

IN THE PUBLIC PROCUREMENT APPEALS AUTHORITY

AT DAR ES SALAAM

APPEAL CASE NO. 24 OF 2019-20

BETWEEN

M/S EMERGING MARKETS POWER (TANZANIA)

LIMITED..... APPELLANT

AND

TANZANIA ELECTRIC SUPPLY COMPANY

LIMITED.....RESPONDENT

RULING

CORAM

- | | |
|-------------------------------------|-----------------|
| 1. Hon. Justice (Rtd) Sauda Mjasiri | - Chairperson |
| 2. CPA. Fredrick Rumanyika | - Member |
| 3. Mr. Rhoben Nkori | - Member |
| 4. Ms. Ndeonika Mwaikambo | - Member |
| 5. Ms. Florida Mapunda | - Ag. Secretary |

SECRETARIAT

- | | |
|------------------------|------------------------|
| 1. Ms. Agnes Sayi | - Senior Legal Officer |
| 2. Ms. Violet Limilabo | - Legal Officer |



FOR THE APPELLANT

1. Ms. Ernestilla Bahati
-Advocate,
Breakthrough
Attorneys
2. Mr. Kheri Mbiro
-Advocate,
Breakthrough
Attorneys
3. Ms. Arwa Yusufali
-Advocate,
Breakthrough
Attorneys
4. Mr. Zabron Mwaipopo
-Emerging Markets
Power (Tanzania)
Limited

FOR THE RESPONDENT

1. Mr. Peter Kigadye
-Project Coordinator
2. Mr. Michael Bangu
-Procurement Manager
3. Mr. Abdallah M. Awadh
-Principal Procurement Officer
4. Mr. Mwiga Kasalama
-Procurement Officer

The Appeal was lodged by M/s Emerging Markets Power (Tanzania) Limited (hereinafter referred to as "**the Appellant**") against the Tanzania Electric



Supply Company Limited known by its acronym TANESCO (hereinafter referred to as "**the Respondent**").

The Appeal is in respect of Tender No. PA/001/2018-19/HQ/N/034 for the Provision of Wind Power Generation Project (hereinafter referred to as "**the Tender**").

The Tender was conducted under the requirements of 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**")

According to the documents submitted by the parties to the Public Procurement Appeals Authority (hereinafter referred to as "**the Appeals Authority**") the background of this Appeal may be summarized as follows:-

The Respondent through a letter dated 2nd August 2019, invited thirteen (13) pre-qualified tenderers to submit their Request for Proposal (RFP). The deadline for submission was initially set for 8th November 2019; however, it was extended until 14th February 2020, whereby six (6) firms submitted their proposals.

Proposals were then subjected to technical evaluation, which was conducted in two stages; namely, preliminary and detailed evaluation. At the preliminary evaluation stage, all proposals were found to be responsive to the requirement of RFP, thus were subjected to detailed evaluation. In

that stage, three proposals including that of the Appellant were disqualified for failure to meet the minimum score point of 70%.

S/N	FIRM'S NAME	POINTS	REMARK
1.	M/s Akuo Energy SAS in association Upepo Energy Partners Limited	79.5	PASS
2.	M/s Sino Tan Renewable Energy Ltd	72.0	PASS
3.	M/s Windlab Tanzania SPV I Ltd	71.5	PASS
4.	M/s Globeleq Africa Holdings Limited	61.0	FAIL
5.	M/s RP Global Holding Italy SRL in association Abo Wind AG	59.0	FAIL
6.	M/s Emerging Markets Power (Tanzania) Limited	54.5	FAIL

On 29th May 2020 the Tender Board approved the Technical Evaluation Report and ordered opening of Financial Proposals of the three qualified bidders.

On 1st June 2020, the Respondent's Accounting Officer issued the results of technical evaluation to all the firms which participated in the Tender process. On 3rd June 2020, the Appellant requested to be availed with detailed breakdown of its scores pursuant to Regulation 238 (1) of the Regulations.

Having received no response, on 10th June 2020 the Appellant lodged an application for administrative review to the Respondent's Accounting Officer challenging amongst other, the Respondent's failure to avail it reasons behind the low technical scores of 54.5.

On 17th June 2020, the Appellant received the Respondent's letter dated 9th June 2020 with Ref. No. SMP/MCC/PMU/20/18/815 containing a breakdown of points scored by the Appellant in the technical proposal.

On 18th June 2020 the Appellant received another letter from the Respondent dated 12th June 2020 with Ref. No. SMP/MCC/PMU/20/18/834 which stated that its application for administrative review could not be entertained as it was submitted after a lapse of seven working days. A complaint ought to have been filed within seven (7) working days.

Dissatisfied with the Respondent's decision, on 25th June 2020 the Appellant lodged its Appeal to the Appeals Authority.

GROUND OF APPEAL

The grounds of Appeal may be summarised as follows: -

The Respondent's failure to apply Regulation 105(1) of the Regulations

The Appellant submitted that the course of action for its complaint arose on 1st June 2020 after it had received results of technical proposals. According to the law, a dissatisfied tenderer is required to lodge its complaint if any within seven (7) working days from the date of becoming



aware of the circumstances giving rise to the complaint. Counting from 1st June 2020, the seven working days lapsed on 10th June 2020 the date which the Appellant submitted its application for administrative review.

The Appellant expounded its argument by citing section 60 (1) (c) of the Interpretation of Laws Act, Cap 1 which provides guidance in computation of time. According to it, where anything is to be done within a time before a specified day, the time shall not include that day. Thus, its application was filed within the time prescribed by the law.

With regard to the reasons for its disqualification, the Appellant submitted as follows: -

1. Track record in similar projects

The Appellant submitted that the RFP required bidders to provide overall track record on how the project would be delivered, this includes amongst other compliance with the environmental requirement, construction, engineering, funding capabilities, operation and maintenance. The Appellant contended to have complied with such requirement as it provided eleven specific projects in similar markets. It added that its consortium includes two companies with good financial position and manufacturer of turbine blades. Thus, the Respondent's act of awarding it 2% out of the possible 8% score indicates that, it had not understood the capability of the consortium members. Further, the Appellant added that much as the RFP required details of financial capability, it was silent if the specific financing mechanism was to be included in the track record.

2. Technical capability

Regarding this ground the Appellant argued that, it is not true that it proposed the use of 132 kV transmission line to connect with the existing 220/33kV substation. It stated that, it conducted a study and its findings indicated that the project could be connected to the Respondent's transmission system without any substantial cost. The study came up with three options which the Respondent was at liberty to choose any amongst them. Those include 110 MVA, 220/33kV power transformer for stepping up the power and evacuation through 1 no of 15.5 km, 220 kV line to Dodoma 220 kV sub-station; 60 MVA, 220/33 kV power transformer for stepping up the power and evacuation through 2 no of 15.5km, 220 kV line to Dodoma 220 kV sub-station and 110 MVA, 220/33 kV power transformer for stepping up the power and evacuation through LILO of 1 of 220 kV lines from Dodoma sub-station to Singida sub-station. The Appellant added that the conceptual design specifications for the grid transformer were provided as required.

It added further that, it had offered the vast technical capabilities of the world's largest turbine manufacturer. Thus, the Respondent's act of awarding them lower marks based on an alien criteria which were not provided in the RFP was contrary to the law.

3. Financial capability

The Appellant disputes the Respondent's allegation that it did not provide detailed information of how the project would be financed. It asserted that bidders were required to demonstrate their capability to finance the project by providing information relating to ability to attract funds, securing project finance, terms for proposed financing, financial strength, credit worthiness and financial statements. The Appellant claimed to have complied with such requirement as all information was contained in its technical proposal.

The Appellant added that, it attached a Joint Bidding Agreement signed by all consortium members to affirm their commitment to the project while other detailed information relating to financial capability were provided in its financial proposal which was not opened. Thus, the Respondent's act of using the financial proposal criterion to evaluate the Appellant's technical proposal was not fair as it contravened the requirement of the RFP.

4. Commercial operation date

The Appellant submitted that, the consortium has a vast experience in project scheduling from conception to full operations and it prepared the project schedules committing EMP (Tanzania) to a commercial operating date of 2021. It also provided detailed milestones and critical path in its technical proposal. It added that, a full and compliant grid code study was completed indicating that there would be no delays within the project schedule.

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The Appellant expounded its argument by indicating that, its transport logistics were well arranged as the consortium through Vestas ran a tender for local transport which could not have been compared with other bidders. It submitted that it had proposed the cheapest logistics costs to all other projects delivered through Dar es Salaam port. Thus, a Dodoma project was the shortest distance with easy logistic proposal. The Appellant also stated that, qualified bidders costs are higher for about 25% compared to its proposed costs taking into consideration that Dodoma wind farm had logistics costs of at least 50% less than the three projects. The Appellant submitted further that, transport logistics were not provided in the RFP, thus the Respondent used an alien criteria in evaluating technical proposal.

5. Regulatory and Statutory compliance

The Appellant argued that it submitted extensive details in relation to regulatory and statutory compliance as per the structure and forms provided in the RFP. It further argued that permits of the project from the relevant authorities which included Tanzania Civil Aviation Authority (TCAA) and National Environment Management Council (NEMC) were attached to its technical proposal. The Appellant also claimed to have indicated in its technical proposal that some other processes from the regulatory authorities were yet to be completed. It believed that even other bidders were not able to finalize all the processes, thus a maximum score ought to have been awarded to it.

6. Compliance with environmental requirement

The Appellant disputes the Respondent's assertion that the choice of blade or turbine would have environmental consequences during transportation. It submitted that transport and logistics plan were covered in the ESIA report for the project. Further, Vestas (as EPC Contractor) consulted Tanroads and Dar es Salaam Port who did not indicate any environmental impacts related to transport. It added that, it conducted environmental and social impact assessment covering all impacts in accordance with the relevant legislation and was awarded NEMC Certificate. Further, three bidders who scored higher points had not received NEMC Certificate at the time of submission of the RFP. Only the Appellant and M/s Windlab had NEMC Certificates at the time of submission of the proposals. Thus, it complied with requirement of RFP.

7. Ability to secure site

Arguing on this ground the Appellant stated that it complied with this requirement as it submitted details related to land right and site control, site location, land ownership/right of use of the project site and right of way. It also attached various authorisation from Dodoma City Council which included Dodoma City Council Land Agreement letter (indicating that a lease would be granted after confirmation of award), Dodoma City Council Land Access letter, Nala Ward Land Agreement, Met Mast Lease Agreement and Minutes of local Community meetings. According to it, it was not possible for other bidders to have a secured project site. Thus, the Appellant ought to have scored equal or higher points than other bidders.



8. Lack of transparency

That the Respondent's tender process lacked transparency as other bidders were awarded higher scores while others were given lower scores and without any justifiable reasons.

Finally, the Appellant prayed for the following orders: -

- i. Annulment of the decision to disqualify the Appellant's bid without due regard to the law and reason;
- ii. Revision of the Respondent's decision to remove the Appellant's bid from the tender evaluation and in its place order re-evaluation of the tenders, which were submitted as to the gist of their contents since they were substantially responsive.
- iii. Order the Respondent to proceed with the Tender Process in a lawful manner, after finding in affirmative prayer (i) and (ii) above;
- iv. Alternatively, and in addition to (i) and (ii) above, find that the intended awardees/ and or the persons with higher scores than the Appellant have no qualifications requisite to warrant and justify the intended award; and
- v. Any other order and remedy this honourable Authority may deem fit to grant.



REPLY BY THE RESPONDENT

The Respondent's reply on the grounds of Appeal may be summarised as follows: -

That, the Respondent complied with requirement of Regulation 105 (1) of the Regulations which required it to entertain complaint lodged within seven working days from the date a tenderer became aware of the circumstances giving rise to the complaint. The Appellant was informed about its disqualification on 1st June 2020. However, it filed its Application for administrative review on 10th June 2020, one day after the expiration of the allowed seven working days, thus his application was filed out of time and the same could not have been entertained.

Regarding technical capability, the Respondent submitted that, the Appellant was disqualified for proposing the use of 132 kV Transmission line to connect with existing 220/33kV substation and to make modifications of the additional bay to transform 132/220kV. This was stated in the Appellant's technical proposal Item 2.2.4 titled Transformers and item 2.2.6 titled Transmission Line and Grid Connection.

That, in evaluating the proposals, the ratings used were the ones provided under Item 5.2.2 of the RFP. The rating criteria were known to the Appellant as the said document was availed to all bidders prior to submission of their technical and financial proposals. The Respondent submitted further that, the Appellant was aware that the rating criteria had no problems otherwise it could have sought for clarification from the Respondent before submitting its proposals.



That, the Appellant was lowly rated due to the weaknesses found in its submitted technical proposal as it failed to furnish information regarding financing mechanism for the past project, commitment details for partners/consortiums in financing the project, certainty of Commercial Operation Date and confirmation of Grid transformer specifications.

Regarding technical scores of other bidders, the Respondent submitted that, the Appellant's argument in that regard is baseless as it did not participate in the evaluation exercise therefore it was not in a position to know the technical capability of other Bidders.

That, the Appellant was disqualified at the technical evaluation stage due to its failure to meet the required minimum scores. Its contention that Vestas, one of its shareholder is ranked highly globally in Wind Power Generation has no basis as that was not among the terms of reference given in the RFP.

Finally, the Respondent prayed for dismissal of the Appeal in its entirety with costs.

Before hearing the appeal on merits, the Appeals Authority brought to the attention of the parties that it was of the considered view that, there was a point of law for determination before considering the merits of the Appeal. This was in relation to the Locus Standi of the Appellant to file this Appeal. According to the record of appeal, the Appellant, M/s Emerging Markets Power (Tanzania) Limited participated in the Tender as a consortium, between Dodoma Ventures Limited, Emerging Markets Power (Tanzania) Limited, Emerging Markets Power (Holdings) Limited, JCM

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Power Corporation and CIO. Thus it was proper to verify if it had the authority to act on behalf of other consortium members. The Appeals Authority also observed that the Appellant attached a Power of Attorney which expired before the deadline for submission of proposals. The said Power of Attorney was issued solely by the Appellant and not the Consortium as per the Joint Bidding Agreement. The Appeals Authority therefore, invited parties to first address it on the point of law and thereafter on the merits of the appeal which centred on the following issues:-

- 1. Whether or not the application for Administrative Review was filed within the required time of seven (7) working days;*
- 2. Whether the disqualification of the Appellant was justified; and*
- 3. What reliefs, if any, are the parties entitled to.*

SUBMISSIONS BY THE APPELLANT ON THE POINT OF LAW

The Appellant's counsel commenced its submission by indicating that the Joint Bidding Agreement is silent as to who is a lead partner amongst the members of consortium. Counsel conceded that no lead partner was appointed. It was stated that, the appointment of a lead partner was not necessary as that was not amongst the requirements provided for in the RFP document. Counsel added that, according to Regulation 9(10)(d) of the Regulations the requirement to appoint a lead partner ought to have been specified in the RFP document.



Regarding the expired Power of Attorney, counsel for the Appellant conceded that the Appellant's Power of Attorney had expired before the deadline for submission of Proposals. The counsel however submitted that, the expiration of the Power of Attorney does not lead to the disqualification of the Appellant's proposals as according to Regulation 9(10)(d) of the Regulations, the Power of Attorney has to be submitted at the time of contract award. The Appellant had not reached that stage. Counsel added that, much as the requirement to submit a Power of Attorney was specified in the RFP it was not certain at what stage the same ought to have been submitted. The Appellant's counsel conceded that the Power of Attorney is amongst the important documents but according to Regulation 9(10)(d) of the Regulations the same is to be submitted during contract award.

Counsel for the Appellant submitted further that Clause 4.6 of the RFP provides for circumstances that may render a bidder to be ineligible, the Appellant does not fall within any of the circumstances. Counsel also added that, the expiration of the Appellant's Power of Attorney has been caused by the Respondent's act of extending deadline for submission of proposals. Thus, the Appellant should not have been penalized for the Respondent's conduct.

The Appellant Counsel concluded its submissions by praying that Appeals Authority be guided by the law in determining the point of law so raised suo motu.

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SUBMISSIONS BY THE RESPONDENT ON THE POINT OF LAW

The Respondent submitted that, the Power of Attorney was amongst the documents required to be submitted along with the technical proposal. The Appellant's assertion that the same ought to be submitted at the contract award stage is not correct. The RFP was clear as to when the Power of Attorney was to be submitted. The Respondent added that, the Appellant was availed with the RFP document before submission of its proposals, thus if the Power of Attorney requirement was not clear, it ought to have sought for clarification from the Respondent.

The Respondent submitted further that, the Appellant's Power of Attorney expired on 31st January 2020 before the deadline for submission of proposals which was set for 14th February 2020. This implies that the Appellant's proposal was signed by an unauthorized person. Furthermore, the Appellant had lodged this Appeal on its own behalf, as there is no proof that it has been authorized to act on behalf of other consortium members. Thus, the Appellant's appearance in this Appeal is invalid.

Finally, the Respondent prayed for dismissal of the Appeal as the Appellant lacks locus standi.

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ANALYSIS BY THE APPEALS AUTHORITY

The Appeals Authority is of the considered view that the main issue for consideration and decision is ***whether the Appellant has the locus standi to file the appeal before the Appeals Authority.***

In resolving this issue the Appeals Authority reviewed the Technical Proposal Submission Form submitted by the Appellant and observed that it participated in the Tender which is the subject matter of this appeal as a consortium of five companies. It was further observed that, the said consortium was formed through a Joint Bidding Agreement signed on 30th January 2020 by five members namely; Dodoma Ventures Ltd, Emerging Markets Power (Tanzania) Ltd, Emerging Markets Power (Holdings) Ltd, JCM Power Corporation and CIO. The record of Appeal indicates that the Appellant lodged this Appeal under the name of M/s Emerging Markets Power (Tanzania) Ltd.

To substantiate if the Appellant has the mandate to act on behalf of other consortium members, the Appeals Authority revisited Clause 1.4 of the Joint Bidding Agreement and observed that no party is allowed to act independently in relation to the Bid or the project without the consent of the other consortium members. The said Clause reads as follows: -

Clause 1.4 "No Party shall act independently in relation to the Bid or the Project or the Contracts without first consulting the other Parties and in any and all such dealings, it shall first be made clear (in writing) to the third party with whom dealings are taking place that for any



*agreement with the Consortium Company or the Project Company to be binding **it shall require written consent of all the Parties.**"*

[Emphasis provided].

According to the Appellant's technical proposal there is no document which indicates that the Appellant has been authorized to act on behalf of the consortium. It was further observed that the Joint Bidding Agreement has not specified who is the lead partner of the consortium.

During the hearing, Members of the Appeals Authority asked the Appellant's counsel to substantiate if it has the authority to act on behalf of the consortium. In response thereof, the Appellant conceded that it has no authorization. Based on such admission the Appeals Authority is of the settled view that the Appellant's act of lodging this Appeal contravenes Clause 1.4 of the Joint Bidding Agreement.

The Appeals Authority finds the Appellant's act to have not only contravened Clause 1.4 of the Joint Bidding Agreement but also Regulation 9(10)(d) of the Regulations which reads as follows:-

Reg. 9 (10) "Where a solicitation document allows a tenderer to submit a tender as part of a joint venture, consortium or association, the solicitation shall require, where appropriate, that-



(d) A joint venture, consortium or association shall appoint a lead member who shall have the authority to bind the joint venture, consortium or association and the lead member shall at the time of contract award confirm the appointment by submission of a power of attorney to the procuring entity."

[Emphasis provided].

According to the above quoted provision it is mandatory for consortium members to appoint a lead member in the Joint Bidding Agreement who would have the authority to act on behalf of other consortium members. Since the Joint Bidding Agreement has not appointed a lead member, it goes without saying that none of the member has an authority to act on behalf of other members. That is to say, the Appellant has no authority to institute this Appeal on behalf of the consortium.

The Appeals Authority observed further that, much as the Appellant lacks the authority to act on behalf of the consortium, it granted a Power of Attorney to one Zabron Mwaipopo authorizing him to submit a Bid on behalf of its company and not the consortium. It was further observed that, the Power of Attorney to Mr. Zabron Mwaipopo was granted on 17th December 2019 and was valid until 31st January 2020 while the Joint Bidding Agreement between the consortium members was entered on 30th January 2020. Therefore, the Appeals Authority observed that the Appellant granted the Power of Attorney to Mr. Zabron Mwaipopo before



the consortium came into existence. Furthermore, the granted Power of Attorney expired on 31st January 2020 before the deadline for submission of proposals which was on 14th February 2020.

Given to what is stated herein above, it is evident that the Appellant's bid was defective from the commencement of the tender process as it was presented by a person who lacks authority to act on behalf of the consortium.

The Appeals Authority considered the Appellant's argument that the Power of Attorney was among the important documents but the same ought to be submitted at the time of contract award pursuant to Regulation 9(10)(d) supra. The Appeals Authority would like to enlighten the Appellant that a Power of Attorney which needs to be submitted at a later stage of contract award is the one appointing a lead partner and not the one authorising the signatory of the bid to commit the bidder. According to Clause 4.1.6 and Table 1 item 2 of the RFP the Power of Attorney authorizing the signatory of the bid had to be submitted during the bidding process. Clause 4.1.6 and Table 1 item 2 of the RFP read as follows:-

Clause 4.1.6 "The bidder should submit a Power of Attorney authorising the signatory of the Bid to commit the Bidder."

Table 2, Item 2 "Whether the Authorised Person has been specified and Notarised Power of Attorney has been included."

Regarding the Appellant's assertion that the expiration of the Power of Attorney was caused by the Respondent's act of extending deadline for submission of proposals, the Appeals Authority finds no basis in that argument as there is no justification whatsoever for the Appellant to submit an expired Power of Attorney, despite the extension.

From the above findings and observations, the Appeals Authority is of the firm view that the Appellant lacks locus standi to file the appeal given the circumstances. In view of the conclusion reached on the point of law, the Appeals Authority will not delve into the merits of the appeal.

The appeal is hereby dismissed.

Each party is to bear its own costs.

Order accordingly.

This Ruling 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 Ruling is delivered in the presence of the parties this 17th day of July 2020.

HON. JUSTICE (RTD) SAUDA MJASIRI


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CHAIRPERSON

MEMBERS:

1. CPA. FREDRICK RUMANYIKA 
.....

2. MR. RHOBEN NKORI 
.....

3. MS. NDEONIKA MWAIKAMBO 
.....