

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

**APPEAL CASE NO. 67 OF 2010**

**BETWEEN**  
**GRONTMIJ AB** - **APPELLANT**  
**AND**  
**RURAL ENERGY AGENCY (REA)** - **RESPONDENT**

**DECISION**

**CORAM:**

1. Hon Augusta G.Bubeshi I, J (Rtd) - Chairperson
2. Hon. Victor K. Mwambalawa - Member
3. Mr. Kesogukewe M.Msita - Member
4. Mrs Nuru S.N.Inyangete - Member
5. Ms Bertha .G.Malambugi -Secretary

## **SECRETARIAT**

1. Mr. Moses Malipula - Accountant
2. Mr. Patrick Assey - Procurement  
Expert

## **APPELLANT**

1. Mr. Godfrey William Mashauri  
-Representative: Grontmij AB

## **RESPONDENT**

1. Mr Lutengano U.A. Mwakaheya – Director General
2. Mr. George M.J. Nchwali –Director: Finance &  
Admin
3. Mr. Musa Y.Muze - Legal Affairs Manager
4. Ms Theresia Nsanzugwako -Procurement Officer
5. Ms Amina Lwasye -Legal Affairs Officer
6. Mr. Clement Kisinga -Procurement Officer

This decision was scheduled for delivery today 29<sup>th</sup> April 2010 and we proceed to deliver it.

This appeal was lodged by M/s Grontmij AB of Sweden (**hereinafter referred to as the Appellant**) against the Rural Energy Agency commonly known by its acronym REA (**hereinafter to be referred to as the Respondent**) in relation to an invitation to provide consultancy services for REA Capacity Building under Tender No REA/EoI-3 /2008/9 (**hereinafter to be referred to as the RFP**)

The Appellant was one of the 12 short listed consultants who submitted proposals in response to the Invitation for Expression of Interest issued by the Respondent in January, 2009.

The opening of Technical Proposals took place on 21<sup>st</sup> May, 2009, and was attended by the consultants or their representatives including the Appellant's representative.

The Technical Proposals were evaluated and the results thereof were communicated to the Appellant on 10<sup>th</sup> July, 2009, through letter Ref: BC/72/157/01/29. The said letter stated that the Appellant's Proposal was not evaluated due to late submission.

On receiving the abovementioned communication, the Appellant wrote to the Respondent's Accounting Officer through letter referenced GM/REA/090701 dated 13<sup>th</sup> July, 2009 disputing the decision on the basis that had the proposal been late, it would have been rejected on the day the tenders were opened as per ITC 29.1 of the RFP. The Appellant therefore insisted that their proposal be considered to be a valid and eligible

proposal and be evaluated together with the other proposals.

On 16<sup>th</sup> July, 2009, the Respondent sent a reply through their letter Ref: BC/72/157/01/31 indicating that the Appellant's Proposal could not be considered as it was delivered after the Tender closing time and furthermore that it was not sealed.

The reply that their Technical Proposal was not evaluated aggrieved the Appellant who submitted the matter for review to the Public Procurement Regulatory Authority (**hereinafter referred to as PPRA**). PPRA having reviewed the complaint ruled that the Appellant's Technical Proposal had been unfairly removed from the evaluation process and therefore directed that the Respondent re-evaluate all the Technical Proposals afresh and include the Appellant's proposal in the evaluation process. PPRA further observed that by accepting and opening the proposal instead of rejecting and returning it at the time of tender opening, the Respondent signified that the proposal was considered as having been submitted in time and that it was accepted.

On 21<sup>st</sup> August, 2009, the Appellant through letter with Ref: GM/REA/090802 wrote to PPRA expressing their fears that it was unlikely that they would be evaluated fairly given that the other Consultants' Financial Proposals had already been opened on 14<sup>th</sup> August, 2009. They wanted re-assurance that their proposal would be evaluated fairly otherwise they proposed that it would be better if the process was re-started.

PPRA responded to the Appellant's concerns through letter Ref: PPRA/AE/008/17 of 28/08/2009 indicating that the Respondent had been directed to Re-Evaluate all the Technical Proposals and to include the Appellant's Technical Proposal.

On 2<sup>nd</sup> December, 2009, the Respondent communicated the Technical scores obtained by all the Consultants, including the Appellant through a letter with Ref: BC 72//157/01/65 which indicated that the Appellant's Technical Proposal had ranked fourth out of the six proposals and that they had scored 87.22 points which was above the cut off point of 70 marks. In the same letter, the Respondent invited the consultants to attend the opening of the Appellant's Financial Proposal to take place on 11<sup>th</sup> December, 2009, which was later rescheduled to 14<sup>th</sup> December, 2009.

The opening of the Appellant's Financial Proposal took place on 14<sup>th</sup> December, 2009, and was attended by all the six consultants whose Technical Proposals had scored the minimum qualifying mark including the Appellant's representative. Prior to the opening, the Technical scores obtained by all qualifying consultants were read out as follows:

	CONSULTANTS NAME	TECHNICAL SCORE
1.	ECON POYRY	92.72
2.	JV MERCADOS &FICHNER &CEERT	88.18
3.	SWECO INTERNATIONAL	88.02

4.	GRONTMIJ AB	87.22
5.	JV KPMG &CAMCO&SEI	87.20
6.	IPA	86.58

The Technical Scores obtained by each of firms were first read out followed by the opening of the Appellant's Financial Proposal and the price tendered was read out including the prices tendered by the other consultants whose financial proposals had been opened prior to the Appellant lodging his complaint.

The read out prices were as follows:

	NAME OF CONSULTANT	PHASE	READ OUT PRICE (IN SEK)
1.	ECON POYRY	Inception /Implementation Phase	8,998,471.00
		Optional consolidation	2,995,820.00
		TOTAL	11,994,291.00
2.	JV MERCADOS &FICHNER &CEERT	Inception /Implementation Phase	8,996,219.00
		Optional consolidation	2,465,906.00
		TOTAL	11,462,125.00
3.	IPA	Inception /Implementation Phase	8,999,648.00
		Optional consolidation	2,998,577.00
		TOTAL	11,998,225.00
4.	SWECO	Inception /Implementation Phase	8,996,516.00
		Optional consolidation	2,997,002.00
		TOTAL	11,995,518.00

5.	KPMG &CAMCO&SEI	Inception /Implementation Phase	8,986,080.00
		Optional consolidation	2,953,600.00
		TOTAL	11,939,680/=
6.	GRONTMIJ AB	Inception /Implementation Phase	8,995,800.00
		Optional consolidation	2,995,640.00
		TOTAL	11,991,440.00

On 2<sup>nd</sup> February, 2010, the Appellant sent a message through e-mail expressing concern that at the time of opening the Appellant's Financial Proposal, the other consultants' prices were already known prior to the re-evaluation process.

He also was of the view that what the Respondent had done contravened Regulation 57(2) of the Public Procurement Goods, works, Non Consultant services and Disposal of Public Assets by Tender of 2005 (**hereinafter referred to as G.N. 98**) which requires that the Evaluators of Technical Proposals not to have access to the Financial Proposals until the Technical evaluation is concluded.

On 10<sup>th</sup> February, 2010, the Respondent replied to the Appellant's concerns indicating that they were forced to open only one financial proposal because the Financial Proposals of the other consultants had already been opened prior to the directive to do a re-evaluation of the Technical Proposals by PPRA.

The Respondent also re-assured the Appellant that the Re- Evaluation had been done properly using a different evaluation team

## **THE APPELLANT'S SUBMISSIONS**

That, the Appellant is not satisfied with the Respondent's decision reached after the Re-Evaluation due to the following reasons:

That, it has not been clearly demonstrated by the Respondent that the re-evaluation process was done fairly and objectively.

That, the Respondent did not suspend the procurement process on receiving the complaint as required by the Act and G.N. 98 but instead publicly declared the winner.

That, the Appellant appeals to the Authority to investigate the said procurement to determine if there is a clear violation of the Public Procurement Act (hereinafter **referred to as the Act**) and the rules and procedures laid out in the Government Notice No. 98

That, the Appellant fears that the re-evaluation of Technical Proposals did not follow the procedures that were outlined to ensure fairness and objectivity and that the Pre-opening of the Financial Bids on 14<sup>th</sup> August, 2009, was in violation of the Procurement Act and may have compromised the procurement.

## **THE RESPONDENT'S SUBMISSIONS**

That, it was true that the Respondent had erred in the first instance by not rejecting the Appellant's Proposal at the time of tender opening. However, on being ordered by the PPRA, the Respondent conducted the evaluation process as required in line with what was ordered by PPRA.

That, after the order by PPRA, the Respondent appointed a new evaluation team which consisted of members from TANESCO and from the Respondent's organization and that the exercise was done outside of the Respondent's premises in order not to compromise confidentiality of the process.

That, the re-evaluation did follow procedures and that is the reason why after the Technical Re-evaluation all the six proposals including that of the Appellant were found to have attained above the minimum score of 70% and therefore qualified for opening of their Financial Proposals .

That, it is true that only one Financial Proposal of the Appellant was opened on 14<sup>th</sup> December, 2009 as it was not possible to open the other proposals since they were already opened prior to the order to re-evaluate tenders by PPRA.

That , this fact was known by the Appellant at the time of opening ,as the invitation notice which was sent to them on 2<sup>nd</sup> December, 2009, through Letter

Referenced BC/72/157/01/65 had indicated that the meeting was convened to open the Appellant's Financial Proposal only.

That, under the Fixed Budget Sstem, the Financial Proposal could not influence the final evaluation results except where the Financial Proposal would have exceeded the budget.

That, the Respondent deems that the Appellant has the objective of frustrating the process simply because he did not emerge the winner.

That, the Respondent has already signed a contract with the winning bidder and therefore prays that the appeal be dismissed and that the Authority grant any other relief as it deems fit.

## **ANALYSIS BY THE AUTHORITY**

Having gone through the documents submitted and having heard the oral submissions from parties, the Authority is of the view that, the appeal is centred on the following four main issues:

### **1.0 WHETHER THE ACCEPTANCE OF THE APPELLANT'S PROPOSAL BY THE TENDER BOARD DURING THE OPENING WAS PROPER AT LAW.**

**2.0 WHETHER THE EVALUATION AND RE-EVALUATION OF THE PROPOSALS WAS CONDUCTED IN ACCORDANCE WITH THE LAW.**

**3.0 WHETHER THE AWARD MADE TO THE SUCCESSFUL CONSULTANT IS VALID.**

**4.0 TO WHAT RELIEFS, IF ANY, ARE THE PARTIES ENTITLED TO.**

Having framed the main issues, the Authority proceeded to resolve them as hereunder:

**1.0 WHETHER THE ACCEPTANCE OF THE APPELLANT'S PROPOSAL BY THE TENDER BOARD DURING THE OPENING WAS PROPER.**

The Authority observes that, the law requires the opening process of any tender to be conducted in accordance with the applicable law as well as the RFP. In order to ascertain whether the process followed by the Respondent during opening of the tender under appeal, was proper at law, the Authority revisited the submissions by the parties v/s a vis the relevant provisions of the Law, and the Instructions to

Consultants in the RFP (**hereinafter referred to as the ITC**) cited hereunder:

Regulation 56(6) of GN 98 and ITC 28.1 and 27.3 of the RFP provides guidance as to how the proposals should be submitted in the following words:

**“Regulation 56(6) - To safeguard the integrity of the process, the Technical and Financial proposal shall be submitted in a manner prescribed in the Request for Proposal” (Emphasis supplied)**

**ITC Clause 28.1**

**“Proposals must be received by the Procuring Entity at the address specified under ITC 27.3 no later than the date indicated”**

Proposal Data Sheet Clauses 28.1 and 27.3

**“The Proposal submission address is:**

**The Secretary,  
Tender Board,**

**Rural Energy Agency (REA)**

**114 Malik Street, TAC Building, Upanga**

**3<sup>rd</sup> Floor, Room 10**

**Dar-Es-Salaam**

**Tanzania**

**Tel +255 22 22134006**

**Proposals must be submitted not later than the following 21<sup>st</sup> May 2009 at or before 12:00 noon.”**

**(Emphasis supplied)**

Upon perusal of the Minutes of the Tender Board's Proposal Opening Ceremony, the Authority observes that it was recorded that the Appellant's Representative arrived at the Respondent's Premises 10 Minutes before closing time and that the Appellant submitted his Proposals at 12.03 p.m. This is supported by the Tender Opening Checklist which was signed by the consultants or their representatives who attended the Proposal opening ceremony, including the Appellant's representative. This cements the Respondent's argument that the Appellant was late in submitting his proposal. This factor was not disputed by either party during the hearing and the Appellant

duly signed the opening checklist to signify agreement with what was recorded by the Respondent.

In view of the late submission of the Appellant's Proposal, the Tender Board erred by failing to reject it outright as required by ITC Clauses 29.1, 31.3 and Regulation 56(9) of GN 98. This was equally contrary to Section 66(3) of the Act which requires only tenders submitted before the deadline time and date to be opened in public.

For purposes of clarity the said Section 66(3) of the Act, Regulation 56(9) of GN 98 and the related ITC Clauses 29.1, 31.3 are reproduced herein below:

**“Section 66(3) All tenders submitted before the deadline time and date for submission shall be opened in public** in the presence of the tenderers or their representatives and other parties with a legitimate interest the tender proceedings **and the opening shall take place immediately after the deadline time and date given in the tender document .....**”

**“56(9) Any proposal received after closing time for submission of proposals shall be returned unopened” (Emphasis supplied)**

**“ITC 29.1 Any proposal received by the Procuring Entity after the deadline for submission of proposals in accordance with ITC 28 shall be declared late, will be rejected and returned unopened to the consultant”(Emphasis supplied)**

**“ITC 31.3 No Proposal shall be rejected at Proposal opening except for late proposals, which shall be returned unopened pursuant to ITC 29” (emphasis supplied)**

Having examined both the requirements of the Law and the RFP, the Authority concludes that the acceptance of the Appellant’s Proposal which was received late and no rejecting and returning it was not proper.

## **2.0 WHETHER EVALUATION AND RE-EVALUATION OF THE PROPOSALS WAS CONDUCTED IN ACCORDANCE WITH THE LAW.**

In order to resolve this issue, the Authority formulated two sub issues as follows:

**2.1 Whether the evaluation of the proposals was conducted in accordance with the law**

**2.2 Whether the Re-Evaluation as directed by PPRA was proper at law**

**2.1 Whether the evaluation of the proposals was conducted in accordance with the law**

The Authority observes that the Evaluation Committee appointed by the Respondent first rejected the Appellant's Technical Proposal due to late submission and went on to evaluate five Technical Proposals which were submitted in time at the opening and ranked them in accordance with Clause 36.2 of the ITC.

The Authority observes that the decision taken by the Respondent's Evaluation Committee not to evaluate the Proposal submitted by the Appellant was right as it

was clearly shown in the proposal opening minutes that the Appellant's proposal was submitted late.

On the basis of the ranking all the five evaluated Proposals scored above the minimum mark of 70 points and the consultants were invited for opening of Financial Proposals. The five consultants and marks scored in the Technical Evaluation were:

1. Econ Pöyry - 92.58 points
2. Mercados & Fichner &CEEST - 91.56points
3. IPA - 91.34 points
4. SWECO - 87.28 points
5. KPMG & CAMCO & SEI - 82.24 points

The Authority observes that on 13<sup>th</sup> July 2009, the Respondent received a complaint for administrative review from the Appellant. Despite receiving the complaint, the Respondent's Tender Board went ahead and opened the Financial Proposals on 21<sup>st</sup> July 2009.

According to the Provisions of Section 84(4) of the Act and Regulation 107(1) of GN 98, the Accounting Officer

is required to suspend the procurement proceedings if he deems it necessary; but he chose not to do so.

The Authority further observes that the Authority has not noted any apparent defect in the Technical Evaluation hence it considers that the Technical Evaluation was properly done.

In conclusion on Issue number 1 above, the Authority is of the view that the evaluation was conducted in accordance with the Law.

## **2.2 Whether the Re-evaluation as directed by PPRA was proper at law.**

It has been indicated that the Respondent's Accounting Officer received a request for administrative review from the Appellant on 13<sup>th</sup> July 2009. A reply was sent indicating that the Proposal was not evaluated because it was submitted late. Thereafter, the Appellant referred the matter to PPRA. On 18<sup>th</sup> August, 2009, the PPRA directed the Respondent to Re-evaluate the Technical Proposals of all the six consultants, the Appellant's inclusive. By

this time the Financial Proposals of the other five consultants had already been opened on 21<sup>st</sup> July, 2009, and were under evaluation. The PPRA directive was complied with.

The Appellant expressed concern that the opening of his Financial Proposal while those of the other consultants were already open, affected their chances of winning. The Authority shares the Appellant's concerns that it would be difficult to assure the integrity of the process, however, this concern notwithstanding, the Appellant's Proposal did not deserve to be evaluated since it was submitted late.

The Authority is of further view that, had PPRA known that at the time they were giving the directive, the Financial Proposals of the other consultants were under evaluation, such a directive would not have been given. The Authority is of the view that the PPRA directive to Re-evaluate the proposals was therefore contrary to the law.

Having established that the Respondent had rightly excluded the Appellant's Proposal from the Technical Evaluation in the first evaluation process due to late submission, the Authority concludes Sub issue 2 that the Re-evaluation done by the Respondent as directed by PPRA was not proper at law.

In conclusion on issue no 2 the Authority observes that the evaluation was properly done however , the re-evaluation was not proper at law.

### **3.0 WHETHER THE AWARD TO THE WINNING CONSULTANT IS VALID AT LAW**

Having reviewed the process followed by the Respondent in determining the winning proposal, the Authority observes that despite the flaws identified in the process, the award to the winning consultant was valid since the same consultant qualified for award in the first evaluation process which was conducted in accordance with the RFP and the law.

The Authority therefore, concludes on issue no 3 that the award to the winning consultant is valid at law.

### **4.0 WHAT RELIEFS IF ANY ARE THE PARTIES ENTITLED TO?**

Having established that the award to the winning consultant is valid, the Authority considered the Appellant's prayer which required that the Authority

investigate the procurement process and determine whether there was a violation of the Procurement Act and the rules as laid out in GN 98. The Authority has reviewed the process as prayed for and has found that the Appellant's proposal should not have been accepted for evaluation from the start. The Authority therefore dismisses the appeal and orders each party to bear own costs.

## **5.0 OTHER MATTERS THAT CAUGHT THE ATTENTION OF THE AUTHORITY**

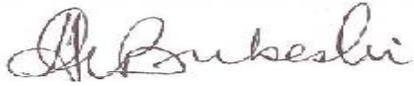
1. The Respondent's advert for "Expression of Interest" which appeared in the Guardian Newspaper of 30<sup>th</sup> January, 2009, indicated that the proposals would be evaluated under combined quality and cost considerations (**QCBS**) while the RFP indicates that it will be evaluated under Fixed Budget Selection (**FBS**). Care should be taken in future to ensure consistency of information between what is advertised and what is contained in the RFP.
2. While reading the comments of the Evaluation Team in relation to the submitted proposals, one of the comments was that one of the consultants

**JV, KPMG & CAMCO& SEI** submitted a document having a **scanned signature**. The Evaluation Team considered this to be a minor deviation due to the fact that **there is no provision of the law prohibiting such signatures**, Hence they continued with the evaluation of the said proposal.

The Authority deems this to be erroneous since **ITC 26.3** clearly requires the submission of **original documents duly signed** by the person authorised to represent the consultant (**Emphasis Supplied**). Had the need for original signatures not been mandatory, then tenderers/ consultants would not be required to submit **original signed copies** of documents .

### **Right of Judicial Review as per Section 85 of the Act, explained to parties**

Decision delivered in the presence of the the Respondent and in absence of the Appellant who was duly notified this 29<sup>th</sup> day of April, 2010.



.....  
**JUDGE (rtd) A.G. BUBESHI**

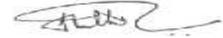
**CHAIRPERSON**

**MEMBERS:**

1. HON. V.K. MWAMBALASWA (MP)
2. MR K. M. MSITA
3. MRS. N.S.N. INYANGETE



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