

**IN THE INDEPENDENT REVIEW COMMITTEE HEARING ("IRC")**

**HELD AT MBABANE**

**IN THE MATTER BETWEEN;**

**SLOMOES CORPORATION (PTY) LTD**

**APPLICANT**

**AND**

**ESWATINI INVESTMENT PROMOTION**

**AUTHORITY**

**RESPONDENT**

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**RULING ON ADMINISTRATIVE REVIEW PROCEEDINGS IN TERMS**

**OF SECTION 49 OF THE PROCUREMENT ACT 2011 ON TENDER**

**NO. 6B OF 2019/2020**

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**QOURUM:**

<b>MR. B.S DLAMINI</b>	<b>: Chairman</b>
<b>MR. A. NGWENYA</b>	<b>: Member</b>
<b>MR. L. MANYATSI</b>	<b>: Member</b>

## **1. PARTIES & REPRESENTATION**

- 1.1 The Applicant is Slomoos Corporation (Pty) Ltd, a company duly registered and incorporated as such in accordance with the company laws of the Kingdom of Swaziland with its principal of business at Dzeliwe Street, Mbabane, District of Hhohho. During the administrative review hearing, the Applicant was represented by Mr. Nkosinathi Manzini, an Attorney based in Mbabane, District of Hhohho.
- 1.2 The Respondent is the Eswatini Investments Promotion Authority, a corporation established as such in accordance with the laws of the Kingdom of Eswatini based in Mbabane, District of Hhohho. The Respondent was represented Mr Mlamleli Dlamini from M.A Dlamini Consulting Engineers and other officials from the same company.

## **2. ISSUES IN DISPUTE**

- 2.1 The issues in dispute emanate from Tender No.6B OF 2019/20 advertised by the Respondent in terms of which companies were invited to tender for the *“proposed construction of the Kellog Tolaram Factory, Matsapha - Electronics Installation (Nominated Subcontract).”*
- 2.2 On opening of the bid documents from the various companies, the Applicant’s tender document was found not to be responsive (compliant) on one ground namely;
- 2.2.1 The Applicant had left a whole section, namely Section 6 on the “Bill of Quantities” not priced.

### 3. **BACKGROUND INFORMATION**

- 3.1 The Respondent advertised Tender No.6B of 2019/2020 for the supply, and installation of electronics systems in a proposed project for the construction of a Kellogg Tolagram Factory.
- 3.2 The *Invitation to Tender Document* outlined in detail or specified how prospective tenderers were to prepare and submit their tender documents to the relevant procuring entity, in this case being the Eswatini Investment Promotion Authority (“Respondent”).
- 3.4 In response to the tender invitation, 3 companies duly expressed their interest to carry out the works spelt out in the Invitation to Tender Document namely, Destiny Group (Pty) Ltd, Engineered Systems Solutions (ESS) and the Applicant, Slomoes Corporation (Pty) Ltd..
- 3.5 As already indicated herein above, the Applicant, Slomoes Corporation (Pty) Ltd was disqualified for its failure to complete Section 6 of the Bill of Quantities dealing with a specified component of the electronics system.
- 3.6 Being dissatisfied with the decision to disqualify it, the Applicant invoked the provisions of Section 47 of the Procurement Act which essentially is an internal review to the procuring entity. The Applicant was unsuccessful in its bid to overturn the decision through the mechanism enshrined in Section 47 of the Act.
- 3.8 In line with the provisions of Section 49 of the Procurement Act, 2011, the Applicant has approached the Independent Review Committee for a review of the Controlling Officer’s decision of declining to entertain its complaints as

set out in its undated letter in which the Applicant lodged four grounds of review.

3.9 The first sitting of the Committee was on the 5<sup>th</sup> June 2020 at the Eswatini Public Procurement Regulatory Authority (“ESPPRA”) boardroom with those in attendance being the Applicant and its representative and Respondent’s representatives.

3.10 During the hearing of the 5<sup>th</sup> June 2020, several issues were discussed including but not limited to the following issues:

(i) Introduction of the committee members.

(ii) Introduction of all parties involved in the matter.

(iii) Declaration of conflict or potential conflict by all parties concerned.

(iv) The rights of the parties to legal representation.

(v) The procedure to be adopted during the administrative review hearing.

(vi) Exchange of documents between the parties.

(vii) The documents required by the committee prior to hearing the application.

(viii) The date, time and venue for the hearing of the review application.

#### 4. **THE APPLICANT’S CASE**

4.1 On the date set for the hearing of the matter, the Applicant’s legal representative, Mr. Nkosinathi Manzini, initially made a submission to the

effect that he had been informed by his client that a request had been made by his client to be furnished with a “record” and that this request was turned down by the IRC. Mr. Manzini proceeded to apply that he be furnished with a “record of the proceedings” before he could proceed to make his submissions on the Applicant’s application for review.

- 4.2 When requested to clarify what he meant by the reference to a “record”, the response by Mr. Manzini was that he meant all documents used by the decision maker in arriving at the decision to exclude and disqualify the Applicant, including the “hand notes” used by each one of the participants in the decision- making process.
- 4.3 When requested to specify the documents that he wanted to be furnished with, Mr. Manzini totally refused to specify the documents he wished to be given except to maintain that he wanted **all the documents** that were used in arriving at the decision to exclude the Applicant. On being asked what the relevance of all the documents namely, trading licenses, tax compliance certificates, certificate of incorporation, labour compliance and so on would be to his case, Mr Manzini kept stating that he wanted to be furnished with all the documents used in arriving at the decision and referred the Committee to Rule 53 of the High Court Rules.
- 4.4 As a Committee we then adjourned to consider the request by the Applicant’s Attorney. After considering the Applicant’s request, the Applicant’s application was found to be lacking in substance and we did not understand its relevance to the grounds of complaint advanced on behalf of the Applicant. The full reasons for rejecting the Applicant’s request are fully stated herein below.

- 4.5 On being informed that his request to be furnished with documents is declined and that the matter should proceed on the merits and/or the reasons of complaint by the Applicant, Mr. Manzini for the Applicant went on a fit of rage and like a wounded bull became uncontrollable and accused the Committee of bias and demanded that we recuse ourselves *en masse*. On being repeatedly asked to deal with the merits of the matter, Mr Manzini demanded that the matter be adjourned as he wanted to make a review application at the High Court against our decision not to furnish him with the record of proceedings. The Applicant's Attorney made it clear that he would not deal with the merits of the matter despite our direction that the matter be dealt with on the merits. The Applicant's Attorney was informed that nothing would prevent him from instituting a review application at the High Court once the matter was dealt with and finalized by the IRC, that is, if there would be any need for such because as a Committee we were yet to decide on the Applicant's complaints on the merits.
- 4.6 When it became clear that the Applicant's Attorney was not prepared to address us on the merits of the Applicant's complaints, we ruled that it was clear that the Applicant was not prepared to verbally address us on the merits and that we will proceed to decide the issues with what we have at our disposal. The matter was then adjourned for the Committee to make a ruling on the issues arising.

## 5. ANALYSIS OF ISSUES

- 5.1 The process of administrative review is enshrined in sections 48 and 49 of the Procurement Act, 2011. Section 49 (1) of the Act provides that;

**“An application for administrative review in accordance with section 48, shall be submitted in writing to the Agency.”**

5.2 In Section 49 (3) of the Act, it is provided that;

**“Upon receipt of an application for administrative review, the Agency shall-**

**(a) immediately give notice of the application to the procuring entity;**

**(b) prohibit the procuring entity from awarding a contract prior to completion of the administrative review process; and**

**(c) establish an Independent Review Committee in accordance with section 50, which shall investigate and decide on the application in accordance with section 51”.**

5.3 Section 51 (1) of the Act on the hand stipulates that;

**“Unless the application is dismissed, the Independent Review Committee shall-**

**(a) immediately institute an investigation; and,**

**(b) issue a written decision within fifteen working days after submission of the application.”**

5.4 The decision by the IRC must, in terms of section 51 (3) state whether the application is upheld in part or in whole or dismissed. The section also requires that reasons of the decision must be properly articulated and that if there are any corrective measures to be taken against a procuring entity, such measures be communicated accordingly.

- 5.5 As may be seen from the captioned Sections of the Act, the role of the IRC and how it ought to go about the process of “review” is specified in the Act. The first process of review in terms of Section 47 of the Act, which is the internal review directed to the procuring entity is the forum to which the Applicant should have directed his request to be furnished with whatever document it wished to be furnished with, provided that the document requested does not constitute privileged and confidential documents.
- 5.6 As a Committee, we were prepared to consider the request to be furnished with documents by the Applicant’s Attorney as long as the request was relevant, feasible and practical to comply with. To demand to be furnished with all the documents without specifying which ones relevant to the Applicant’s case was, in our view, totally misconstrued, unrealistic and impractical to comply with.
- 5.7 The word “review” used in the Procurement Act must be used in its proper context. Its usage must be confined to the four corners of the enabling legislation. Surely it would be a total misnomer and misinterpretation to place the review referred to in sections 47, 48 and 49 of the Procurement Act on the same scale with the review spelt out in Rule 53 of the High Court Rules. The High Court is a superior court with powers far superior than the IRC. The IRC’s powers of review are limited to the four corners of the legislation and anything falling outside the Act would constitute an illegality. The consequences of the reviews outlined in the Act and the High Court Rules may be the same but the path or route leading to the outcome is not the same. We do not agree that as a Committee we are bound by Rule 53 of the High Court Rules. In summary, there is nothing in the Act that authorizes us as a Committee to disclose sensitive, confidential and privileged documents of



competing companies to an aggrieved company. This would be the overall effect if the Applicant's demand to be furnished with **all documents** would be complied with.

5.8 The direction that we made to have the Applicant's Attorney address us on the merits of the Applicant's complaint was, in our view, a fair, legitimate and proper direction. The less said about the outbursts and accusations of bias directed at us by Mr Manzini, the better. Coming from an experienced and senior attorney in the country, this was indeed an unfortunate incident that was totally uncalled for. Hopefully Mr. Manzini will have time to do an introspection and self-correct in the future. As a Committee we work under very trying and challenging circumstances. This, notwithstanding, we can say without hesitation that our work is beyond reproach and we have always worked with the highest level of integrity and honesty.

## 6. ANALYSIS OF APPLICANT'S COMPLAINTS ON THE MERITS

6.1 All the parties filed their written submissions in the matter. From the written application for review and the written submissions in support of its case, the Committee is fully aware of what the issues or complaints by the Applicant are. The Committee is also fully aware of the Respondent's responses to the complaints by the Applicant.

6.2 The three main complaints (stated as four grounds of appeal by the Applicant) are as follows;

6.2.1 The Respondent was wrong to exclude or disqualify the Applicant on the basis that Section 6 of the Bill of Quantities was not completed or priced.

- 6.2.2 The company which is intended to be awarded the tender is foreign company yet the notice of intention to award the tender suggests that it is a local company registered in the country.
- 6.2.3 The Applicant should not have been disqualified because it has done similar works in the past where it had been engaged by the same consultants enlisted by the Procuring Entity and that it has always left the schedule or section dealing with Audio Visual Systems unpriced.
- 6.3 In the application for review (internal review) to the procuring entity, the Applicant complained as follows on the first ground;
- “We verily believe that the intended to be awarded company [sic] by the Procuring Entity, is a foreign company, however, the notice of intention to award suggests that it is a company registered in Eswatini in terms of the Companies Act of 2009. We believe that the case be, the procuring entity might not have followed procedure 23 of the Public Procurement Procedures (PPP) as enshrined in Circular No.1 of 2016, had these provisions followed [sic], our company would have emerged the best evaluated tenderer. Considering the opposite of our belief, if the intended to be awarded company is registered in the Kingdom in terms of the Companies Act, we believe that the evaluations might have not been conducted with honesty and fairness in particular with regards to paragraph 1.12 of the tender document which deals with amongst other things, the magnitude and relevance of previous projects completed by the tenderer and his performance on them.”**
- 6.4 The above highlighted ground of complaint was misplaced. The Procuring Entity responded to the Applicant’s complaint by annexing all documents of

registration of the company in the country. The company is registered as Mukwa Electrical Services (Pty) Ltd trading as Engineered Systems Solutions (ESS). All documents of registration in the country including Form J, trading license, certificates of membership to professional bodies in the country and certificate of incorporation were duly sent by the procuring entity to the Applicant following its complaint. We have also had sight to these documents and we are satisfied that they are legal documents recognized by the laws of the country. This complaint by the Applicant is therefore not valid and is rejected. The procuring entity did nothing wrong by recognizing the legal documents of registration and operation of ESS in the country.

6.5 The second ground of review by the Applicant is couched as follows;

**“We have learnt from the controlling officer’s response to our application for review in terms of section 46 of the PPA that our tender was rejected because we did not complete /price Bill 6 (audio Visual Systems) of the schedule of Bill of Quantities and nothing else. We submit that such decision to reject our tender was irregular and un-procedural because it is against the provisions of paragraph 1.5 of the Tender Document which is very clear with regards to the completion of schedule of quantities. The provision does not preclude tenderers bearing incomplete schedule. It is therefore in our firm view that our tender was not supposed to be rejected/disqualified based on the assertions that Bill 6 was not priced.”**

6.6 In the Public Procurement Procedures (PPP), there are specific rules that apply to the evaluation criteria applicable at the Preliminary Examination stage. In Rule or Item 79 (2) of the PPP’s it is provided that;

**“Any deviations, which are considered to be material deviations, shall result in rejection of the tender and such tenders shall not be subject to technical evaluation. Deviations which are considered to be non-material shall not result in rejection of the tender.”**

6.7 In Rule 79 (3) of the Public Procurement Procedures, it is provided that;

**“A material deviation or reservation is one that:-**

**a) affects in any substantial way the scope, quality or execution of the works;**

**b) limits in any substantial way, inconsistent with the Tender Document, the Procuring Entity’s rights or Tender’s obligations under the Contract; or**

**c) if rectified, would affect unfairly the competitive position of other Tenderers presenting substantially responsive Tenders.”**

6.8 It is not in dispute that the Applicant did not price Section 6 of the Bill of Quantities relating to the audio visual system. The issue for determination is whether the failure by the Applicant to price Section 6 of the Bill of Quantities was a material deviation which ought to have resulted in the Applicant’s bid document to be disqualified.

6.9 The first task is to assess the instructions on the Invitation to Tender Document. It is provided item 1.5 of the Invitation to Tender Document that;

**“Each item in the Schedule of Quantities shall be priced by the Tenderer. The rate or price for each item shall include the cost of executing the work and fulfilling the obligation described in the item. Items against which no rate or price is entered by the Tenderer will not be paid for by the**

**Employer when executed and shall be deemed to be covered by other rates and prices in the Schedule.”**

- 6.10 The above instruction, at best, is confusing, contradictory and creates uncertainty. In the paragraph in question (Clause 1.5 of the Instruction to the Tenderers), the Respondent made it mandatory to include the pricing and the labour associated with the section in question. In the same paragraph the Respondent created flexibility by stating that in the event that a tenderer does not include the pricing of items in a particular section, the procuring entity will consider that the pricing left out in that section is covered in the other items or sections of the bill of quantities. In other words, if the other sections of the bill of quantities are a total of Eleven Million Emalangeni, then the section left out, in this case, the pricing of the audio visual system is covered in the total bill in respect of the other sections. From a mere reading of clause 1.5 of the Instructions to the Tenderers, there clearly was confusion and uncertainty with regards to the pricing on the bill of quantities.
- 6.11 The confusion on Clause 1.5 of the Invitation to Tender Document was however clarified by the Respondent using the Public Procurement Procedures. It is not in dispute that following the submission of its tender documents to the procuring entity, written correspondences were issued by the Eswatini Public Procurement Authority as well as the agent or consultant engaged by the procuring entity to the Applicant to bring it to Applicant's attention that Section 6 of the Bill of Quantities had not been completed or priced. In response to the written queries, the Applicant's response was that it acknowledged that Section 6 of the bill of quantities had not been priced by it and that it stood by the bid documents it filed. In other words, the Applicant

deliberately left out the pricing on section 6 of the bill of quantities and requested that it be assessed on the basis of what it submitted.

6.12 By writing to the Applicant and asking it to attend to Section 6 of the bill of quantities, the procuring entity was clarifying that Section 6 of the bill of quantities was in fact mandatory and had to be completed. If the Applicant had chosen not to charge for Section 6, namely the audio visual system, then it should have expressly and in writing stated in its response to the procuring entity that it was not charging for the installation and labour in respect of the audio visual system. As a matter of fact, the Applicant should have included item 6 in its bill of quantities but write “nil” in all the components of this item including the labour as opposed to simply leaving out altogether this item in its bill of quantities. In that way it would have been clear that the Applicant is not charging any amount at all in respect of this item and the labour thereof.

6.13 In Rule 77 (3) of the Public Procurement Procedures, 2016, it is provided that;

**“The evaluation committee may in writing ask tenderers for written clarification of their tenders in order to assist in evaluation, but no changes in the substance of tenders, including changes in price, shall be permitted after the date and time of tender closing, unless otherwise provided for in these procedures.”**

6.20 In Rule 77 (4), it is stated in the Procedures that;

**“The failure of a tenderer to reply to a request for clarification in writing may result in the rejection of its tender.”**

6.21 The failure by the Applicant to include the pricing on Section 6 of the Bill of Quantities or to indicate in writing that it was not charging at all in respect of

the audio visual system even on written request amounted to a deviation in terms of Rule 79 (3) of the PPP’.

6.22 In relation to the third ground of review, namely that the Applicant has adopted the same method of leaving out the section on the audio visual system in the past and in similar projects in which the same consultants have been engaged by the same procuring entity, it is our considered view that the Committee is only confining itself to the facts of the present matter and the law applicable to the present matter. If, in the past, deviations were condoned and allowed by the procuring entity, that does not mean automatically we should follow suit as a committee. Furthermore, nothing in terms of documentation and evidence of the other similar tenders was placed before us. It follows therefore that this ground must similarly be rejected as a valid ground of review.

## 7. CONCLUSION

7.1 Having considered the written grounds advanced on behalf of the Applicant for the rejection of its bid by the Respondent and the respective submissions by the parties hereto, it is our conclusion that the Applicant’s bid was lawfully and properly rejected by the evaluation committee appointed by the Respondent.

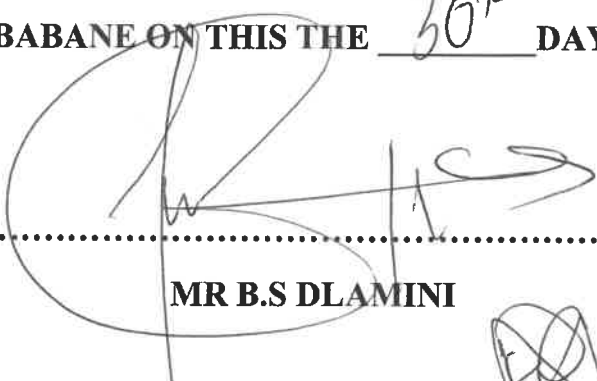
## 8. AWARD AND/OR ORDER

8.1 **The order we make in the matter is that;**

8.1.1 **The rejection of Applicant’s bid in Tender No.6B of 2019/2020 by the Respondent is valid and lawful in the circumstances of the matter.**

**8.1.2 The applicant's application for review in terms of Section 49 of the Procurement Act, 2011 is dismissed.**

**DATED AT MBABANE ON THIS THE 30<sup>th</sup> DAY OF JUNE 2020**



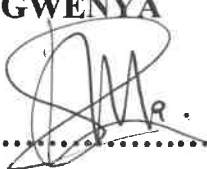
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**MR B.S DLAMINI**



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