

**IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY
APPEAL CASE NO. 22 OF 2017-18
BETWEEN
M/s JASSIE & COMPANY LIMITED..... APPELLANT
AND
GEITA TOWN COUNCILRESPONDENT**

DECISION

CORAM

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

SECRETARIAT

- | | |
|---------------------------|------------------------|
| 1. Ms. Florida R. Mapunda | - Senior Legal Officer |
| 2. Mr. Hamisi O. Tika | - Legal Officer |
| 3. Ms. Violet S. Limilabo | - Legal Officer |

FOR THE APPELLANT

- | | |
|-----------------------|---------------------------|
| 1. Mr. Sundeep Bachu | -Managing Director |
| 2. Ms. Saskireth Kaur | - Procurement Team Member |

FOR THE RESPONDENT

1. Eng. Modest J.A -Town Director
2. Mr. Bashir Muhoja - Solicitor
3. Ms. Queen A. Luwanda - Solicitor
4. Mr. Tatizo M.Christopher -Procurement Officer
5. Mr. Samson Lubala -Supplies Officer
6. Mr. Boniface M. Victor -Architect

The Appeal at hand was lodged by M/s Jassie & Company Limited (hereinafter referred to as "**the Appellant**") against Geita Town Council (hereinafter referred to as "**the Respondent**"), in respect of Tender No. LGA/160/HQ/ULGSP/2017/2018/RW-01 for Upgrading of Madini-Bomani Road (3.2 KM) to Bituminous Standard, in Geita Town (hereinafter referred to as "**the Tender**").

According to the documents submitted to the Public Procurement Appeals Authority (hereinafter referred to as "**the Appeals Authority**"), the facts of the Appeal may be summarized as follows:

On 29th September 2017, the Respondent through "Habari Leo" newspaper invited eligible tenderers to bid for the above mentioned Tender. The deadline for tender submission was 16th October 2017, whereby three tenders were received from M/s NCL International, M/s Jassie and Company Limited and Mwananchi Engineering & Contracting Co. Limited.

These tenders were subjected to evaluation and eventually, M/s Mwananchi Engineering & Contracting Co. Limited was proposed for award

of the contract at a corrected contract price of TZS. 5,670,904,750.00 subject to successful negotiations on the reduction of scope of work and reducing advance payment to 15% of the contract sum.

On 6th November 2017, the Tender Board approved the award of the contract to the proposed successful tenderer subject to successful negotiations on price. On 9th November 2017, the negotiation meeting was conducted, in which the quantity and the prices of some items in the BoQ were reduced and some items were completely removed. Finally the agreed price by the parties stood at TZS.4,833,674,500.00 VAT Exclusive.

On 10th November 2017, the Respondent issued the Notice of Intention to Award the contract to all bidders who participated in the tender, giving reasons thereof to unsuccessful tenderers.

Dissatisfied, on 15th November 2017, the Appellant lodged an official complaint to the Respondent's Accounting Officer challenging his disqualification. The Appellant's grounds were that;

- i. He had submitted the CV of the Materials Engineer in his bid and the same has 6 years of experience in the field. The said person has capability of performing the contract in this Tender taking into account his responsibilities in previous contract No. LGA/160/W/ULGSP/2014/2015/RW-01 which the Appellant had executed for the Respondent and in which the same Materials Engineer held a senior position. That, if he did not possess the said experience required in the Tender Document, then the

Respondent ought to have considered it as a minor deviation which could have been discussed during negotiation. He therefore believes to have met the criterion as required.

- ii. That, it was unlawful for the Respondent to disqualify his tender on assertion of abnormally low quoted rates in some items in the BoQ since his prices based on the fact that the company has roots in the Lake Zone and that he is conversant with the surroundings as well as the prevailing market in the area. Therefore, his prices were very competitive capable of executing the contract to the satisfaction of the Respondent.
- iii. That, the evaluation process of the tenders was discriminatory.

The Respondent however, did not respond. To the contrary, on 20th November 2017, he issued the acceptance letter to the proposed successful tenderer.

On 22nd November 2017, the Appellant reminded the Respondent on his request for administrative review so filed. The Respondent kept numb. Aggrieved further, on 6th December 2017, the Appellant lodged this Appeal.

SUBMISSIONS BY THE APPELLANT

The Appellant's grounds of Appeal are similar to the grounds for the administrative review to the Accounting Officer. He however added the following grounds:-

- i. That, the price of the contractor to be awarded the contract has dropped drastically from the read out price. He wondered whether there is a chance for the said bid to have contravened the law or

the same is tainted with flaws which have been disregarded by the Respondent. Furthermore, the Appellant contended that even after the negotiation to reduce the prices, his price was lower than that of the proposed successful bidder by more than TZS. 200,000,000/- . If the Respondent had invited the said bidder for negotiations, why wouldn't they call him to negotiate on the Materials Engineer, who was found to have less than the required years of experience.

- ii. That, the Respondent's Engineer's estimates for some items in the BoQ are not correct. Furthermore, the proposed successful tenderer is based in Dar es salaam, hence his costs for production will be higher which can have a domino effect of delays in the project compared to him who is fully established in the region.
- iii. That his documentations including the list of key personnel and their CVs as well as the proposed equipment, work programme and similar experience was up to the required standards. Thus, the Respondent's assertions on these matters are weak.
- iv. The price by the proposed successful tenderer is higher than the two bidders regardless of non confirmation of the VAT element in his quoted price.

Finally, the Appellant prayed for the following orders:-

- i. Evaluating and making a thorough review of the procurement process under Appeal;
- ii. To award the tender to him since his bid was the most responsive.
In the alternative;

- iii. Order for re-tendering.

REPLY BY THE RESPONDENT

The Respondent's oral replies to the grounds of Appeal during the hearing were as follows;

That, the Appellant was fairly disqualified for failure to comply with the requirements of the Tender Document, specifically on the Materials Engineer who had less than five (5) years experience of similar nature projects executed as stated in the Tender Document. The Appellant's disqualification was based on Regulations 203 and 204 of the Public Procurement Regulations, GN. No. 446 of 2013 and not otherwise. Furthermore, the said Appellant's Materials Engineer had no degree in the field as he was a mere technician who does not qualify to perform the contract at the required skills. Therefore, the Appellant did not qualify to be awarded this contract.

That, the Site Engineer referred to by the Appellant, one Eng. Karanver Bachu has experience of less than five (5) years. Moreover, he has never performed the managerial tasks in the previous contract as asserted by the Appellant in his claim. In the referred contract, the said person was working as a project coordinator, who does not fit the current position in the disputed tender as per the Tender Document.

That, the Appellant had abnormally quoted low rates of some items in the BoQ, rendering execution of the project with those quotations questionable based on experience of this bidder in previous contract which he had

executed with the Respondent. In the said contract, the Appellant had quoted some items with low prices, but in actual execution of the project he failed to deliver. To date the referred project has stalled. Additionally, the Respondent could not have awarded the contract to a bidder whose price is below the financiers estimates of the project cost.

With regard to evaluation process of the proposed successful tenderer's tender, the Respondent submitted that the process was properly done by competent personnel and that even the conducted negotiation was in compliance with Regulation 226(2)(a) of GN.No.446 of 2013. Thus, the Appellant's assertion that the award price of the proposed successful bidder has dropped drastically is not proper since the law allows negotiation of the price with the bidders. The Appellant should understand that the read out price of the tender should not necessarily be the award price. Finally, the Respondent prayed for the dismissal of the Appeal for lack of merits and quick determination of the Appeal due to the time constraint they are facing in implementation of the projects.

ANALYSIS

The Appeals Authority, having gone through the tender proceedings including various documents submitted by the parties and the oral submissions during the hearing, is of the view that the Appeal has been centred on four main issues calling for determination, which are:-

1. **Whether the evaluation of the tender was in compliance with the law.**
2. **Whether disqualification of the Appellant's tender is justified.**
3. **Whether the award of the tender to the proposed successful tenderer is proper at law.**
4. **What relief(s), if any, are parties entitled to.**

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

1. Whether the evaluation of the tender was in compliance with the law

In resolving this issue, we took cognisance of the Appellant's contention that the evaluation process of the tenders was discriminatory.

In verifying this contention, we revisited the Evaluation Report, the Tender Document vis-a-vis the applicable law. In the course of doing so, we observed that the evaluation of this tender was in three stages; namely preliminary, detailed and post qualification.

The Respondent's Tender Document indicates at Clause 34.1 as hereunder;

"Subject to ITT Clause 36, the Procuring Entity will award the Contract to the successful tenderer whose Tender has been determined to be substantially responsive to the Tendering Documents and who has offered the lowest Evaluated Tender Price, provided that such Tenderer has been determined to be (a) eligible in

accordance with the provisions of ITT Clause 3 and (b) qualified in accordance with provisions of ITT Clause 12”.

We revisited the referred Clauses 3 and 12 of the ITT and observed that while Clause 3 of the ITT refers Evaluators to the evaluation of eligibility of the tenderer, Clause 12 provides for evaluation of documents establishing eligibility and qualifications of the tenderer as contained in the Tender Forms. These are;

- a) 1.1 Eligibility
- b) 1.2 Work performed as prime contractor on works of a similar nature and volume over the last five years
- c) 1.3 Equipment and plants
- d) 1.4 Personnel
- e) 1.5 Sub contracting
- f) 1.6 Average Annual Construction Turnover
- g) 1.7 Financial Situations and Performance
- h) 1.8 Financial Capability.

Contrary to the above, the Respondent's evaluation was differently carried out. We observed for instance, that after conducting the preliminary evaluation, the Respondent did not conduct technical evaluation of the tenders, instead he did arithmetic correction of errors of the two tenders and ranked them. This anomaly not only contravened the referred ITT Clauses and the cited provisions of the law but also made the Respondent to conduct post qualification of both bidders contrary to Clause 33.3 of the ITT and Section 53 of the Act as well as Regulation 218 of GN.No.446 of

2013, which require post qualification to be conducted only to the bidder who has offered the lowest evaluated bid only.

Evidently therefore, the Respondent did not adhere to procedures enshrined in his own Tender Document. As these procedures are a replica of the procedures laid down in Regulations 204 and 205 of GN. NO.446 of 2013, the Respondent has as well contravened the law.

We observed further, that it is during post qualification that the Appellant's bid was found to have lacked experience of the key personnel. We believe that had the Respondent been keen in conducting evaluation in accordance with the law, he would have checked the compliance of the bids on the above aspects and that, if at all the Appellant did not qualify, he would have been disqualified much earlier.

In addition to the above, we observed also that, while the Appellant's tender price was considered to be abnormally low in some items in the BoQ; and which formed one of the basis for his disqualification, Clause 4 and 5 of the Preamble to the BoQ read;

Clause 4

"A rate or price shall be entered against each item in the priced Bill of Quantities, whether quantities are stated or not. **The cost of Items against which the Contractor has failed to enter a rate or price shall be deemed to be covered by other rates and prices entered in the Bill of Quantities**".

Clause 5

"The whole cost of complying with the provisions of the Contract shall be included in the Items provided in the Priced Bill of Quantities, **and where no items are provided, the cost shall be deemed to be distributed among the rates and prices entered for the related Items or Works**". (Emphasis Added)

Despite the above provisions, we noted that Clause 33 (2) (b) of the ITT requires the Respondent, before rejecting a tender which he considers to be abnormally low, to demand the respective tenderer to explain in writing of his tender or part of the tender which have been considered to be abnormally low. The procuring entity is then supposed to consider the evidence as well as explanations provided before rejecting the tender. This was not done.

We are of a considered view that, the Respondent, should have asked for the necessary explanations. As such, we are of the view that the evaluators were wrong in disqualifying the Appellant for quoting what they have termed as "an abnormally low quoted price".

Accordingly, the Appeals Authority's conclusion regarding this issue is that the Evaluation process of the tenders was marred with irregularities and that it did not comply with the law.

2. Whether disqualification of the Appellant's tender is justified

In resolving this issue, we first took cognisance of our conclusion on the first issue above. However we deemed necessary to revisit the Appellant's

tender as well as the Tender Document in order to ascertain whether contentions by the Respondent that the Appellant did not possess key personnel of the required experience, specifically, the Site Supervising Engineer as well as the Materials Engineer. In the course of doing so, we observed that Clause 19 (b) of the Bid Data Sheet (BDS) required bidders to include among others in their bids, a Site Supervising Engineer who is a Civil or Structural Engineer with a minimum of five (5) years of experience in Bitumen Road works. Also bidders were to include a Materials Engineer with a degree or Advance Diploma who possesses any minimum five (5) years experience in Materials works for Bitumen Road works. We observed that the Appellant's tender includes a Site Supervising Engineer, one Mr. Karanveer S. Bachu who got his Bachelors degree of Applied Science at Windsor University in 2013. From this fact, we are of the view that at the time when this tender was floated, the said Site Supervising Engineer had less than five (5) years of experience required by the Tender Document as correctly submitted by the Respondent. We therefore, do not agree with the Appellant that the Respondent would have treated the said aspect as a minor deviation since the law under Regulation 203(1) of GN.NO.446 of 2013 provides crystal clearly that the basis of the Tender evaluation shall be the criteria explicitly stated in the Tender Document.

Furthermore, we are of the view that the Respondent was not bound on the Appellant's propositions to term the departure as a minor deviation since Clause 27.5 of the ITT is self explanatory. The same reads;

Clause 27.5

“If a tender is not substantially responsive, it will be rejected by the Procuring Entity and may not subsequently be made responsive by the tenderer by correction of the non-conformity.” (Emphasis Supplied)

Reading this provision, one may conclude that the Appellant's move is calculated to make his non responsive bid to be responsive. Thus, his contentions that his Site Supervising Engineer had six years of experience is negated. From the records, the said personel acquired engineer status in 2013 after acquisition of his first degree and not otherwise. We therefore, agree with the Respondent that the Appellant lacked the requisite personnel with experience stated in the Tender Document.

In addition to the above observation, we wish to enlighten the Appellant that the experience of the personnel in tendering is not counted on the basis of the date he graduated. Rather, it is counted on the basis of the works he had performed after the award of the respective degree, which, in this case were not articulated.

With regard to the Materials Engineer, we observed that he had included in his bid one James Jonas with four (4) years experience in Materials works for Bitumen Road works instead of five (5) years required in the BDS. We further observed that the said personnel holds an Ordinary Diploma in Civil Engineering from Mbeya University of Science and Technology acquired on 14th December 2013 and not a degree or Advance Diploma in Materials Works required in the BDS.

In view of the above, we are of the settled mind that had the Tender evaluation process been properly and meticulously conducted, the Appellant would have been disqualified at the technical evaluation stage of the bids. Nevertheless, the response to this issue is that the disqualification of the Appellant's tender is justified.

3. Whether the award of the tender to the proposed successful tenderer is proper at law

In resolving this issue, we referred to the Appellant's doubts on the drastic change of the contract price and assertions on whether the said bid contained anomalies which might not have been taken into account by the Respondent during evaluation process.

In order to clear the said doubts, we deemed necessary to revisit the Tender Document vis-a-vis the tender of the proposed successful tenderer; Evaluation Report and the applicable law. We observed with utter dismay that the bid by the proposed successful bidder contained neither certificates of the key personnel nor their signed Curriculum Vitae (CVs) contrary to Clause 19(b) of the BDS which reads in part;

"The Contractor must provide the listed staff. Their CV's including their signatures and Academic Certificates and contacts must also be provided". (Emphasis Added)

When asked by the Members of the Appeals Authority about these glaring discrepancies, the Respondent claimed that the proposed successful tenderer's bid submitted to the Appeals Authority was a copy and not original. Further contending that his original version contained the

required documents. Additionally, the Respondent referred the Appeals Authority to Clause 19.1 of the ITT which provides that the original shall prevail in the event of discrepancy between the original and copies. The Respondent argued that the submitted bid should be ignored and the original admitted instead. Nonetheless, the so called original bid still lacked the signed CVs.

We are of the view that when preparing a bid, the bidder is bound to have his original bid as well as copies which emanate from the original. We thus do not agree with the Respondent that the bid submitted to us should be ignored. And in any case, the so called original, still lacks the signed CVs of the key personnel as required by the Tender Document rendering the said bid to be non responsive to the Tender Document.

Thus, the proposed successful tenderer's bid should have been equally disqualified due to contravention of Regulation 203 *supra* and the above referred Clause. Accordingly, our conclusion regarding this issue is that the award of the tender to the proposed successful tenderer is not proper in law.

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

We have considered the prayers by the parties and observed that had the Appellant's and/or the proposed successful tenderer's tenders been in compliance with the criteria in the Tender Document, re-evaluation of the tenders would have been appropriate. However, taking cognizance of our findings on issues Nos. 2 and 3 above, we can not issue such an order.

We rather, uphold the Appeal to the extent analysed; and order for nulification of this Tender.

In the event the Respondent is still interested with the project, then fresh process of re-tendering should commence in accordance with the law.

Each party bears own costs.

It is so ordered.

This decision is binding upon the parties and may be executed 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 15th day of January, 2018.

M. Otaru

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MS. MONICA P. OTARU
Ag. CHAIRPERSON

MEMBERS:

1. ENG. FRANCIS T. MARMO.....
F. Marmo

2. MR. LOUIS ACCARO.....
L. Accaro