

IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY
AT DAR ES SALAAM

APPEAL CASE NO. 45 OF 2013-14

BETWEEN

M/S LUKOLO COMPANY
LIMITED.....APPELLANT

AND

MBARALI DISTRICT COUNCIL.....RESPONDENT

DECISION

CORAM:

1. Hon. Augusta G. Bubeshi, J. (rtd) – Chairperson
2. Mr. Kesogukewele M.Msita –Member
3. Mr. Haruni S. Madoffe –Member
4. Eng. Francis T. Maimo – Member
5. Mr. Ole-Mbille Kissioki – Ag. Secretary

SECRETARIAT

1. Mr. Hamisi O. Tika – Legal Officer
2. Ms. Violet S. Limilabo – Legal Officer

FOR THE APPELLANT:

1. Mr. Burton Nsemwa -Managing Director
2. Eng. Andrew Mwaisemba -Representative, Association
of Citizen Contractors.
3. Mr. Masanja Emmanuel -Marketing Officer

FOR THE RESPONDENT:

1. Mr. Athumani Mickidadi Bamba – Legal Officer
2. Eng. Moses Msuya – District water Engineer.
3. Ms. Mariam O. Ulomi -Procurement Officer.

This decision was scheduled for delivery today 10th July, 2014,
and we proceed to deliver it.

The appeal at hand was lodged by **M/s LUKOLO COMPANY LIMITED** (hereinafter referred to as "**the Appellant**") against **MBARALI DISTRICT COUNCIL** (hereinafter referred to as "**the Respondent**").

The said Appeal is in respect of Tender No. LGA/076/W/34 for the Construction of (Intake Structure Gravity main pipe Network Kangaga Water Tank and Chambers), A part of Luduga-Mawindi Water Supply Scheme in Mbarali District Council (hereinafter referred to as "**the tender**").

According to the documents submitted to the Public Procurement Appeals Authority (hereinafter referred to as "**the Authority**"), as well as oral submissions by the parties during the hearing, the facts of the Appeal may be summarized as follows:

The Respondent vide the Guardian Newspaper dated 10th January, 2014, invited Class II and above registered contractors for the tender.

The deadline for the submission of the tender was set for 25th February, 2014 whereby two tenders were received. The read out prices were as follows;

S/ N	NAME OF THE BIDDER	QUOTED PRICE IN TSHS.	DURATION	BID SECURITY
1.	M/s GNMS CONTRACTORS	9,690,412,600.00	12 MONTHS	SUBMITTED
2.	M/s LUKOLO COMPANY LTD.	10,155,780,250.00	12 MONTHS	SUBMITTED.

The tenders were then subjected to three stages of evaluation, namely; preliminary, detailed and post qualification evaluation.

At the preliminary evaluation stage, tenders were examined to determine if they were substantially responsive to the Tender Document, whereby both tenders were found to be substantially responsive.

Thereafter, the tenders were subjected to detailed evaluation, whereby the Evaluation Committee ranked the tender by M/s GNMS Contractors Company Limited to be the lowest evaluated.

Thus, Evaluation Committee conducted Post Qualification of M/s GNMS Contractors Company Limited and observed that they were qualified for the works. Accordingly, they recommended them for the award of the tender.

The Tender Board at its meeting held on 4th April, 2014, deliberated on the recommendations by the Evaluation Committee and approved award of the tender as recommended.

On 25th April, 2014, the Respondent's Accounting Officer vide a letter referenced LGA/076/W/RF/34/09 informed both the tenderers of the intention to award the tender to M/s GNMS Contractors Company Limited.

Upon receipt of the above mentioned letter, the Appellant vide a letter referenced LCL/Gen.info/2014/07 dated 30th April, 2014, lodged their complaint to the Respondent's Accounting Officer complaining that, the proposed winner did not comply with the requirement of Clause 13 of the Bid Data Sheet (hereinafter referred to as the BDS). This is because they submitted a company cheque of Tshs. 194,000,000/- in contravention of the Bank of Tanzania regulations. Thus, they ought to have been disqualified for non compliance of the criterion.

On 9th May, 2014, the Respondent vide a letter referenced LGA/076/W/34/07, clarified to the Appellant that Clause 13 of the BDS covered all types of Bid Securities and that any bid security submitted by a tenderer, would have been accepted. Therefore, they were justified and indeed they had complied

with the law in proposing the award of the tender to the proposed tenderer.

Having received the Respondent's letter and being aggrieved by the contents thereof, the Appellant, on 27th May, 2014, lodged their Appeal to the Authority.

SUBMISSIONS BY THE APPELLANT

The Appellant's arguments as deduced from documents availed to this Authority, as well as oral submissions and responses to questions raised by Members of the Authority during the hearing, may be summarized as follows;

That, they were amongst the two tenderers who participated in the tender.

That, they are dissatisfied with the Respondent's proposal to award the tender to M/s GNMS Contractors Limited since they did not comply with the Tender Document.

That, Clause 13 of the BDS required tenderers to ~~tenderers~~ to submit a bid security of 2% of the bid price and that, the proposed tenderer for the award M/s GNMS Contractors Company Limited submitted a bid security with the amount of Tshs. 194,000,000/- in a form of an ordinary cheque contrary to the Circular issued by the Bank ^of Tanzania on 20th

February, 2009, pursuant to Section 71 of the Banking and Financial Institutions Act of 2006, which forbids processing of cheques with a value above Tshs. 10Million.

That, the Respondent erred in law by accepting the bid security submitted by the proposed successful tenderer since, the same could not fulfill the purpose of a bid security. The Respondent therefore contravened Regulation 23(2) (b) of the Public Procurement (Goods, Works, Non- Consultant Services and Disposal of Public Assets by Tender) Regulations, 2013 hereinafter to be referred to as "**the GN.NO. 446 of 2013**".

That, had the Respondent performed their duties diligently in terms of Section 48(1) of the Public Procurement Act (hereinafter referred to as "**the Act**"), they would have realized that the bid security submitted by the proposed successful tenderer was unacceptable for failure to fulfill the security purposes provided for under Clause 18.2 of the Instructions To Bidders. Thus, they ought to have been disqualified at the preliminary stage of evaluation.

That, the Respondent's proposal to award the tender to M/s GNMS Contractors Company Limited based on a company cheque worth more than Tshs. 10Million which is in contravention of the decision by this Authority in Appeal case

Finally, the Appellant prayed for the following orders;

- i. Re-evaluation of the tender in order to reach to a lawful decision.
- ii. To be paid costs to the tune of Tshs. 120,000/- being Appeal filling fees.
- iii. Any other order the Authority deems necessary.

SUBMISSIONS BY THE RESPONDENT

The Respondent's documentary, oral submissions as well as responses from questions raised by Members of the Authority during the hearing may be summarized as follows:

That, the Tender Document did not require tenderers to submit security bond as the sole type of securities in their tenders as contended by the Appellant. Every tenderer was free to submit any security of their choice.

That, the security bond submitted by the proposed successful tenderer complied with the requirement of the Tender Document. Therefore, there was no sufficient ground for the Respondent to disqualify them.

That, the Appellant's contention was in relation to a bank procedure which was not provided for in the Tender Document;

and that tenderers had to comply with the Tender Document only and not extrinsic factors.

That, Regulation 23(2) (b) referred by the Appellant is nowhere to be found in GN.NO. 446 of 2013. However, Regulation 23(2) of GN.NO. 446, insists on the requirement of the tender security to conform with the Tender Document, to which the proposed successful tenderer complied with.

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

ANALYSIS BY THE AUTHORITY

Having gone through the documents submitted and having heard the oral submissions by parties, the Authority is of the view that, this Appeal is centred on the following issues;

- **Whether the recommended award of the tender to M/s GNMS Contractors Company Limited is proper at law.**
- **To what relief(s), if any, are parties entitled to**

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

1. Whether the proposed award of the tender to M/s GNMS Contractors Company Limited is proper at law.

In resolving this issue, the Authority considered the main contention by the parties regarding validity of the form of the bid security submitted by the proposed successful tenderer, namely a certified cheque worth Tshs. 194, 000,000.

In the course of doing so, the Authority revisited the proposed successful tenderer's cheque, the Tender Document vis -a- vis the applicable law. The Authority observed that, Clause 18(3) of the Tender Document allowed tenderers to submit bid securities in any of the forms provided therein. The Clause reads as follows;

"Clause 18(3). The bid security shall be in the currency of the Bid or in another freely convertible currency, **and shall be in one of the following forms;**

- a) A bank guarantee, an irrevocable letter of credit issued by a reputable bank, or an insurance firm located in the United Republic of Tanzania, in the form**

- provided in the Bidding documents or another form acceptable to the Procuring Entity and valid for thirty days beyond the end of the validity of the Bid. This shall also apply if the period for Bid validity is extended. In either case, the form must include the complete name of the Bidder; or,
- b) a cashier's or **certified check**.
 - c) Another security if indicated in the Bid Data Sheet

From the above Clause, the Authority is of the view that, any of the above bid securities could have been submitted by the tenderer and be accepted by the Respondent. However, such an option should be in conformity with other laws as provided for under Regulation 23 of GN.NO.446 of 2013, which reads as follows;

"Reg. 23 (1) where the procuring entity requires tenderers submitting tenders to provide a tender security-

- (a) The requirement shall apply to all tenderers;
- (b) The solicitation documents shall stipulate that the issuer of the tender security and the confirmer, if any, of the tender security, and the

forms and terms of the tender security have to be acceptable to the procuring entity;

(c) N/A

(2) Notwithstanding the provision of sub regulation 1 (b) and unless the acceptance by the procuring entity of a tender security would be in violation of laws of Tanzania, a procuring entity shall not reject a tender on the grounds that the tender security was not issued by an issuer in Tanzania if the tender security and the issuer otherwise conform to the requirements prescribed in the solicitation document”.

From the above provision, the Authority is of the considered view that, issuance of banker's cheques is not regulated by the Public Procurement Act. However, specific law, regulations or guidelines and circulars, if any, have to be complied with.

The Authority revisited Circular No. 2 of 2008 issued by the Bank of Tanzania relied upon by the Appellant and observed that it requires all payments exceeding Tshs. 10 Million to be processed through the Tanzania Interbank Settlement System (commonly referred to as “the TISS”).

The Authority is of the considered opinion that, in view of the Circular cited above; and given the clarification by the Bank of Tanzania availed to the Authority vide a letter referenced LD/422/535/04 dated 10th July, 2014, it was not proper for the Respondent to accept an ordinary or indeed even a certified cheque which exceeded the legal threshold set out by the Bank of Tanzania as correctly submitted by the Appellant. For purposes of clarity, the Authority reproduces in part the said letter as hereunder;

The Bank issued Circular No.8 of 2008 to limit drawing of cheques by individuals or corporates that are processed in the interbank clearing system at a cap of Tanzania Shillings Ten Million Only.

In view therefore, any cheque transaction that exceed the limit of TZS 10,000,000/= (Ten Million only) cannot be processed for clearing. If it is submitted at Clearing House, it will be returned to the drawer's bank with reference of exceeding the Cheque limit. This renders the cheque referred to in your letter to be non-compliant cheque in as far as the Circular is concerned and it cannot be cleared in the clearing house.

The application of Circular No. 8 as noted above is to limit drawings of interbank cheques to the TZS

Ten Million limit; hence parties that require drawing of a cheque for any business transaction including surety need to comply with the Circular.
(Emphasis Added).

Furthermore, based on the Authority's decision in Appeal case No.4 of 2013-14 between Cool Care Services Limited and the Board of Trustees of the Parastatal Pensions Fund, whereby it was held at page 23 that; **"a bankers' cheque is not allowed to exceed an amount of Tshs. 10,000,000.00..."**, it is obvious that, the proposed successful tenderer's tender security breached the law.

The Authority observed that, the certified cheque submitted by the proposed successful tenderer would not save the intended purpose in case of default since the same cannot be honoured by any bank in terms of the above cited Circular. A cheque that cannot be cashed is as good as nothing. Such a cheque cannot obviously qualify to be a valid bid security as envisaged by law and the Tender Document. Accordingly, the Evaluation Committee ought to have disqualified the proposed successful tenderer during evaluation.

From the above findings, the Authority is of the considered view that, the assertion by the Respondent that the above criterion was an extrinsic factor which they did not take into account

With regard to the prayers by the Respondent that, the Appeal be dismissed for lack of merits, the Authority does not agree with them as the Appeal clearly has merits.

On the basis of the aforesaid findings, the Authority upholds the Appeal and orders the Respondent to re-evaluate the tenders afresh in observance of the law and pay the Appellants a sum of Tshs. 120,000/-

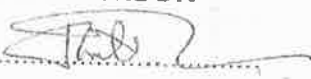
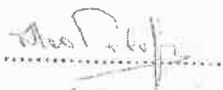
The decision is binding upon the parties and the Appellant has the right to execute the same in terms of Section 97(8) of PPA, 2011.

Right of Judicial Review as per Section 101 of the PPA/2011 explained to parties.

Decision delivered in the presence of the Appellants and the Respondent this 10th July, 2014.


JUDGE (rtd) A. G. BUBESHI
CHAIRPERSON

MEMBERS:

1. MR. K.M.MSITA 
2. MR. H.S.MADOFFE 
3. ENG. F. T.MARMO 