

IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY
AT DAR ES SALAAM
APPEAL CASE NO. 08 OF 2016-17

BETWEEN

M/S ICB DAR ES SALAAM INSTITUTE OF
TECHNOLOGY IN PARTNERSHIP WITH POWER
RESEARCH & CONSULTANTS PVT LIMITED.....APPELLANT

AND

RURAL ENERGY AGENCYRESPONDENT

DECISION

CORAM

- | | | |
|-------------------------------------|---|-----------|
| 1. Hon. Vincent K.D Lyimo, J. (rtd) | - | Chairman |
| 2. Mrs. Rosemary A. Lulabuka | - | Member |
| 3. Eng. Francis T. Marmo | - | Member |
| 4. Mr. Ole-Mbille Kissioki | - | Secretary |

SECRETARIAT

- | | | |
|---------------------------|---|----------------------|
| 1. Ms. Florida R. Mapunda | - | Senior Legal Officer |
| 2. Ms. Violet S. Limilabo | - | Legal Officer |
| 3. Mr. Hamisi O. Tika | - | Legal Officer |

FOR THE APPELLANT

- | | | |
|-------------------------|---|----------------------------|
| 1. Mr. Samwel Maneno | - | Legal & Procurement Expert |
| 2. Mr. Nelson E. ndelwa | - | Legal Officer |

3. Dr. Joseph Mkilania - ICB (DIT) Manager
4. Mr. Benedicto Mahela - Procurement Expert
5. Mr. Robert Shija - Marketing Manager

FOR THE RESPONDENT

1. Eng. Boniface Nyamo Hanga - Ag. Director General
2. Mr. George M. J. Nchwali - Director of Finance & Administration
3. Mr. Musa Muze - Legal Affairs Manager
4. Mr. Prosper Msellem – Director of Planning Policy and Research
5. Mr. Clement Kisinga - Procurement officer.

This decision was set for delivery today 14th December 2016 and we proceed to deliver it.

This Appeal was lodged by M/s ICB Dar es salaam Institute of Technology in partnership with Power Research & Consultants Pvt Limited (hereinafter referred to as “the Appellant”) against Rural Energy Agency (hereinafter referred to as “the Respondent”). The Appeal is in respect of Tender No. AE/008/2015-2016/HQ/C/21 for Provision of Consulting Services for Preparation of Rural Energy Master Plan (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 may be summarized as follows:

The Respondent issued an Invitation for Expression of Interest (EoI) in the Daily News newspaper dated 3rd October 2015. The said Invitation was modified by an advertisement in the same newspaper dated 15th January 2016. The deadline for the submission of the EoI was on 18th February 2016 and thirty one (31) firms expressed their interest. After conducting due process of evaluation, only ten (10) firms were pre-qualified for the issuance of the Request for Proposal (RFP). Thus, on 9th May 2016 the Respondent issued the RFP to ten firms so pre-qualified.

The deadline for the submission of the RFP was set for 9th June 2016, whereby five (5) bids were received from the following companies namely:-

1. M/s Ghods Niroo Engineering Company – Iran
2. M/s Multiconsult ASA – Norway
3. M/s ICB Dar es salaam Institute of Technology in partnership with Power Research & Consultants Pvt Limited
4. M/s CPCS International Limited in association with Aurecon – Barbados, and
5. Tractebel Engineering S.A - Belgium.

The tenders were subjected to technical evaluation as per the Information to Consultants (herein after referred to as "ITC"). In order for any bidder to qualify, the minimum score was set at 75%. During Technical Evaluation four (4) technical proposals including that of the Appellant met the minimum score, while one tender by M/s Ghods Niroo Engineering Company was disqualified. The scores for each of the qualified bidders were ranked by the evaluation committee as follows-

S/N.	FIRM'S NAME	POINTS
1)	M/s. Multiconsult ASA	89.4
2)	M/s Tractebel Engineering S.A.	88.4
3)	M/s CPCS International Limited in Association with Aurecon	87.2
4)	M/s ICB Dar es Salaam Institute of Technology (DIT) in Partnership with Power Research & Consultants Pvt. Ltd.	86.2

At its meeting held on 21st July 2016, the Respondent's Tender Board approved the recommendation of the evaluation team on the technical result as well as the opening of the financial proposals for the qualified tenderers. And on 19th August 2016, the financial proposals were opened in the presence of all tenderers. The read out prices for each of the bidders were as follows-

S/N	FIRM'S NAME	AMOUNT IN TZS
1)	M/s. Multiconsult ASA	2,020,000,000.00 Tax 231,540,000.00
2)	M/s Tractebel Engineering S.A.	1,970,000,000.00 Tax 347,647,590.00
3)	M/s CPCS International Limited in Association with Aurecon	3,068,539,448.00 Tax 1,093,844,062.00
4)	M/s ICB Dar es Salaam Institute of Technology (DIT) in Partnership with Power Research & Consultants Pvt. Ltd.	1,777,523,834.00 Tax 319,954,289.00

After the opening, the Financial Proposals were subjected to arithmetic correction of errors and the results of technical and financial proposals were combined, whereby M/s Multi Consult ASA scored 89.10 and was

ranked first, followed by that of the Appellant which scored 88.96 and was ranked second. The tender board, through a circular resolution dated 20th October 2016 approved the recommendation of awarding the contract to M/s Multi Consult ASA at contract price of TZS. 2,050,000,000.00 VAT Inclusive.

On 21st October 2016 the Respondent's Accounting Officer, by his letter Ref. No. AG. 157 /226/01/Vol. I/4 issued the Notice of Intention to Award the contract to the Appellant.

Aggrieved, on 27th October 2016 the Appellant lodged an application for administrative review to the Respondent's Accounting Officer challenging amongst other issues, the Respondent's failure to grant a margin of exclusive preference to the Appellant's bid as per the requirement of the law.

On 1st November 2016 the Respondent's Accounting Officer by his letter Ref. No. AG.157/226/01/Vol.I/8 dismissed the Appellant's complaint on the grounds that the Tender Document did not provide for exclusive preference. In addition, the Respondent informed the Appellant that selection of the successful tenderer was hinged on 'Quality and Cost Based' selection. According to the Respondent, it was not proper for the Appellant to base its argument on the cost aspect and forgo the quality, which constituted 80% of the assignment.

Dissatisfied with the responses, on 23rd November 2016 the Appellant lodged his Appeal to the Appeals Authority.

SUBMISSIONS BY THE APPELLANT

The Appellant had filed a lengthy petition of appeal but the basic ground thereof may be summarized as follows:

- i. That, the Respondent erred in law for failure to grant a margin of preference which was a mandatory requirement of the law.

In addressing this issue, the Appellant contended that according to Clauses 25.4, 25.6 and 25.7 of the ITC tenderers were required to attach in their bids, the Bid Securing Declaration. The value of the contract did not exceed the threshold provided for in the Ninth and Thirteenth Schedule of GN. No. 446 of 2013 and reference to the Bid Securing Declaration meant that the Respondent was obliged to apply the principle of exclusive preference.

Further, the Appellant attacked the Respondent's decision on two levels. First, the Appellant argued that the Respondent had failed to take into consideration the requirement of Regulation 39(2) of the Public Procurement Regulations, Government Notice No. 446 of 2013 (hereinafter referred to as "GN. No. 446 of 2013") which mandates procuring entities to apply exclusive preference if in a joint venture the association or participation of a local company is greater than 60%. The Appellant asserted that in the disputed tender there were five tenderers who submitted their proposals, four of which were foreign companies and the Appellant's Joint Venture was the only firm which had local composition. The Appellant's proposal clearly indicated that technical staff from local firm were more than the foreign experts. That in itself indicates that the shareholding of local firms was more than 75% in the

Appellant's Partnership. When making reference to the ranking of the bidders, the Appellant asserted that going by the marks awarded, the difference between its partnership and the proposed successful bidder was basically zero.

Second, according to Section 51 of the Public Procurement Act, 2011 (hereinafter referred to as the Act), as the value of the tender did not exceed the threshold of TZS. 3,000,000,000/- prescribed in the Thirteenth Schedule of the GN. No. 446 of 2013 the Respondent erred in law for treating all tenderers as foreigners while the Appellant's Partnership comprised of locals. The Respondent ought to have treated the Appellant's tender different from others through application of the margin of exclusive preference. Thus, the Respondent's failure to apply exclusive preference is non-compliance with the law.

And in his conclusion, the Appellant argued that apart from the legal requirements to grant margins of preference as shown, the Respondent had acted in blatant disregard of the Government Circular with Reference No. CEA.III/372/01/15 dated 8th December 2015, which required all procuring entities to award public contracts to local consultants firms or suppliers that are capable of providing quality services; and who have met the lowest technical scores. The Appellant asserted that his bid was very competitive and had the Respondent applied the said principle, all the foreign companies which participated in the said tender ought to have been eliminated.

Finally, the Appellant prayed for the following orders-

- a. Suspension of award process pending determination of the appeal or Judicial Review if any.

- b. Declaration that the Notice of Intention to Award the contract be null and void as well as the contract, if it has been signed.
- c. Re-evaluation of the tender by considering margin of preference.
- d. The Respondent be ordered to pay the Appellant a sum of TZS. 10,500,000/- as per the following breakdown:-
 - Legal fees TZS 6,000,000/-
 - Appeal filing fees TZS. 50,000/-
 - Transport, accommodations and meals TZS. 450,000/-
 - General damages TZS. 4,000,000/-
 - Any other relief that the Appeals Authority may deem just and fit to grant.

REPLIES BY THE RESPONDENT

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

- i. That, the Tender Document did not provide for exclusive preference and as such the requirement was not applicable. For exclusive preference to be applicable, such a requirement must be contained in the Tender Document in terms of Section 54(2) of the Act. And as the Appellant did not seek any explanation as to whether or not the principle of exclusive preference was applicable, he should be precluded from complaining.
- ii. That the tender in dispute is jointly financed by development partners, including the Royal Government of Norway. There is a specific agreement between the Governments of Norway and

Tanzania which stipulated that tenderers from outside the country could participate in the tender with equal opportunity as provided for under article VIII (3) of the said Agreement.

- iii. That, Section 20 of the Rural Energy Act provides for Special Purpose Fund, under which modalities on how to utilize funds from development partners are provided as part of the specific agreement. Funds applied for the tender falls under this category which requires the recipient, in this case, the Government of Tanzania to use the same in the manner prescribed in the Specific Agreement.

Touching on the first response, the Respondent argued that during the evaluation, the Evaluation Team did not employ the exclusive preference scheme because the tender in question entailed some complex issues touching on the value and technical competence of bidders. The paucity of local bidders was evidence of the complex nature of the project. That the law, as provided for under Regulation 254 (2) (b) of GN.No.446 of 2013, allows a procuring entity to widen the scope of participation of foreign consultants regardless of the value in order to attract the required technical competence. The tender at hand is technically complex and it had never been performed by local consulting firms in Tanzania. Thus, the argument that this tender should have been reserved exclusively to local firms would have not provided the Respondent with the technical expertise that was required for the assignment since there was only one local firm.

Further, the Respondent pointed out that the selection criteria for this tender was based on quality and cost, whereby quality carried 80% and cost 20%. The quality was given high weight since it was the paramount aspect for such a complex assignment and that the same was clearly stipulated in the Tender Document so that bidders could understand how the tendering process would be conducted.

Regarding the Appellant's Partnership, the Respondent argued that the so called partnership was never witnessed by a valid partnership Agreement to prove the share holding pattern by individual partners. The Respondent asserted that there was no way it could be established that local shareholding was over 60% as put by the Appellant in order to deserve to be considered for exclusive preference. Thus, the whole evaluation process was conducted in accordance with the law and the proposed award has been fairly made.

Addressing the question of the Bid Securing Declaration, the Respondent stated that the provision for the same in the tender document was an oversight. The Respondent never meant to provide for exclusive preference to the bidders but had aimed at protecting its interest against bidders conduct before the tendering process is finalized.

Therefore, the Respondent prayed that-

- i. Appeal be dismissed as no procedural violation was done by them.
- ii. That, the Appellant be ordered to pay costs for the Appeal
- iii. Any other relief that the Appeals Authority may deem appropriate and just to grant.

In his brief rejoinder, the Appellant insisted that any reference to the existing agreement between the Government of Tanzania and Norway should be treated as an afterthought. He insisted that in so far as the tender documents made reference to Bid Securing Declaration, it meant that principles on exclusivity were applicable and that all bidders were made to understand that the tender would have been evaluated based on that principle.

ANALYSIS BY THE APPEALS AUTHORITY

In this Appeal there are two triable issues namely:-

- Whether, the Respondent should have applied exclusive preference in determining the award of the tender; and
- To What reliefs, if any, are the parties entitled to.

Having identified the issues, the Appeals Authority proceeded to determine them as hereunder-

1.0 Whether, the Respondent should have applied exclusive preference in awarding the tender

In determining this issue, the Appeals Authority reviewed the documents submitted and observed that neither the Tender Document nor the tender advertisement indicated that exclusive preference was applicable.

The Appeals Authority further observed that Clause 25 of the Proposal Data Sheet (hereinafter referred to as "the PDS") had specified that the applicable bid security for the tender was Bid Securing Declaration.

According to Regulation 27 of GN No. 446 of 2013, Bid Securing Declaration is only applicable in public procurement where the value does not exceed the threshold for exclusive preference provided in the Ninth and Thirteenth Schedules of the Regulations. That means, Bid Securing Declaration is only applicable in tenders which grant exclusive preference. Based on that, the Appeals Authority is of the view that much as the Tender Document was silent on the applicability of exclusive preference, the requirement of Bid Securing Declaration set by the Respondent in the PDS presupposed that exclusive preference was applicable in this tender. That said, the Appeals Authority rejects the Respondent's arguments that the provision for bid security in the form of Bid Securing Declaration was an oversight. The Respondent was obliged by law to use bid securities that are appropriate if he did not intend to grant exclusive preference.

Moreover, the Appeals Authority revisited Section 55 of the Act which guides on the applicability of the exclusive preference to local persons and local firms. The said provision states as follows:-

“Where financial resources are exclusively provided by a Tanzanian Public body, each procurement of works, goods or services that has a value not exceeding the threshold specified in the Regulations shall be reserved exclusively for local persons or firms”. (Emphasis added)

The above quoted provision clearly requires exclusive preference to be applicable when the funds for the project are exclusively provided by a Tanzanian public body. From the documents submitted, the Appeals Authority observed that, Clause 2 of the Invitation for Expression of

Interest as well as Clause 2.1 and 2.3 of PDS had indicated that the project is funded by the Government of Tanzania. That fact alone implies further that exclusive preference was applicable in this Tender. However, in reviewing the Statement of Reply as well as the Respondent's oral submissions during the hearing, the Appeals Authority observed that the Respondent had indicated that the project is to be funded by the Norwegian Government. In support of his argument, the Respondent attached the Agreement between the Norwegian Ministry of Foreign Affairs and the Government of the United Republic of Tanzania. The contents of the said agreement indicate that the same has been entered purposely for supporting Rural Energy Projects in order to increase access to modern energy services through the Rural Energy Fund. During the hearing Members of the Appeals Authority asked the Respondent to clarify why the Tender Document did not indicate that the project was funded by the Norwegian Government.

In reply to the above question, the Respondent submitted that, they have been receiving funds from different development partners and that such funds are kept in a single fund identified as Special Purpose Fund pursuant to the Rural Energy Act. He contended further that, once the funds have been received from development partners and deposited into the Special Purpose Fund, the same are recognized as Government funds. The Respondent insisted that he could not declare the funds as having been received from the Norwegian Government since the Fund include grants and loans received from other development partners.

From the above facts the Appeals Authority is of the view that, much as the Respondent did not disclose in their Tender Document that the funds

for the project were from development partners, the Appeals Authority cannot deny or close its eyes to the existing arrangement between the Government of Tanzania and other Governments; like Norwegian Government in supporting rural energy initiatives. However, since the Respondent treated the funds for the project as Government Funds as the Rural Energy Act pointed out above, the presumption is that the project was to be funded by the Government of Tanzania. Based on the said presumption, the Respondent ought to have provided exclusive preference as per Section 55 of the Act.

The Appeals Authority revisited Regulation 254 of GN No 446 of 2013 relied upon by the Respondent who asserted that, procuring entities are allowed to widen the scope of participation regardless of the nationality and value of the project in order to secure technical expertise. The Appeals Authority observes that the referred provision refers to a situation where tendering is by way of international competitive selection. In this Appeal, there has been no reference to International Competitive Selection.

Further, the Appeals Authority revisited Regulation 32 of GN. No 446 of 2013 which guides on the requirements for the applicability of preference schemes. For purposes of clarity, Regulation 32(1) and (6) is reproduced herein below:

32(1)"A tenderer who wishes to be granted preference according to these regulations shall apply for registration with the Authority in the form set out in the Eighteenth Schedule".

32(6)“A procuring entity shall, in granting a margin of preference or applying exclusive preference use the Authority’s register of tenderers to determine whether or not tenderers are qualified for margin of preference or exclusive preference”. (Emphasis added).

From the above quoted provision, it is crystal clear that for a tenderer to qualify for exclusive preference scheme he must first be registered by the Public Procurement Regulatory Authority (PPRA). During the hearing the Appellant could not prove that they were registered as such. Moreover, the Appeals Authority observed that among the five firms that submitted their proposals, it was only the Appellant who deserved to be considered for exclusive preference if they could have complied with the requirement of the law. In this case, the existence of the Appellant's partnership could not be vouch saved and the alleged partnership has not been registered by PPRA. From the above facts, the Appeals Authority is of the settled view that, the Appellant did not deserve to be given exclusive preference.

The Appeals Authority considered the Circular issued by the Ministry of Finance with Ref No. CEA.III/372/01/15 dated 8th December 2015 relied upon by the Appellant that gives directives on the issue of exclusive preference and observed that it had not changed the requirement of the law. The Circular requires in consultancy service, local firms or personnel to be given exclusive preference. However, the Circular had not changed the requirement of the law on the modalities of granting exclusive preference.

The Appeals Authority made reference to Appeal No 27 of 2015-16 relied upon by the Appellant on the applicability of exclusive preference. In the former Appeal No 27 of 2015-16 the Appellant had shown that he was entitled to the margin of preference which the Respondent had miserably failed to apply. In the present Appeal the Appellant has not shown that he is entitled to exclusive preference.

Therefore, the Appeals Authority's conclusion with regard to the first issue is that, the Respondent should have applied exclusive preference in determining award of the tender, save that the Appellant did not qualify.

2.0 To what reliefs, if any, are the parties entitled

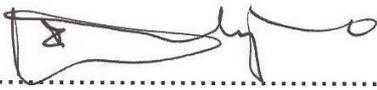
In determining the prayers by the parties, the Appeals Authority took cognizance of three findings made herein above, to wit,

- (i) The Appellant by any stretch of imagination did not deserve to be granted exclusive preference;
- (ii) To the extent that the Respondent did not disclose that part of the funds are donor funds;
- (iii) The Respondent did not consider exclusive preference in awarding the tender.

Therefore, the Appeals Authority partly upholds the Appeal and partly dismisses it. The prayers by the Appellant for re-evaluation cannot issue. The Appeals Authority observes further that other than the issue of preference, the Appellant did not challenge the Selection Process and that he did not substantiate the costs contained in the prayers. Therefore the Appeal is dismissed and each Party to bear own costs.

The Right of Judicial Review as per Section 101 of the Act is explained to the Parties.

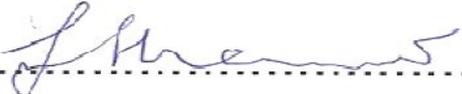
This Decision is delivered in the presence of the Respondent and in the absence of the Appellant, this 14th December, 2016.



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VINCENT K.D. LYIMO, J. (RTD)
CHAIRMAN

MEMBERS:

1. ENG. FRANCIS T. MARMO..... 

2. MRS. R. LULABUKA 