

IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY
AT DAR ES SALAAM
APPEAL NO. 03 OF 2017-18

BETWEEN

DATAHOUSE TANZANIA LIMITEDAPPELLANT

AND

LAPF PENSIONS FUND.....RESPONDENT

DECISION

CORAM

- | | | | |
|----|-------------------------|---|--------------|
| 1. | Eng. Francis Marmo | - | Ag. Chairman |
| 2. | Mrs. Rosemary Lulabuka | - | Member |
| 3. | Eng. Aloys Mwamanga | - | Member |
| 4. | Mr. Ole-Mbille Kissioki | - | Secretary |

SECRETARIAT

- | | | | |
|----|---------------------|---|----------------------|
| 1. | Ms. Florida Mapunda | - | Senior Legal Officer |
| 2. | Ms. Violet Limilabo | - | Legal Officer |
| 3. | Mr. Hamis Tika | - | Legal Officer |

FOR THE APPELLANT

- | | | | |
|----|--------------------------|---|---------------------------|
| 1. | Mr. Hussein Kitta Mlinga | - | Advocate, Elite Attorneys |
| 2. | Mr. Richard Woiso | - | Director |

FOR THE RESPONDENT

1. Mr. Eliad E. Mndeme - Principal Legal Officer
2. Mr. Emmanuel W. Mayage - Procurement and Supplies Manager

This Decision was set for delivery today, 14th August 2017 and we proceed to deliver it.

The Appeal was lodged by M/s DATAHOUSE Tanzania Limited (hereinafter referred to as "the Appellant") against the LAPF Pensions Fund (hereinafter referred to as "the Respondent"). The Appeal is in respect of Tender No. PA095/HQ/2016/2017/G/10 LOT II for Supply, Installation, Testing and Commissioning of Electrical Filing Cabinets and Document Management Systems at LAPF Head Office in Dodoma (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 facts of the Appeal can be summarized as follows:-

The Respondent vide the Daily News newspaper dated 31st March 2017, invited tenderers to participate in the above named Tender which was conducted in accordance with the Public Procurement Act of 2011 (as amended), (hereinafter referred to as "the Act") and the Public Procurement Regulations, G.N. No. 446 of 2013 (as amended) (hereinafter referred to as "G.N. No. 446 of 2013"). Eight (8) firms purchased the bidding documents. On the deadline for the submission of

the Tenders which was set for 2nd May 2017, five (5) tenders were submitted whereby the read out prices for the bidders during the tender opening ceremony were as follows;

Tender No	Name of Bidder	Currency	Amount	Tender Security/Form
1.	COSEKE TANZANIA LTD	TZS	534,463,500.60	Insurance Bond
2.	HEADLINE GENERAL TRANSPORT CO. LTD	USD TZS	156,010.95 7,200,000.00	Bank Guarantee
4.	MIDATA TECH LTD	TZS	88,812,200.00	Insurance Bond Altered from IT 19.1
5.	DATA HOUSE (T) LTD	USD	153,154.00	Bank Guarantee
6.	TERA TECHNOLOGIES AND ENGINEERING LTD	TZS	232,933,264.22	Insurance Bond

The tenders were subjected to evaluation which was conducted in two stages namely; Preliminary and Detailed Evaluation. During Preliminary Evaluation four tenders, the Appellant's inclusive were found to be non responsive for failure to comply with eligibility requirements. The only remaining tender by M/s COSEKE Tanzania Ltd was subjected to other

stages of evaluation and it was found to be substantially responsive. The Evaluation Committee recommended the said firm for award of contract at TZS 534,463,500.60 VAT inclusive. The Evaluation Committee further recommended due diligence and negotiations be conducted before award of the contract.

The recommendations of the Evaluation Committee were submitted to the Tender Board and after deliberations it was approved that pre-contract negotiations be conducted with M/s COSEKE Tanzania Ltd. The negotiations were conducted on 13th June 2017 whereby the issues discussed led to the reduction of the quoted price from TZS 534,463,500.60 to TZS 462,381,333.84. The Tender Board at its meeting held on 20th June 2017 approved the outcome of the negotiations. In the same meeting the Tender Board approved the award of contract to M/s COSEKE Tanzania Ltd at contract price of TZS 462,381,333.84 VAT inclusive.

On 20th June 2017, the Respondent vide letter with Ref. No. LAPF/T.53/19/229 issued a Notice of Intention to Award to all bidders, the Appellant inclusive. The said notice informed the Appellant that its tender was disqualified for failure to comply with tender requirements, namely;

- lack of five years experience in manufacturing or as an agent/supplier of similar type of goods and services;

- lack of experience in execution of at least two projects of a similar nature, complexity and value;
- failure to submit certified copies of Registration Certificate with relevant professional board;
- failure to provide copies of academic certificates of the proposed technical staff; and
- submission of unregistered Power of Attorney.

Dissatisfied with the reasons given for their disqualification, on 28th June 2017 the Appellant sought for administrative review to the Respondent's Accounting Officer challenging amongst others; their disqualification and award proposed to the successful tenderer. On 30th June 2017, the Respondent issued his decision, whereby the Appellant's complaints were rejected in their entirety. Dissatisfied with the Respondent's decision the Appellant lodged this Appeal on 6th July 2017.

SUBMISSIONS BY THE APPELLANT

The Appellant's grounds of Appeal were the same as those submitted to the Respondent during application for administrative review which may be summarized as follows;

- i) Lack of five years experience as an agent or supplier of similar type of goods and services;
- ii) Lack of experience in execution of at least two projects of a similar nature, complexity and value;

- iii) Failure to submit certified copies of Registration Certificate with relevant professional board;
- iv) Failure to provide copies of academic certificates of the proposed technical staff; and
- v) Submission of unregistered Power of Attorney
- vi) Variations on the awarded contract price

During the hearing the Appellant conceded to have not complied with requirements relating to five years experience as an agent or supplier of similar type of goods and also they lacked experience in executing two projects of a similar nature, complexity and value. Thus, they did not argue for the two conceded grounds.

The above notwithstanding, the Appellant's submissions on the remaining grounds of Appeal may be summarized as follows;

a) Submission of academic certificates of the proposed technical staff:-

In support of this point the Appellant submitted that the said requirement was not provided for in the Tender Document. According to Clause 11 of the Bid Data Sheet (BDS) which modified Clause 14.3(c) (iii) of the ITB tenderers were required to submit at least two names of technical personnel and indicate their professional or academic qualifications. The said provision did not require academic certificates to be submitted as proof of the academic qualifications. The Appellant submitted three CVs of the Technical personnel containing details of their academic

qualification. Thus, they complied with the requirement of the Tender Document.

b) Failure of submitting certified copies showing registration with relevant Professional Board:-

The Appellant argued that there is no professional board which regulates Electronic Document Management System. They further submitted that there is no Professional Board which registers or regulates computer scientist professionals. According to them, the Tender requires technical personnel who are computer scientists, thus since there is no professional board which regulates the said cadre; the Appellant was of the view that, the requirement of registration with relevant professional board was intended for Lot One which involved construction and engineering works.

c) Submission of unregistered Power of Attorney

The Appellant submitted that the requirements of Clause 11 and 17 of the BDS were contradictory. They argued that while Clause 11 which modified Clause 14.3(c) (ninth bullet) of the ITB requires submission of notarized Power of Attorney, Clause 17 of the BDS requires submission of specific Power of Attorney which is also registered. According to the Appellant, the two provisions were contradictory.

The Appellant submitted further that, the Public Procurement Regulatory Authority (PPRA) in June 2017 had issued a guideline in

relation to registration of Power of Attorney. The said guideline explicitly indicates that the registration of Power of Attorney during tendering process is not compulsory. Thus, the Appellant argued that they had submitted a notarized Power of Attorney and the same was sufficient to comply with the requirement. They stated further that, although the PPRA guideline was issued after the tenders had already been submitted, the same ought to have been used in this Tender as its applicability is retrospective as it has no penal effects.

d) Variations on the awarded contract price.

The Appellant submitted that the Respondent erred in law for intending to award the Tender to a tenderer whose price is higher than the prevailing market prices. They argued that the read out price for the proposed successful tenderer was TZS 534,463,500.60 VAT inclusive; and the award price was TZS 462,381,333.84 VAT inclusive. There was no justification on the drastic change on the awarded price. Furthermore, the Appellant disputes the Respondent's argument that the price of the proposed successful tenderer seems to be slightly higher as they had indicated that they would scan and arrange more than eight million four hundred (8,400,000) copies of papers the item that was missing in the Appellant's tender. The Appellant argued that, the said requirement was not provided for in the Tender Document, thus it was improper regarding it as one of the requirement of the Tender.

Finally the Appellant prayed that the tender process be nullified and the same be re-advertised.

REPLIES BY THE RESPONDENT

The Respondent's replies on the grounds of appeal may be summarized as follows;

The Respondent started his submission by averring that since the Appellant had conceded to the two grounds which led to his disqualification, it is undisputed that the Appellant had been fairly disqualified for failure to comply with the requirements of the Tender Document.

Apart from above, the Respondent proceeded to submit as follows;

The Appellant failed to comply with requirement of Clause 11 of the BDS which modified Clause 14.3(c)(iii) of the ITB which requires tenderers to submit at least two names of technical staff indicating their professional/academic qualifications in Electrical/Electronic Engineering and Computer Engineering or science. The Appellant attached to their tender three CVs of the members of their technical team without attaching certified copies of their professional/academic certificates that would have enabled the Respondent to verify the information contained in the CV.

The Respondent contended further that, the Appellant failed to submit certified copies of certificates proving registration with relevant

professional board as required by Clause 11 of the BDS which modified Clause 14.3(c) (third bullet) of the ITB. The Respondent averred that the Appellant had not submitted any certificate which proves that either the firm itself or its technical staff had been registered with relevant professional board. The Respondent disputes the Appellant's argument that the said requirement was intended for Lot One. They further argued that, if the Appellant was not certain if the said requirement was also applicable to Lot Two, they ought to have sought for clarifications since they had ample time to do so in the pre-bid meeting and site visit where all contentious issues were clarified.

Regarding submission of registered Power of Attorney, the Respondent submitted that Clause 17 of BDS required a written confirmation of authorization to be a specific and registered Power of Attorney. The Appellant submitted a Power of Attorney which was not registered as required by the Tender Document. The Respondent submitted further that, the PPRA's Guideline on the Power of Attorney relied by the Appellant is not applicable in this Tender as the same was issued when the tenders had already been opened and evaluated.

With regard to the argument relating to the price of the proposed successful tenderer the Respondent submitted that, since the Appellant's tender was found to be non-responsive during preliminary evaluation, they were not supposed to compare their prices with a tenderer who is proposed for award as they did not reach the price comparison stage. The Respondent further submitted that, the pre-contract negotiation had

reduced the original quoted price of TZS 534,463,500.60 to TZS 462,381,333.84 as there were discounts given on some of the items. Furthermore, they contended that the proposed bidder had clearly indicated that the costs provided would also cover scanning and arranging more than eight million four hundred thousand (8,400,000) copies of papers. This Item was not clearly specified in the Appellant's tender while it was one of the requirements provided for in the Tender Document.

Finally, the Respondent prayed for dismissal of the Appeal since the Appellant had conceded to have been fairly disqualified.

ANALYSIS BY THE APPEALS AUTHORITY

From the above submissions, the Appeals Authority is of the opinion that there are three (3) triable issues to be determined. These are:-

- Whether the disqualification of the Appellant is proper in law;
- Whether the proposed award of the tender to the proposed successful tenderer is justified; and
- To what reliefs, if any, are parties entitled to

Having identified the issues, we proceed to determine them as hereunder:-

1.0 Whether the disqualification of the Appellant was proper in law

In resolving this issue the Appeals Authority considered the Appellant's self admission during the hearing that they failed to comply with

experience requirements as provided for in the Tender Document and observes that the Appellant was indeed fairly disqualified.

The above admission would suffice to dismiss this Appeal in its entirety, but since the Appellant challenged other grounds that led to their disqualification apart from experience, the Appeals Authority deemed it prudent to analyze each one of them.

To start with the Appeals Authority considered the Appellant's ground of disqualification regarding failure to submit academic certificates of the proposed technical personnel. In substantiating the validity of the Appellant's disqualification basing on this ground, the Appeals Authority revisited Clause 11 of the BDS that modified Clause 14.3(c) (iii) of the ITB which guides on the technical personnel's requirement. The said provision requires tenderers to submit "at least two names of technical staff indicating the professional/academic qualifications in electrical/electronic engineering and computer engineering or science". From the wording of the said provision it is crystal clear that tenderers were required to provide names of the technical personnel and indicate their academic qualification. The said provision does not require tenderers to attach academic certificates to prove academic qualifications of their technical personnel. The Appeals Authority observes that, if the Respondent required such proof, he ought to have specified it in the Tender Document.

The Appeals Authority revisited the Appellant's tender and observed that, it was attached with three CVs of the technical personnel which indicate their professional academic qualifications. Therefore, the Appeals Authority is of the firm view that, the Appellant complied with requirement of Clause 14.3(c) (iii) of the ITB as modified. Thus, his disqualification based on this criterion was not proper at law.

The Appeals Authority considered the Appellant's ground of disqualification regarding failure to submit certified copies of certificate of registration with relevant Professional Board. In substantiating the validity of the Appellant's disqualification based on this ground, the Appeals Authority revisited Clause 11 which modified Clause 14.3(c) (third bullet) of the ITB and observes that it specifically requires tenderers to submit "certified copies of registration certificate and latest subscription receipt from the respective Professional Board of Tanzania". The Appeals Authority revisited the tenders submitted by the Appellant and the proposed successful tenderer and observed that neither of them had been attached with certified copies of certificate of registration from the relevant Professional Board.

When the Respondent was asked whether the registration was meant for individual professional personnel or the firm, he responded that it was individual personnel and not the firm. Again when required to identify/mention the relevant Professional Board which tenderers were required to submit proof of their registration with it, they were unable to do so. Based on that fact, the Appeals Authority is of the view that, much

as the Respondent required tenderers to prove their registration with relevant Professional Boards which even themselves were not aware of it, the Appeals Authority finds the Respondent's act of disqualifying the Appellant based on this uncertain criterion was not proper.

Furthermore, the Appeals Authority observed that, the proposed successful tenderer did not comply with such criterion but still his tender was found to be substantially responsive. The Appeals Authority wishes to remind the Respondent the requirement of Section 74(1) of the Act which requires evaluation process to be conducted on common basis in order to determine the best offer to the procuring entity. Thus, if the Respondent waived such criterion when evaluating the tender of the proposed successful tenderer, such waiver ought to have been equally applied to all tenders.

The Appeals Authority considered the Appellant's ground of disqualification regarding submission of unregistered Power of Attorney and deemed it necessary to ascertain what was the specific requirement provided for in the Tender Document. In the course of so doing, the Appeals Authority revisited Clause 17 of the BDS which provides that "written confirmation of authorization is specific and registered Power of Attorney". The Appeals Authority further observed that Clause 11 of the BDS which modified Clause 14.3(c) (ninth bullet) of the ITB specified that the Power of Attorney has to be certified by the notary public. During the hearing the Appellant argued that the two provisions were conflicting

each other, thus they decided to submit a notarized Power of Attorney. Having reviewed the above mentioned provisions the Appeals Authority is of the view that, the provisions are not conflicting each other, since Clause 14.3(c) (ninth bullet) required a Power of Attorney to be notarized and Clause 17 of the BDS goes further expounding that the said Power of Attorney has to be registered. Therefore, the Appeals Authority is of the settled view that tenderers were required to submit a registered Power of Attorney.

The Appeals Authority considered the Appellant's argument that according to PPRA guideline issued June 2017, Power of Attorney need not be registered, thus it was unfair for them to be disqualified based on such requirement. In substantiating the Appellant's argument in this regard the Appeals Authority revisited the said PPRA guideline and observes that the same was issued on 9th June 2017 and it specifically requires tenderers to submit Powers of Attorney during tendering process and before signing of the contract. According to the said guideline registration of Power of Attorney should not be a compulsory requirement; instead, the same should be notarized by Commissioner for Oath.

The Appeals Authority revisited the documents submitted and observed that Tender was advertised on 31st March 2017 and the tender opening took place on 2nd May 2017. It was further observed that evaluation of tenders was completed on 11th May 2017 and the evaluation report was tabled before the Tender Board on 16th May 2017 for deliberations. Based on the above facts it is evidently that by the time the PPRA guideline was

issued the evaluation process had already been completed and its findings were already submitted to the Tender Board which ordered amongst others pre-contract negotiations be carried out with the proposed successful tenderer. The Appeals Authority is of the view that, since the procurement process had reached an advanced stage by the time PPRA guideline was issued; it was not possible for the Respondent to apply the said guideline in the Tender under Appeal. Reading from the wording of the said guideline, it is clear that it is not intended to be applied retrospectively. The Appeals Authority rejects the Appellant's argument that the guideline was to be applied retrospectively as it deals with procedural matters and not substantive justice because the procurement process was at an advanced stage; and taking into consideration the fact that there was no indication that the guideline was to be applied retrospectively, reversing the process at that point would not be proper.

Based on the above the Appeals Authority is of the settled view that, since the PPRA guideline was not applicable in this Tender, tenderers were compulsorily required to submit registered Powers of Attorney. Thus, failure to do so amounts to non-compliance with the requirement of the Tender Document. Therefore, the Appellant's tender was fairly disqualified based on this ground as they submitted unregistered Power of Attorney.

Accordingly, the Appeals Authority's conclusion with regard to the first issue is that, the disqualification of the Appellant is proper in law as

conceded by themselves that they lacked the requisite experience and they submitted unregistered Power of Attorney.

2.0 Whether the proposed award of the tender to the proposed successful tenderer is justified

In resolving this issue the Appeals Authority took cognizance of its findings made on the first issue above that the Appellant has been fairly disqualified at the preliminary evaluation stage, hence his price cannot be compared with the price quoted by the proposed successful tenderer. Price comparison is done among the tenderers who passed preliminary and technical evaluation stages.

The Appeals Authority further observes that, in this Tender there were five tenderers and four of them were all disqualified at the preliminary evaluation stage, only the proposed successful tenderer qualified up to the last stage. Thus, at the time of price comparison there was only one tender whose price had none to compete with. Since the Appeals Authority had already established that the disqualification of the Appellant was proper and there was no any other ground which challenges the proposed successful tenderer's qualification in this tender apart from price, the Appeals Authority is of the settled view that the award of the Tender to the proposed successful tenderer is justified.

3.0 What reliefs, if any, are parties entitled to

Taking cognizance of the findings made above, the Appeals Authority finds the Appeal to have no merits as the Appellant was fairly disqualified

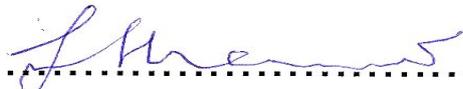
and the proposed award to the successful tenderer is justified; the Appeals Authority therefore dismisses the Appeal and orders the Respondent to proceed with the tender process.

It is so ordered. Each party to bear own costs.

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 Appellant and in absence of the Respondent this 14th August, 2017.


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ENG. FRANCIS MARMO
Ag:CHAIRMAN

MEMBERS:

1. MRS. ROSEMARY LULABUKA 
2. ENG. ALOYS MWAMANGA 