications and criteria”.

(Emphasis Added)

The Appeals Authority revisited the argument by the 1st Respondent that it was simply incorporating the Donor's opinion and observed that the argument is an afterthought. This is so, because when the Donor's observations were made after the scrutiny of the first Evaluation Report, the Evaluation Committee rejected the observation and gave a detailed legal position for rejecting bids by the 2nd Respondent and M/s JV Rana Technologies and Aplite Consulting Company Limited (bidder No. 7). The Donor granted “the No Objection” after it had received the clarifications

and the position of the 1st Respondent. It is on record that the Donor granted "the No Objection" to award the tender to the Appellant on 4th September 2018 vide its letter with Ref. No. COTZ/LT/HS/2018/09/0001. At that point in time, the clarification by the 2nd Respondent was available to the 1st Respondent but the same was not considered. This is because it contravenes Clause 27.1 of the ITB.

The Appeals Authority did not find any other correspondences between the 1st Respondent and the Donor after it had granted the first "No Objection". The 1st Respondent conceded during the hearing that there were no further correspondences with the Donor after approval of the first Evaluation Report save for correspondences seeking for the second "No Objection".

The Appeals Authority is of the settled view that the change was caused by the 1st Respondent and not the Donor. Consequently, the Appeals Authority's finding with regard to the first issue is that the revocation of the Appellant's proposed award was not proper in law.

2. Whether the proposal to award the tender to the 2nd Respondent is justified

In resolving this issue, the Appeals Authority took cognizance of its findings on the first issue above and observed that the bid by the 2nd Respondent was non-responsive at the beginning but was later on made responsive by the 1st Respondent through clarification it had sought contrary to its own Tender Document and the law.

Regulation 203(1) of GN.No.446 of 2013 provides as follows:-

“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”.

The Appeals Authority is of the considered view that, the 2nd Respondent did not meet the criterion regarding delivery destination in its bid. Thus, its bid was non-responsive.

Accordingly, the Appeals Authority's finding with regard to this issue is that, the proposal to award the Tender to the 2nd Respondent was not justified.

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

Taking into consideration the findings on issues No. 1 and 2 above, the Appeals Authority finds the Appeal to have merits and therefore nullifies the Notification of award made to the proposed successful tenderer, the 2nd Respondent. The 1st Respondent is ordered to proceed with the tender process from where it ended with the Appellant and to secure the necessary internal and external approvals prior to issuing an award.

The Appeal is hereby allowed as indicated above and the Respondents are ordered to compensate the Appellant a sum of Tanzanian Shillings three hundred thousand only (300,000.00) as Appeal filing fee. 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 Appellant, the 2nd Respondent and in the absence of the 1st Respondent this 3rd day of May 2019.



HON. JUSTICE (RTD) SAUDA MJASIRI

CHAIRPERSON

MEMBERS:

1. ENG. STEPHEN P. MAKIGO.....

2. CPA. FREDRICK RUMANYIKA.....