

IN THE PUBLIC PROCUREMENT APPEALS AUTHORITY

APPEAL CASE NO. 46 OF 2022-23

BETWEEN

M/S MEK ONE GENERAL TRADERS LTD.....APPELLANT

AND

TANZANIA ELECTRIC SUPPLY COMPANY LTD.....RESPONDENT

RULING

CORAM

- | | |
|-------------------------------------|---------------|
| 1. Hon. Justice (rtd) Sauda Mjasiri | - Chairperson |
| 2. Ms. Ndeonika Mwaikambo | - Member |
| 3. Mr. Pius Mponzi | - Member |
| 4. Mr. James Sando | - Secretary |

SECRETARIAT

- | | |
|------------------------|------------------------------|
| 1. Ms. Florida Mapunda | - Deputy Executive Secretary |
| 2. Ms. Violet Limilabo | - Senior Legal Officer |

FOR THE APPELLANT

- | | |
|-----------------------|--|
| 1. Mr. Elias Machibya | - Advocate - Machibya Professional Attorneys |
| 2. Mr. Omar Ali Mussa | - Head of Legal Department |
| 3. Mr. Nicolaus Kuya | - Personal Assistant – Machibya Professional Attorneys |

FOR THE RESPONDENT

1. Ms. Faika Mamuya - Senior Legal Officer
2. Mr. Michael Bangu - Procurement Manager

This Appeal was lodged by M/S Mek One General Traders Ltd (hereinafter referred to as "**the Appellant**") against the Tanzania Electric Supply Company Ltd commonly known by its acronym as "**TANESCO**" (hereinafter referred to as "**the Respondent**"). The Appeal is in respect of Tender No. PA/001/2022-2023/HQ/G/191 for Supply of Lubricant Oil (Shell Mysella S3 N40 and Shell Tellus S2 M100) for Ubungo 1 Gas Plant and Tegeta Gas Plant under Framework Contract (hereinafter referred to as "**the Tender**").

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

The Tender was conducted through single source tendering method as specified in the Public Procurement Act, No. 7 of 2011 as amended (hereinafter referred to as "**the Act**") and the Public Procurement Regulations, GN. No. 446 of 2013 as amended (hereinafter referred as "**the Regulations**").

On 13th January 2023, the Respondent through Tanzania National electronic Procurement System (TANePS) invited M/S VIVO Energy Tanzania Ltd to participate in the Tender through single source procurement method. The deadline for submission of the tender was set

for 27th January 2023. On the deadline, M/S VIVO Energy Tanzania Ltd submitted its tender.

The tender was subjected to evaluation and after completion, the Evaluation Committee recommended award of the Tender to M/S VIVO Energy Tanzania Ltd at the contract price of Tanzanian Shillings Three Billion One Hundred Twenty Five Million Eight Hundred Fourteen Thousand Four Hundred Sixty Six and One Cent Only (3,125,814,466.01) VAT inclusive, subject to negotiations.

Negotiations successfully took place on 14th March 2023 whereby M/S VIVO Energy Tanzania Ltd reduced its quoted price from TZS 3,125,814,466.01 to TZS 3,063,298,176.70 VAT inclusive. The Respondent through a letter dated 27th March 2023 notified M/S VIVO Energy Tanzania Ltd that it intends to award it the Tender.

The record of Appeal indicates further that on 12th May 2023, the Appellant applied for administrative review to the Respondent objecting the proposed award of the Tender. The Respondent did not respond to the Appellant's letter. Aggrieved further, on 25th May 2023, the Appellant filed this Appeal to the Appeals Authority.

When the matter was called on for hearing and at the time of framing up the issues, the Appeals Authority informed the parties that, having reviewed the record of Appeal, particularly the sequence of events, it observed that there is a need to determine if the Appellant is eligible to file this Appeal and if the choice of a procurement method chosen by the

procuring entity can be challenged. Given the above observations, the following issues were framed:-

- 1.0 Whether the Appellant is a tenderer and therefore eligible to file this Appeal;**
- 2.0 Whether the Respondent's choice of procurement method can be challenged;**
- 3.0 Whether it was unlawful for the Respondent to use single source procurement method;**
- 4.0 Whether the Respondent's act of intending to award the contract to M/S VIVO Energy Tanzania Ltd is proper in law; and**
- 5.0 What reliefs, if any, are the parties entitled to?**

SUBMISSIONS BY THE APPELLANT

In this Appeal the Appellant was represented by Mr. Elias Machibya, learned counsel, assisted by Mr. Omar Ali Mussa, Head of Legal Department from the Appellant's office. Mr. Elias Machibya commenced his submissions on the first issue by stating that if the Tender under Appeal is considered in isolation of Tender No. PA/001/2021-2022/HQ/G/152 for Supply of Lubricant Oil (Shell Mysella S3 N40 and Shell Tellus S2 M100) for Ubungo 1 Gas Plant and Tegeta Gas Plant Under Three (3) Years Framework Contract (hereinafter referred to as "**the Rejected Tender**"),

the Appellant is not a tenderer as it did not participate in the Tender under Appeal.

The Tender under Appeal was conducted through single source procurement method. However, the Appellant's interest on the subject Tender arose from the previous Rejected Tender in which the Appellant was among the tenderers who participated. The Rejected Tender and the Tender under Appeal are both for the supply of lubricant oil (Shell Mysella S3 N40 and Shell Tellus S2 M100) to the Respondent. Having rejected the initially floated tender, the Respondent floated this Tender under a single source procurement method. Thus, the Tender under Appeal cannot be considered in isolation of the Rejected Tender. The two tenders are related and the Tender under Appeal having been conducted in contravention of the law, the Appellant is eligible to lodge this Appeal.

On the second issue the learned counsel submitted that the law does not allow a tenderer to challenge a choice of a procurement method by the procuring entity. In this Appeal, the Appellant is not challenging the single source procurement method used by the Respondent; rather, it challenges the Respondent's motive of intending to award the contract to M/S VIVO Energy Tanzania Ltd (hereinafter referred to as "**the proposed successful tenderer**"). The proposed successful tenderer is not eligible to be awarded the contract due to the existence of the distributorship agreement between the former and the latter that gave exclusive rights to the Appellant to supply the lubricant oil to the Respondent.

The learned counsel submitted that the Respondent's ill motive of intending to award the contract to the proposed successful tenderer could be traced from the moment the Respondent rejected the initially floated tender. If the Respondent did not have an ill motive it would not have rejected the Tender and proceed to procure the same lubricant oil through the single source procurement method. Thus, the Respondent's conduct in this regard contravened Regulation 78(2) of the Regulations which prohibits procuring entities from engaging in fraudulent practices. Therefore, the Appellant does not challenge the choice of the procurement method by the Respondent.

The learned counsel submitted that, if the Appeals Authority would be of the view that the Appellant challenges the Respondent's use of the single source procurement method, then the Appellant lacks *locus standi* to file this Appeal.

On the third and the fourth issues the learned counsel submitted that according to Regulations 159 and 160 of the Regulations the Respondent had an option of using single source procurement method. However, since the Tender under Appeal was preceded by the Rejected Tender, the Respondent ought not to have floated the Tender under Appeal by using single source procurement method.

The learned counsel elaborated that the Appellant was among the tenderers in the Rejected Tender. Before the said tender was rejected the Appellant realized that the proposed successful tenderer being a manufacturer has issued manufacturer's authorization letters to other

tenderers who participated in the Rejected Tender. The Appellant had a distributorship agreement with the proposed successful tenderer giving it an exclusive right to supply lubricant oil to the Respondent. Having noted this, on 6th August 2022, the Appellant wrote a letter to the proposed successful tenderer inquiring the status of its exclusive right of supplying lubricant oil to the Respondent. The proposed successful tenderer through a letter dated 16th August 2022 confirmed that the Appellant was the only appointed distributor for the supply of lubricant oil to the Respondent for the Rejected Tender. The letter was also copied to the Respondent.

The learned counsel submitted that, the Appellant has been supplying lubricant oil to the Respondent since October 2012 through the signed contract between Shell Tanzania Limited and Wartsila Tanzania Limited upon their exit from Tanzania. On 29th October 2012 the tripartite agreement was executed between the Respondent, Shell Tanzania Limited and the Appellant. In addition to that, the Appellant had signed an exclusive distributorship agreement as the sole entity that would supply the Respondent with lubricant oil manufactured by Shell Tanzania Limited, now the proposed successful tenderer. The Appellant added that it has been an exclusive distributor of the lubricant oil to the Respondent under several contracts from 2012 up to 31st May 2023 when the last contract expired.

The learned counsel contended further that, the Appellant has been registered by the Public Procurement Regulatory Authority (PPRA) as one of the beneficiaries of the national preferential scheme. Such a registration proves that the Appellant's company is 100 percent Tanzanian owned. The Appellant stated that, the Respondent ought not to have awarded the



Tender to the proposed successful tenderer without due consideration of the requirements of the preferential scheme. According to the official search made to the Business Registration and Licensing Authority (BRELA), the proposed successful tenderer is a 99 percent foreign owned company. Thus, the Respondent ought not to have negotiated a contract with the proposed successful tenderer which is a foreign firm and pushing aside a locally owned firm registered by the PPRA under local preferential scheme. In addition, the Appellant was a sole authorized distributor of lubricant oil through a contract executed on 2nd May 2022 between it and the proposed successful tenderer. Therefore, it qualifies for award of the Tender.

The learned counsel submitted further that, the Respondent colluded with the proposed successful tenderer to the extent that the latter terminated the distributorship agreement with the Appellant vide a letter dated 31st March 2023. The collusion was done with the intention to create conducive environment for single source tendering that gave unfair advantage to the proposed successful tenderer as an exclusive distributor of the lubricant oil. In view of the above, the Appellant considers the Respondent's act of engaging the proposed successful tenderer through a single source procurement method to be unlawful and contravened Regulations 4, 7, 16, 78 and 79 of the Regulations as well as the PPRA guidelines.

The learned counsel submitted that, despite submitting an application for administrative review to the Respondent's Accounting Officer within seven working days from the date the Appellant became aware of the intended award of the contract to the proposed successful tenderer, the Respondent

never responded to the Appellant's complaint within the time prescribed under the law.

Finally, the Appellant prayed for the following orders:-

- i. A declaration that award of the Tender through a single source procurement method to the proposed successful tenderer was fraudulent, wrongful and unlawful;
- ii. The Appeals Authority to cancel the Tender and compel the Respondent to re-start the Tender process in a competitive basis;
- iii. Costs of the Appeal be borne by the Respondent; and
- iv. Any other relief the Appeals Authority may deem fit and just to grant.

REPLY BY THE RESPONDENT

The Respondent's submissions were made by Mr. Michael Bangu, Procurement Manager from the Respondent's office. He commenced his submissions on the first issue by stating that, the Appellant is not a tenderer as it did not participate in the Tender. In order for a tenderer to be eligible to file an appeal, it has to participate in a particular tender against which an appeal should be brought. This Tender was floated through a single source procurement method and the Appellant did not participate. Therefore, it is ineligible to file this Appeal.

In relation to the second issue, the Respondent stated that the law prohibits the choice of a procurement method by the procuring entity to be challenged. Thus, the Appellant's act of challenging the Respondent's

choice of a single source procurement method is not proper in the eyes of the law.

On the third and the fourth issues, the Respondent stated that it is undisputed that the Appellant has been a distributor of lubricant oil to the Respondent. The last contract was entered between the Appellant and the Respondent in 2018 for supply of lubricant oil for Ubungo 1 gas plant and Tegeta gas plant for a period of three (3) years under Framework contract No. PA/001/2017-18/HQ/G/40. The Appellant was awarded the said contract after being found to be successful in a competitive tendering process whereby other distributors like Prime Fuel Ltd participated. The awarded contract expired on 5th December 2021; however, it was extended to 31st May 2023.

The Respondent submitted further that the Appellant was previously the only distributor of the lubricant oil. However, the Respondent noted recently that there are several distributors including the manufacturer of the products. Thus, the Appellant is not an exclusive distributor of lubricant oil as contended. In addition, the exclusivity of the distributorship agreement lasted for the contract term; therefore, since the contract had already come to an end, the Respondent had the authority to change the products and the supplier.

With regard to the Appellant's argument on the previously Rejected Tender, the Respondent submitted that the referred rejection was done for the benefit of the procuring entity in compliance with Clause 38.1 of the ITT. The Respondent elaborated that it became aware through the



correspondences between the Appellant and the proposed successful tenderer that the latter is a manufacturer and sole licensee of the products. Therefore, it had the discretion of choosing to supply the products directly or through a distributor. Having been aware of such fact, the Respondent opted to deal directly with the manufacturer to avoid the risk of a higher price by dealing with middlemen and to enjoy the value for money through bulk procurement.

The Respondent submitted further that apart from having a good price, it would also have access to after sales services that included oil related training, technical advice and periodic oil condition monitoring (oil analysis). Therefore, the Respondent opted to procure directly from the proposed successful tenderer through single source procurement method.

The Respondent's conduct in this regard was in compliance with Regulation 149A of the Regulations that allows procuring entities to procure directly from the manufacturer so as to enjoy the economies of scale particularly when it does bulk procurement. The Respondent's decision to procure directly from the manufacturer would make costs savings that would be used to improve electricity infrastructure rather than if it would have continued to procure the lubricant oil from the Appellant who had a higher price.

Regarding the Appellant's argument that the Tender has been awarded to a foreign firm instead of a local firm as per the preferential scheme, the Respondent submitted that, the Act and its Regulations does not restrict foreign companies operating within the country from participating in local



Tenders. The Act gives advantage to nationals depending on the price difference after applying a margin of preference. Therefore, the Appellant's argument on this point should be disregarded.

The Respondent contended further that, the contract between it and Appellant came to an end on 31st May 2023. Based on that, the Respondent had a right of advertising the Tender in a manner that suits its circumstances. Thus, the Appellant's argument that the Tender ought to have been advertised competitively as the previously Rejected Tender is baseless.

The Respondent submitted that the Appellant's Statement of Appeal indicates that it has been receiving information relating to the Tender while it was not a part of the process. This proves that the Appellant has been using illegal means of accessing information from the Respondent's office.

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

ANALYSIS BY THE APPEALS AUTHORITY

1.0 Whether the Appellant is a tenderer and therefore eligible to file this Appeal

In resolving this issue, the Appeals Authority revisited Rule 4 of the Public Procurement Appeals Rules GN No.411 of 2014 as amended (hereinafter referred to as "**the Appeals Rules**") which provides guidance as to who is allowed to lodge an Appeal before it. The said Rule reads as follows:-



"4 Any person being a tenderer who is dissatisfied with the decision, matter, act or omission of a procuring entity or the Authority may lodge an appeal to the Appeals Authority."

(Emphasis supplied)

The Appeals Authority further revisited Section 3 of the Act which is in *pari materia* with Rule 3 of the Appeals Rules. The said provisions define the word "tenderer". Section 3 of the Act reads as follows:-

"3 "tenderer" means any natural or legal person or group of such persons participating or intending to participate in procurement proceeding with a view to submitting a tender in order to conclude a contract and includes a supplier, contractor, service provider or asset buyer."

(Emphasis supplied)

In ascertaining if the Appellant is a tenderer, the Appeals Authority reviewed the record of Appeal and observed that the Tender under Appeal was conducted through a single source procurement method. As per Item 2 of the Tender Advertisement, the Respondent invited only the proposed successful tenderer to participate in the Tender. The invited tenderer submitted its tender and was subjected to evaluation. After finalization of the evaluation process and other internal processes, the Respondent issued an intention to award the Tender to the proposed successful tenderer. Based on the above sequence of events, the Appeals Authority observed that the Appellant did not participate in the Tender under Appeal.



The Appeals Authority considered the Appellant's proposition that much as it admits having not participated in the Tender, it urges that the consideration of the Tender under Appeal should not be in isolation of the previously Rejected Tender which it participated. According to the Appellant a right to file this Appeal accrues from the Rejected Tender which was for the supply of lubricant oil as the Tender under Appeal.

Having considered the requirements of Rule 4 of the Appeals Rules and the definition of the word 'tenderer' as per Section 3 of the Act, the Appeals Authority observes that a right of a tenderer to challenge a particular tender process is accrued when such a tenderer has participated or intended to participate in the Tender. The Tender under Appeal was conducted through a single source procurement method and the proposed successful tenderer was the only firm that was invited to participate.

The record of Appeal indicates that the Appellant participated in the previously Rejected Tender. The Appeals Authority is of the considered view that the Appellant's act of participating in the previously Rejected Tender does not make it to be a tenderer or to have an intention of participating in the Tender under Appeal. Much as the Rejected Tender and the Tender under Appeal are for supply of the lubricant oil to the Respondent, the two tenders are distinct and cannot be considered to be one and the same.

In view of the definition of the word "tenderer" quoted herein above and the facts of this Appeal, it is crystal clear that the Appellant did not participate in the Tender.



Given the above findings, the Appeals Authority is of the settled view that the Appellant was not a tenderer in the Tender under Appeal and therefore not eligible to file this Appeal.

The above findings suffice to dispose of this Appeal; however, for the sake of enlightening the parties the Appeals Authority would also determine the second point of law raised *suo motu* by itself as hereunder.

2.0 Whether the Respondent's choice of procurement method can be challenged.

The Appeals Authority revisited Section 95(1) and (2) (a) & (b) of the Act which reads as follows:-

"95 (1) Any tenderer who claims to have suffered or that may suffer any loss or injury as a result of a breach of a duty imposed on a procuring entity by this Act may seek a review in accordance with sections 96 and 97.

(2) The review referred to in sub section (1) shall not apply to -

a) the selection of a method of procurement or in case of services the choice of selecting procedure;

b) The limitation of procurement proceedings on the basis of nationality in accordance with section 54 of this Act or in accordance with the prescribed Regulations."



(Emphasis supplied)

The above quoted provision indicates clearly that a tenderer who claims to have suffered or that may suffer loss or injury caused by a procuring entity has a right to seek for review in accordance with sections 96 and 97 of the Act. However, Section 95(2) of the Act prohibits tenderers from challenging the selection of a procurement method.

In this Appeal the Appellant challenges the Respondent's act of intending to award the Tender to the proposed successful tenderer through a single source procurement method. The Appellant claimed that the Tender process was conducted fraudulently and through collusion so as to isolate the Appellant from participating and being awarded the Tender as a sole distributor of the lubricant oil. Therefore, the Appellant prayed for the cancellation of the Tender and that the Respondent be ordered to re-start the tender process on competitive basis.

Having reviewed the Appellant's contentions as summarized above, it is evident that the Appellant is dissatisfied with the Respondent's act of intending to award the Tender to the proposed successful tenderer through single source procurement method. In addition to that, the Appellant's prayer that the Tender be cancelled and the same be ordered to be re-started on competitive basis, indicates the Appellant's dissatisfaction on the use of single source procurement method in this Tender.

Taking cognizance of the requirement of Section 95(2) of the Act, the Appeals Authority is of the firm view that, much as the Appellant is not satisfied with the procurement method used in this tender, the law



prohibits a tenderer from challenging the procurement method chosen by the procuring entity.

In view of the above, the Appeals Authority concludes the second issue in the affirmative that the Respondent's choice of a procurement method cannot be challenged.

Based on the findings herein above on the first and the second issues on points of law, the Appeals Authority would not delve into the remaining issues relating to the merits of the Appeal.

Given the findings that the Appellant lacks *locus standi* for not being a tenderer and for not having any basis in challenging the Respondent's choice of a procurement method, the Appeal Authority hereby dismiss the Appeal in its entirety. We make no order as to costs.

It is so ordered.

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 Appellant and in the absence of the Respondent though duly notified, this 16th day of June 2023.

HON. JUSTICE (rtd) SAUDA MJASIRI



CHAIRPERSON

MEMBERS: -

1. MS. NDEONIKA MWAIKAMBO.....

2. MR. PIUS MPONZI.....