

IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY

AT DAR ES SALAAM

APPEAL NO. 34 OF 2018-19

BETWEEN

M/S JV OF MAHAB GHODSS CONSULTING ENGINEERING
COMPANY (MGCE) AND TWO OTHERS.....APPELLANT

AND

PERMANENT SECRETARY,

MINISTRY OF ENERGY.....RESPONDENT

DECISION

CORAM

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| 1. Hon. Justice (rtd) Souda Mjasiri | - | Chairperson |
| 2. Eng. Stephen Makigo | - | Member |
| 3. Adv. Rosan Mbwambo | - | Member |
| 4. Ms. Florida Mapunda | - | Ag. Secretary |

SECRETARIAT

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

FOR THE APPELLANT

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| 1. Mr. Ditrick Mwesigwa | - | Advocate |
| 2. Ms. Queen Mtove | - | Legal Officer |
| 3. Mr. Daniel Kashaigiri | - | Structural Engineer |

FOR THE RESPONDENT

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| 1. Mr. Abubakar Mrisha | - | Senior State Attorney,
Office of Solicitor General |
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|----------------------------|---|----------------------------|
| 2. Mr. Said Kalunde | - | Director of Legal Services |
| 3. Mr. Shariff Fadhili | - | Ag. DPMU |
| 4. Mr. Mwesiga Mwesigwa | - | Legal Manager – TANESCO |
| 5. Mr. Romanus Dominicus | - | Engineer - TANESCO |
| 6. Eng. Juma Mkobya | - | Ag. ACED |
| 7. Eng. Stayden Rwebangira | - | Principal Energy Engineer |
| 8. Ms. Lightness Makundi | - | Supplies Officer |

The Appeal was lodged by M/s JV of Mahab Ghodss Consulting Engineering Company (MGCE), JSC Institute Hydro Project in association with Sub-Consultant Advanced Engineering Solutions Ltd (hereinafter referred to as “the Appellant”) against the Permanent Secretary Ministry of Energy (hereinafter referred to as “the Respondent”). The Appeal is in respect of Tender No.ME/008/2017-2018/HQ/C/09 for Design Review, Construction Management and Supervision during Construction, Testing and Commissioning of Rufiji Hydropower Project (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 Tender was conducted through the Public Procurement Act of 2011, as amended (hereinafter referred to as “the Act”) and the Public Procurement Regulations GN. No 446 of 2013 as amended (hereinafter referred to as “the Regulations”).

The Tender commenced with a pre-qualification process advertised on 27th April 2018. After completion of the Pre-qualification evaluation eight (8) firms were shortlisted and were issued with the Request for Proposal (hereinafter referred to as “the RFP”). The deadline for submission of the proposals was set on 30th August 2018 and all eight (8) firms responded. The submitted proposals were then subjected to evaluation. After its completion M/s Studio Ing.G.Pietrangeli (SP) was recommended for award

subject to successful negotiations. Negotiations between the Respondent and M/s Studio Ing.G.Pietrangeli (SP) were held from 20th- 23rd November 2018 and the same were not successful. The Respondent decided to re-start the Tender process afresh by issuing a new RFP to seven (7) remaining shortlisted consultants including the Appellant. The deadline for submission of proposals was initially set for 20th December 2018 but it was later on extended to 28th December 2018.

On the deadline for submission, all seven consultants submitted their proposals. Since the selection method for this Tender combined technical qualification and price consideration, only technical proposals were opened on the date set for Tender opening. The opened proposals were then subjected to evaluation which had two stages, namely preliminary evaluation and technical evaluation. During preliminary evaluation evaluators observed, amongst others, that four proposals including that of the Appellant contained a Power of Attorney which did not comply with the requirements under the laws of Tanzania. For purposes of increasing competition, the Respondent opted not to disqualify them; instead, required all the four consultants to re-submit the modified Power of Attorney which comply with the law.

The Appellant re-submitted the Power of Attorney on 16th January 2019 and was invited to attend the opening of Financial Proposals which took place on 22nd January 2019. The Appellant was among the three consultants whose financial proposals were opened. The financial proposals were evaluated, then the technical and financial scores were combined. M/s SMEC International Pty Ltd emerged to have scored the highest marks, thus, the firm was recommended for the award of the Tender. The Tender Board at its meeting held on 25th January 2019 approved the award as recommended.

On 15th February 2019, the Respondent informed all the tenderers, including the Appellant its intention to award the Tender to M/s SMEC

International Pty Ltd in association with sub-consultants SMEC (Tanzania) Ltd and Daima Associates Limited at a contract sum of Tanzanian Shillings Twenty Seven Billion Eight Hundred and Seventy one million seven hundred seventy eight thousand and four hundred (TZS 27,871,778,400/-) VAT inclusive. The said letter also informed the Appellant that its proposal was disqualified for submitting a Power of Attorney which was neither original nor notarized. Dissatisfied with the reason provided, the Appellant submitted an application for review to the Respondent on 20th February 2019. On 28th February 2019, the Respondent issued its decision dismissing the Appellant's application for review. Aggrieved further, the Appellant lodged its appeal to this Appeals Authority on 6th March 2019.

SUBMISSIONS BY THE APPELLANT

The Appellant's submissions may be summarized as follows:-

1. That, the Respondent erred in law in holding that the Appellant's Power of Attorney was a copy and not notarized. Counsel for the Appellant argued that, on 16th January 2019, it re-submitted an original and notarized Power of Attorney which was executed and authenticated by a competent person duly authorized to notarize it. The counsel argued that, the submitted Power of Attorney was interpreted and notarized by a foreign officer pursuant to Section 11 of the Notaries Public and Commissioners for Oaths Act, Cap 12 (hereinafter referred to as Cap 12).

Expounding his argument, Counsel submitted that, in whatever circumstance failure to submit or submission of a defective Power of Attorney cannot lead to disqualification of a tenderer, as according to Regulation 305 of GN. No 446 of 2013, a Power of Attorney is not a compulsory document required during evaluation process. Further to that, Regulation 9(10)(d) of GN. No 446 of 2013 states in clear terms that a Power of Attorney has to be submitted to the procuring entity prior to the signing of the contract. The wording of Regulation 9(10) (d) has also been amplified under the Guideline issued on 9th June

2017 by the Public Procurement Regulatory Authority (PPRA). Thus, the Respondent ought not to have disqualified the Appellant's proposal since there was still an ample time for submitting a proper Power of Attorney.

2. That, the Respondent erred in fact and law and in gross breach of principle of fairness and transparency by giving an irrational, unreasonable and unjust decision which was based on reasons that were not previously stated to be among the reasons that led to the disqualification of the Appellant's proposal. The Respondent's act in this regard contravened Section 4A of the Act which requires procuring entities when conducting procurement process to ensure equal treatment, fairness, competition, transparency and integrity is observed. The Respondent failed to adhere to the principles of procurement as the reasons given for dismissing the Appellant's application for review were not earlier on included in the notice of intention to award. According to the Appellant, the Respondent had acted retrospectively by introducing new reasons at the review level; thus, its decision is irrational and unreasonable.
3. That, the Respondent erred in law and fact in its decision by holding that financial evaluation was only carried out in respect of two firms namely; M/s SMEC International Pty Ltd and ELC Electro Consult S.P.A. The Appellant's Counsel submitted that, his client's financial proposal was opened along with the proposals of two firms mentioned above, thus it cannot be argued that the same was not evaluated. He stated further that, if the Appellant's proposal was found to be non-responsive during technical evaluation, it would not have been invited for the opening of the financial proposals. The Respondent's act of inviting the Appellant to the opening of the financial proposals proves that its technical proposal met the minimum requirement of the RFP. Therefore, the Respondent's

argument that the Appellant's financial proposal was not evaluated while the same was opened along with other proposals is baseless.

4. That, the Respondent erred in law by not considering the Appellant's assertion that the awarded contract price of TZS 27,871,778,400.00 was unlawfully raised. The amount quoted by M/s SMEC International Pty Ltd, the proposed successful tenderer, as read out during the opening of financial proposals was TZS 24,215,897,699.00 VAT inclusive; surprisingly, the awarded contract sum had been raised by TZS 3,655,880,710.00. The Appellant argued that, the Respondent's act in this regard contravened Regulation 303(2) of GN. No. 446 of 2013 which requires tenderers to be notified if there are any corrections of errors made on the proposals. The Appellant was not informed about the corrections made. The Appellant argued further that, the Respondent's act had also contravened Section 76(2) of the Act which prohibits negotiations for purposes of increasing the price.
5. That, the Respondent erred in fact and law by holding that the Appellant's article published on 27th – 28th January 2019 which indicated that the latter had won the tender had intended to influence the procuring entity's decision regarding the award of the Tender. The Respondent had failed to ascertain how the Appellant's online newspaper publication affected the Respondent's award decision. The Appellant argued further that, much as there is such publication, the same was not done by the Appellant; hence, it should not be victimized for an act done by someone else and for a different purpose.
6. Finally, the Appellant prayed for the following orders:-
 - i) The Respondent's decision issued on 28th February 2019 be quashed;
 - ii) The Respondent's decision of intending to award the Tender to M/s SMEC International Pty Ltd in association with sub-

consultants SMEC (Tanzania) Ltd and Daima Associates Limited be quashed;

- iii) The Respondent be ordered to award the Tender to the Appellant;
- iv) The Respondent be ordered to pay costs of this Appeal and those for administrative review; and
- v) Any other relief which the Appeals Authority may deem fit to grant.

REPLY BY THE RESPONDENT

The Respondent's reply was preceded by Preliminary Objection (PO) on four points of law, to wit;

- a) An act, opinion or decision of the Respondent is not appealable to the PPAA;
- b) The Appellant has no cause of action against the Respondent;
- c) The Appellant has no *locus standi* in this Appeal; and
- d) The Appeal is incomplete as it does not comply with the mandatory requirements of Rule 10 of the Public Procurement Appeals Rules, 2014 read together with the first schedule.

Without prejudice to the above PO, the Respondent's submissions on the grounds of Appeal may be summarized as follows:-

1. That, the decision issued by the Respondent was proper and in accordance with the laws of Tanzania as the Appellant failed to submit an original and notarized Power of Attorney. The Appellant was duly informed through a letter dated 8th January 2019, that it was required to re-submit a Power of Attorney which is original, notarized and signed by donor and donee. To the contrary, the re-submitted Power of Attorney failed to comply with such a requirement which was in accordance with Section 11 of Cap 12.

Thus, the Respondent's decision to disqualify the Appellant's proposal was fair, transparent, reasonable and just.

2. That, regarding evaluation of the Appellant's financial proposal, the Respondent submitted that, during financial evaluation, only financial proposals submitted by M/s SMEC International Pty Ltd and ELC Electro Consult S.P.A were evaluated. The Appellant's financial proposal was not evaluated after it was discovered that it had re-submitted a defective Power of Attorney. The Respondent stated that, much as the Appellant's financial proposal was opened, the same was set aside after it was found that, it failed to submit a proper Power of Attorney as requested in a letter dated 8th January 2019.
3. That, regarding the increase of the awarded contract sum, the Respondent argued that the same was done in accordance with Section 76 of the Act. The Respondent noted during negotiation that additional staff and early mobilization was crucial in the implementation of the assignment hence the increase of the amount. The Respondent further averred that, the increase was necessary and indispensable for the implementation of the project.
4. That, regarding the Appellant's act of publishing an article purporting to have won the Tender before the proposal to award the tender was made, contravened Regulation 201 of GN. No. 446 of 2013 as the same amounted to influencing the decision of the procuring entity. The Appellant did not have any justification for publishing the said article while the tender results were yet to be issued. The Respondent stated further that, the publication was done in the Appellant's country and no statement to date had been issued by the Appellant to contradict such publication. It therefore goes without saying that the same was done deliberately to influence the Respondent's decision regarding the award of this Tender.

5. The Appellant had no *locus standi* as the appeal was filed by Mr. Ditrick Mwesigwa an employee of Advanced Engineering Solutions, one of the firms which formed the joint venture. The appeal should have been filed by Mr. Amir Razer Ahmad Motlagh, the legally authorized representative of the lead partner in the joint venture.
6. Finally, the Respondent prayed for the following orders:-
 - i. Dismissal of the Appeal in its entirety;
 - ii. The decision of awarding the tender to M/s SMEC International Pty Ltd in association with sub-consultants SMEC (Tanzania) Ltd and Daima Associates Limited be upheld;
 - iii. The Respondent's decision on the Appellant's administrative review be upheld;
 - iv. The Appellant to bear the costs for the Appeal and administrative review; and
 - v. Any other relief the Appeals Authority may deem fit to grant.

ANALYSIS BY THE APPEALS AUTHORITY

During the hearing of this Appeal the Respondent was informed by the Members of the Authority that the proceedings before this Appeals Authority are conducted with as little formality and technicality as possible as per Rule 24(2) of the Public Procurement Appeals Rules of 2014, GN No.411 as amended (hereinafter referred to as GN. No 411 of 2014). The said guidance was provided as the first, second and fourth points of PO were based on the fact that the name of the Respondent was wrongly presented in the Statement of Appeal. The Respondent was named as "Ministry of Energy Tender Board" instead of "Permanent Secretary - Ministry of Energy". The third PO was not a pure point of law. Therefore, the Respondent opted to withdraw the preliminary points of law and to proceed with the appeal on merit. The Appeals Authority also granted the Appellant leave to amend the Respondent's name in the Statement of Appeal so as to read the Permanent Secretary, Ministry of Energy.

ISSUES

The appeal centered on two issues, namely:

- Whether the Appellant's disqualification was justified; and
- What reliefs, if any, are the parties entitled to.

1.0 Whether the Appellant's disqualification was justified

In resolving this issue the Appeals Authority revisited the documents submitted before it and observed that the Appellant's proposal was disqualified for failure to meet the deadline for re-submission of original Power of Attorney which was before 16th January 2019. Even the copy of the Power of Attorney re-submitted was not notarized.

According to Clause 4 of Expression of Interest read together with Clause 8.1 of the General Condition of Contract (GCC), the applicable law for this Tender was the Laws of Tanzania. Further, Section 2(1)(a) read together with Section 4 of the Act requires all procurement processes to be governed by the Public Procurement Act particularly if the project is funded by the government. Clause 2.1 of the Proposal Data Sheet states in clear terms that the project is funded by the Government of the United Republic of Tanzania.

In view of that the Power of Attorney had to comply with the laws of Tanzania. According to Section 94 of the Evidence Act a proper Power of Attorney has to be notarized by the Notary Public or Commissioner for Oaths. Section 94 provides as follows:-

"The Court shall presume that every document purporting to be a Power of Attorney and to have been executed before and authenticated by a notary public, or commissioner for oaths, any court, judge, magistrate, registrar, foreign service officer or

diplomatic representative of common wealth country, was so executed and authenticated".

According to the record, the legal representative of the Appellant was appointed by the lead partner M/s Mahab Ghodss Consulting Engineering Company which was a foreign firm. Since it was executed outside the country, for a Power of Attorney to be valid in our jurisdiction, the same ought to have been authenticated/notarized by a Foreign Service officer or diplomatic representative. According to Section 2 of the Interpretation of Laws Act, Cap 1, Foreign Service officer has been defined to mean "*an officer holding or acting in an appointment in the Foreign Service of the United Republic*".

Furthermore, Section 11(1) of the Notaries Public and Commissioners for Oaths Act, Cap 12 states clearly that Foreign Service officer has powers of notaries. The said provision states as follows;

"Every foreign service officer exercising his function in any country or place outside Tanzania may in that country or place administer any oath and take affidavit and also do any notarial act which any person entitled to practice as a notary public and commissioner for oath in Tanzania can do in that part of Tanzania in which he is so entitled, and every oath, affidavit and notarial act administered, sworn or done by or before any such person shall be as effectual as if duly administered, sworn or done by or before any lawful authority in Tanzania".

Given the requirements under the above mentioned provisions, it is crystal clear that the re-submitted Power of Attorney was not notarized as per the requirement of the law.

During the hearing of this Appeal counsel for the Appellant conceded that the Power of Attorney was not authenticated as per the requirement of the law. However, he argued that pursuant to Regulation 9(10)(d) of GN. No.

446 of 2013 read together with PPRA's Guideline, the original Power of Attorney could be submitted any time before the signing of the contract. Thus, the Appellant still had the opportunity of submitting a valid Power of Attorney before the award of the contract; hence, the Appellant's tender ought not to have been disqualified.

The Appeals Authority revisited the PPRA's Guideline regarding Power of Attorney and observed that the same provide guidance in relation to the Registration of Power of Attorney and not notarization. That is to say, tenderers are mandatorily required to submit Powers of Attorney during tendering process, but its registration is not compulsory at the time of bidding, the same could be done before the signing of the contract. The Guideline stipulates further that, for the Power of Attorney to be admissible in our legal system the same must be notarized, show transferable powers and bear signature of donor and donee. Thus, the Appellant's contention in this regard has no basis.

With regard to the applicability of Regulation 9(10)(d) of GN. No. 446 of 2013, the Appeals Authority observes that, the said Regulation does not cover the scenario at hand. The Regulation requires the lead partner to submit the Power of Attorney at the time of the contract award to confirm its appointment as a lead partner. In this Appeal the issue is not confirmation of the appointment of a lead partner; instead, it is confirmation of a person who has been appointed as a legally authorized representative to sign the bid on behalf of the joint venture (JV).

The Appeals Authority having revisited the Appellant's re-submitted Power of Attorney *vis-a-vis* the requirement of the applicable law; is of the settled view that the same was defective. Therefore, the Appeals Authority finds the Respondent's act of disqualifying the Appellant's proposal to be proper and in accordance with the law.

The Appeals Authority fails to comprehend the Respondent's act of inviting the Appellant to attend the opening of Financial Proposal through a letter

dated 18th January 2019, after having received the re-submitted defective Power of Attorney on 16th January 2018.

Regarding the increase of the awarded contract price, the Appeals Authority observed that, Regulation 308(2) and (3) of GN. No. 446 of 2013 allows amongst others, negotiation on the scope of service. During negotiation it was noted that early mobilization and additional key staff was crucial for the implementation of the project and such requirements were not earlier on included in the Tender Document. Thus, the same were added and eventually led to the increase of the awarded contract price.

With regard to the publication of an article which indicated that the Appellant had won the tender before the Tender results were issued, the Appeals Authority does not want speculate on what actually transpired having received no evidence as to who was responsible for the publication.

On the issue of *locus standi*, the Appeals Authority observed that Mr. Ditrick Mwesigwa filed this Appeal as an advocate of the Appellant just like learned Senior State Attorney filed the reply for the Respondent. Mr. Mwesigwa did not file the Appeal as a partner of the JV. Therefore, the Appeals Authority finds the Respondent complaint to have no basis.

From the above analysis, the Appeals Authority's conclusion with regard to the first issue is that the disqualification of the Appellant is justified. Thus, the issue is answered in the affirmative.

2.0 What reliefs, if any, are the parties entitled to

Given our findings on the first issue that the Appellant has been fairly disqualified, we hereby dismiss the Appeal and make no order as to costs.

Order accordingly.

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 parties this 26th March 2019.



HON. JUSTICE (rtd) SAUDA MJASIRI
CHAIRPERSON

MEMBERS:

1. ENG. STEPHEN MAKIGO 

2. ADV. ROSAN MBWAMBO 