

IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY
APPEAL CASE No. 27 OF 2017-18
BETWEEN
M/s SINOTEC CONSTRUCTION APPELLANT
AND
ARUSHA URBAN WATER AND SANITATION
AUTHORITY.....RESPONDENT

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. Jeremiah Mtobesya | - | Advocate, Iuris Perits |
| 2. Mr. Zhang Jianguang | - | Country Representative |

FOR THE RESPONDENT

- | | | |
|-------------------------|---|-----------------------------------|
| 1. Mr. Bahati Chonya | - | Head of Legal Unit |
| 2. Mr. Benedict Kitigwa | - | Head, Procurement Management Unit |

The Appeal at hand was lodged by M/s Sinotec Construction (hereinafter referred to as "the Appellant") against Arusha Urban Water and Sanitation Authority (hereinafter referred to as "the Respondent"). It is in respect of Tender No. AUWSA/AfDB/W/002/2017 for Construction of Waste Stabilization Ponds (hereinafter referred to as "the Tender").

The Tender was conducted using the International Competitive bidding procedures specified in the African Development Bank Guidelines (hereinafter referred to as "the AfDB Guidelines") as well as the Public Procurement Act No. 7 of 2011, as amended (hereinafter referred to as "the Act").

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 3rd July 2017, the Respondent through the Daily News newspaper invited eligible tenderers to bid for the Tender, the deadline for which was 21st August 2017. Thirteen tenders were submitted by the deadline and were subjected to evaluation process, which was conducted in three stages namely; Preliminary, Technical and Detailed evaluation.

Eight tenders, including the Appellant's, were disqualified at the Preliminary Evaluation stage. The remaining five tenders qualified for the next stages of evaluation and finally the tender by M/s China Civil Engineering Construction Corporation & M/s Shanghai Municipal Engineering Design Institute (Group) Company Limited, Joint Venture (CCECC-SMEDI JV) was proposed for award at a contract price of USD. 17,932,953.72 (Seventeen Million Nine Hundred Thirty Two Thousand, Nine Hundred Fifty Three and Seventy Two Cents Only) VAT Exclusive.

The Tender Board at its meeting held on 11th November 2017, approved the award recommendations subject to “No Objection” from the AfDB, which was granted on 19th December 2017.

On 21st December 2017, the Respondent notified all bidders of his intention to award the contract to the proposed successful tenderer. The Notice also contained reasons as to why the remaining bidders were unsuccessful. The Appellant’s reason for disqualification was that the Bid Security submitted did not tally with the format appearing in Section IV of the Tender Document, contrary to Clause 19 of the Instruction To Tenderers (ITT).

Aggrieved, on 9th January 2018, the Appellant filed his request for administrative review to the Respondent’s Accounting Officer challenging his disqualification.

On 15th January 2018, the Respondent dismissed the complaint and reiterated his earlier position that the Appellant was non responsive. Aggrieved further, on 23rd January 2018, the Appellant lodged this Appeal.

SUBMISSIONS BY THE APPELLANT

The Appellant’s grounds of Appeal and submissions thereto may be summarized as follows;

1. That, the Respondent erred in law and fact by disqualifying his tender for the reasons of non responsiveness. Expounding on this ground, the counsel for the Appellant admitted that the Bid Security submitted by his client had changes, he however argued that they were not material to warrant rejection of the tender.

The Appellant referred the Appeals Authority to Clause 28.3 of the ITT which provides for circumstances under which a tender could

be considered to have materially deviated from the Tender Document and that his bid security did not fall within the purview of these circumstances. The counsel emphasized his arguments by referring to Appeals Authority's previous Decisions in Appeal Cases No. 84 of 2010 and No. 1 of 2015-16, in which, the term material deviation was a subject of discussion.

2. That, disqualification of his tender is based on unjustifiable reasons since his bid security is absolutely enforceable but the Respondent misconceived their version. That the format in the Tender Document was not clear as to who is to apply for the security but the Appellant made that clear, that is why it begins with the word "Applicant" and not the "Employer".
3. That, the award of the tender to the proposed successful tenderer is against value for money principle since his bid price is higher compared to the Appellant's. The margin of price by the successful bidder compared to the Appellant's is almost USD 2.4 Million. Therefore, the Respondent should have ignored the minor deviation and save that enormous amount of money involved.

Finally, the Appellant prayed for the following orders:-

- i. A declaration that his disqualification was illegal and unjustified.
- ii. That, award of the tender be made in their favour since the reasons for their disqualification are unfounded and unjustifiable.
- iii. Costs of the Appeal as hereunder;
 - a. Appeal filing fees TZS. 200,000/-
 - b. Legal fees TZS. 4,000,000/-
 - c. Costs incidental to the Appeal as shall be justified in due course.

- iv. Any other order the Appeals Authority shall deem just and fit to grant.

REPLY BY THE RESPONDENT

The Respondent's reply to the grounds of Appeal are summarized as follows;

1. That, Clause 19 and 19.4 of ITT is clear that bidders had to furnish Bid Security using the format in Section IV. The Appellant submitted the Bid Security of a different format which changed its conditions by restricting the Respondent's right of enforcement. The Respondent considered that change as material deviation in terms of Clause 28.3 (a) (ii) of ITT, therefore properly disqualifying the tender as per Regulations 203 and 206 of the Public Procurement Regulations, GN.No.446 of 2013.

In addition to the above, the Respondent submitted that, basing on Clauses 1.3 (d) and 2.14 of AfDB Guidelines for Procurement of Goods and Works (2008), if a bid security is to be used, the same should be in the format specified in the Tender Document. That since the Appellant deviated from the Tender Document, rejection of his bid in terms of Regulation 204(2) of GN.No.446 of 2013 was proper.

The Respondent also distinguished the cases cited by the Appellant that the same emphasize on compliance to the format provided in the Tender Document and not otherwise.

2. Regarding the question of value for money, the Respondent submitted that they have observed the said principle by awarding the Tender to the lowest evaluated bidder.

Finally, the Respondent prayed for;

- i. The Appeal to be dismissed.

- ii. The award of the tender made to the proposed bidder and all other procedures be declared valid.
- iii. Costs of the Appeal, that is travelling costs from Arusha as well as costs for disturbances caused by the Appellant.
- iv. Any other order the Appeals Authority shall deem just and fit to grant.

ANALYSIS BY THE APPEALS AUTHORITY

In dealing with this Appeal, the Appeals Authority went through the Tender proceedings including various documents submitted by both parties and their submissions, and is of the view that the Appeal is centred on three main issues calling for determination; and these are:-

1. Whether disqualification of the Appellant's tender is justified
2. Whether the award of the tender to the successful tenderer is proper in law
3. What relief(s), if any, are parties entitled to.

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

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

In resolving this issue, we took cognisance of the Appellant's admission that his Bid Security form was changed.

Clause 1.3 (d) of the Standard Bid Evaluation Guidelines, issued by the AfDB in 2010, as well as Clause 12.3 of the AfDB Guidelines provide as herein below;

Clause 1.3 (d) "...if the bid security is issued as a bank guarantee, it must be consistent with the wording of the bid

security form provided in the bidding document..."
(Emphasis Added)

Clause 12.3 "the Borrower has the option of requiring a bid security. When used, the bid security shall be in the amount and form specified in the Bidding documents⁴³".

When you look at the above referred cross reference, the Guidelines provide as follows;

43. "The Format of the bid security shall be in accordance with the Standard Bidding Document and shall be issued by reputable bank..."

The Appellant's Bid Security reads in part as follows;

At the request of the Applicant, we CREDIT BANK LIMITED of P.O.Box 61064-00200, Nairobi, Mercantile House, Ground Floor, Koinage street, Nairobi Kenya, as a Guarantor, hereby irrevocably undertake to pay the Beneficiary any sum or sums not exceeding in Total an amount of USD. 350,000 upon receipt by us of the beneficiary's complying demand, supported by the Beneficiary's statement, whether in the demand itself or a separate signed document accompanying or identifying the demand..."

The format provided under part IV reads;

...At the request of the Employer, we.....(Name of the Bank) hereby irrevocably undertake to pay you any sum or sums not exceeding in Total an amount of.....

Clause 19.3 (a) of the ITB reads;

Clause 19.3 If a bid security is specified pursuant to the ITB 19.1, the bid security shall be a demand guarantee in any of the following forms at the Bidder's option:

a) an unconditional guarantee issued by a bank or surety;

We are of the view that the change made to the Appellant's bid security was to the effect of making it conditional versus the required unconditional one as correctly submitted by the Respondent.

A such, it is the Appeals Authority's considered view that the Appellant's tender materially deviated from the format provided in the Tender Document. It is well settled that the cause of action to be taken where there is a material deviation from the Tender Document is to reject the tender as provided by Clause 19.4 and Regulation 204(2) (c) of GN.No.446 of 2013.

Clause 19.4 Pursuant to the option stipulated at ITB 19.1, the bid not accompanied by substantially responsive bid security or Bid Securing Declaration shall be rejected by the Employer as non responsive.

R. 204 (2) Material deviation to commercial terms and conditions, which justify rejection of a tender shall include the following:

(c) Failure to submit a tender security as specified in the tendering document.

Regarding the cases cited by the Appellant's counsel, that is Appeal Cases No. 84 of 2010 and No. 1 of 2015/16, the Appeals Authority revisited them and observed that they both made emphasis on the need for bid security to be valid and in conformity to the Tender Document, otherwise the same should be rejected. Specifically the Appeals Authority had this to say in Appeal Case No. 1 of 2015/16 at pg 23:

"...bid security is among the mandatory requirements that have to be complied with by the tenderer during tender process and its non-compliance results to rejection of a tender." (Emphasis Added)

Accordingly, the Appeals Authority's conclusion regarding the first issue is in the affirmative, that the disqualification of the Appellant's tender is justified.

2. Whether the award of the Tender to the successful tenderer is proper at law

In resolving this issue, we took cognisance of the first issue above and observed that much as the Appellant was disqualified at the preliminary stages of evaluation, his tender could not be compared with that of the proposed bidder since he did not reach the price comparison stage. Therefore, the Appellant's contention that the value for money principle has been defeated is misconceived since Regulations 211 and 212 require the successful tenderer to be the tenderer with the lowest evaluated tender price and not the lowest quoted price.

Additionally, we reviewed the Evaluation Report availed and observed that the successful tenderer was compliant to the requirements of the Tender Document in all aspects and that the financiers of the project approved at every stage of the tender process and award thereof by granting a "No Objection". All these steps indicate that the bidder was procured in observance of the law.

Accordingly, the Appeals Authority's conclusion with regard to the second issue is that the award of the Tender to the successful tenderer is proper in law.

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

Having analyzed the contentious issues above, we revisited the prayers by both parties and observed that the prayers by the Appellant bear no merits since his disqualification was justified and was in accordance with the law. In that view, we accept prayers by the Respondent to dismiss the Appeal and declare that the award of the tender to the proposed bidder and all other procedures were valid.

The Appeals Authority hereby dismisses the Appeal for lack of merits and declares that the award of the tender to the proposed bidder and all other procedures were valid. Each party to bear 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.

Decision is delivered in the presence of both Parties this 9th day of March, 2018.

M. Otaru
.....
Ms. MONICA P. OTARU
Ag. CHAIRPERSON

MEMBERS:

1. ENG. FRANCIS MARMO *F Marmo*

2. MR. LOUIS ACCARO *L Accaro*