

IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY
AT DAR ES SALAAM
APPEAL CASE No. 28 OF 2016-17

BETWEEN

M/S MICHAEL ENOS MWANGOKA T/A
KENNY SUPPLIES GENERAL SERVICES.....APPELLANT

AND

TANZANIA NATIONAL ROADS
AGENCY (TANROADS)RESPONDENT

DECISION

CORAM

- | | | |
|------------------------------------|---|-----------|
| 1. Hon. Vincent K.D Lymo, J. (rtd) | - | Chairman |
| 2. Eng. Francis Marmo | - | Member |
| 3. Mr. Louis Accaro | - | 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. Michael E. Mwangoka | - | Managing Director |
| 2. Mr. Noel Z Ngallo | - | Business Associates |

3. Mr. Joseph Assenga - Advocate -

FOR THE RESPONDENT

1. Mr. Gurisha Y. Muwanza - Legal Counsel
2. Mr. Leonard Deusdedit - Acting Head of Goods and Works
3. Mr. Malimi Masasila - Legal Officer
4. Mr. Joseph E. Shayo - Procurement Expert
5. Mr. Samuel Jima - Supplies Officer
6. Mr. Mellowz L.Voga - Principal HR Officer

This Decision was set for delivery today, 3rd May 2017 and we proceed to deliver it.

This Appeal was lodged by M/s Michael Enos Mwangoka T/A Kenny Supplies General Services (hereinafter referred to as "the Appellant") against Tanzania National Roads Agency, commonly known by its acronym TANROADS (hereinafter referred to as "the Respondent"). The Appeal is in respect of Quotation No.AE/001/2016-17/HQ/G/57 for Supply of T-shirts for TANROADS Staff (hereinafter referred to as "the Tender").

After going through the records submitted by the respective 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 by its letters dated 23rd January 2017 invited three tenderers the Appellant inclusive, to submit quotations in relation to the above named Tender and the deadline for submission was 30th January 2017. The invited firms which submitted quotations were-

- i) M/s Michael Enos Mwangoka T/A Kenny Supplies & General Services
- ii) M/s Mariedo Limited
- iii) M/s Pink Diamond Company Limited

During Evaluation the Quotations submitted by the Appellant and M/s Mariedo Limited were found to be non-responsive for failure to comply with the requirements of the Quotation Dossier. The Evaluation Team recommended award of contract to M/s Pink Diamond Company Limited for the amount of TZS 172,154,330/- subject to pre-contract negotiations on the delivery period. Those recommendations were approved by the Tender Board at its meeting held on 13th February 2017.

The Appellant received unreliable information that the tender had been offered to M/s Mariedo Ltd. and as the Respondent had delayed to issue the relevant Notice of Intention to Award prior to award of the Tender, on 27th February 2017 lodged Appeal No. 21 of 2016/17 with the Appeals Authority. The Appellant was challenging amongst others, reasons for its disqualification and the Respondent's failure to issue the Notice of Intention to Award the Tender. However, on 28th February 2017, the Respondent issued the Notice of Intention to Award the contract to all bidders who participated in the Tender and the Appellant received the said Notice on 2nd March 2017. Consequently, by its letter Ref. KSGS/45/43/111 dated 03rd March 2017, the Appellant withdrew Appeal No. 21 of 2016/17 in order to comply with the appropriate review mechanism procedures provided under the Public Procurement Act, Cap 410 of 2011 (hereinafter referred to as the "Act").

On 6th March 2017, the Appellant submitted its application for administrative review to the Respondent disputing not only the reasons for its disqualification but also the award to the proposed successful tenderer. On 7th March 2017 the Respondent informed the Appellant that he could not entertain the complaint as there was an Appeal before the Appeals Authority and that the said Appeals Authority had suspended the procurement process. On 8th March 2017 the Appeals Authority by its letter Ref. PPAA/APPEALS/21/04/2016-17 informed the Respondent that Appeal No. 21 of 2017 had been withdrawn and on 10th March 2017, the Respondent informed the Appellant through its letter Ref. TRD/HQ/GEN/880/01 that he was working on the application for administrative review and it will be notified of the results in due course.

As the Respondent did not issue its written decision within seven working days as provided by law, the Appellant on 23rd March 2017 lodged this Appeal and after the filing of the Appeal, the Appellant received the Respondent's decision on the application for administrative review dated 22nd March 2017.

SUBMISSIONS BY THE APPELLANT

In its Appeal, the Appellant raised three grounds of Appeal which can be summarized as follows -

- a) Unfair disqualification;
- b) Blatant Violation of the Public Procurement Law and its Regulation in handling this Quotation; and
- c) Failure by the Respondent to issue a decision in response to the application for administrative review.

Arguing in support of the first ground of Appeal, the Appellant stated that it had been unfairly disqualified from the Tender process while it had complied with all the requirements specified in the Quotation Dossier. According to the Appellant, the reasons given for disqualification were not justifiable because:-

i) The T-Shirt samples:

The Appellant submitted three T-Shirt samples, one was track printed on the fabric and two were track stitched on the fabric. The stripes printed on the T-shirt were similar to the artwork photo provided by the Respondent. The artwork photo showed that the stripes are on left but when wearing it the stripes appear on the right hand side. The Appellant asserts to have complied with this criterion.

ii) The Embroidery Slogan

According to the Quotation Dossier the Slogan was to be embroidered on the road map and not screen printed. The Appellant argued that it submitted a sample which indicates that the road maps were digital/track printed since that was the only option available as the Respondent did not want screen printing.

iii) Colour – Gray Emerald Green

The colour of the T-shirt as indicated in the quotation dossier is “GREY, EMALD GREEN” and not “GRAY EMERALD GREEN” as indicated in the Notice of Intention to Award. The Appellant argued that there is no colour named EMALD GREEN and that the Respondent was required to specify the pantone colour code shade. In the absence of such specification, the Appellant had to choose a close corresponding matching colour. Furthermore, the Appellant argued that if the Respondent had erroneously indicated EMALD GREEN instead of

EMERALD GREEN that mistake should be interpreted against the Respondent, a maker of the Quotation Dossier and not against the bonafide tenderer. Further, if this was seen as an omission, the same could have been treated as minor deviation as per Regulation 207(2)(b) of the Public Procurement Regulations, GN. No. 446 of 2013 (hereinafter referred to as "G.N. No. 446 of 2013").

Addressing the Appeals Authority on the second ground, the Appellant asserted that the Respondent had delayed to issue the Notice of Intention to Award. Such delay had prompted the Appellant to file Appeal Case No. 21 of 2016-17 which was subsequently withdrawn. The Respondent's act in this regard had contravened the requirement of the law which requires Notice of Intention to award be issued within the shortest possible time after completion of the evaluation process and obtaining all the necessary approvals.

In concluding on the second ground as relates to the proposed award, the Appellant contended that the award had been proposed to the tenderer who not only did not comply with the requirements of the Quotation Dossier but also had quoted higher price compared to the price quoted by the Appellant. The Appellant submitted that the samples submitted by the proposed successful tenderer neither resembled nor complied with the Respondent's requirements. The Appellant asserted that as all bidders were present at the opening of the bids, each could notice that the samples presented by the proposed successful bidder did not match the Respondent's specifications. The anomalies so observed on the samples by the proposed winner were sufficient to have disqualified the said bidder at the preliminary stage. Further, the

Appellant argued that the proposed successful tenderer had quoted a very high price, indicating that the Respondent was intent to spend additional amount of TZS 25,000,000/- (twenty five Million) contrary to the requirement of Regulation 4(1) of GN No. 446 of 2013 which requires procuring entity to make the best possible use of public funds.

With regard to the third ground, the Appellant submitted that the Respondent erred in law for failure to issue his written decision on the application for administrative review within seven working days as required by Section 96(6) of the Act. The Appellant contended to have submitted its application on 06th March 2017, thus the seven working days within which the Respondent ought to have issued his decision expired on 15th March 2017. The delay in issuing the said decision prompted the Appellant to file this Appeal.

Finally, the Appellant prayed for the following Orders:-

- a) The Appellant be declared a successful tenderer and be awarded the Quotation;
- b) Costs of filling Appeal No. 21 of 2016-17 and this Appeal be borne by the Respondent;
- c) Declaration that the Respondent has been operating contrary to the law;
- d) Declaration that the Respondent must be acting in accordance with the law;
- e) Warning/reprimand be issued against the Respondent for failure to issue a written decision for administrative review; and
- f) Any other remedy the Appeals Authority may deem just to grant

REPLIES BY THE RESPONDENT

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

In relation to the first ground of Appeal the Respondent submitted that, the Appellant was fairly disqualified during evaluation for failure to comply with the requirements of the Quotation Dossier. The Respondent pointed out that the Appellant submitted sample T-shirts with vertical stripes which were not of the same materials as the T-shirt itself since the stripes were not fabric. He contended further that the Appellant failed to comply with quotation requirements in relation to embroidery slogan and the required colour. The Respondent further contended that if the Appellant had realized that the specification in relation to colour was not clear whether it was "EMALD GREEN" or EMERALD GREEN" the Appellant ought to have requested for clarifications before submission of its quotation.

Elaborating on the manner it conducted the administrative review, the Respondent submitted that in the course of the review, the Review Panel noted serious anomalies apart from those observed by the Evaluation Committee. The Administrative Review Panel noted that the Appellant's quotation ought to have been disqualified at the Preliminary Evaluation stage as it had not submitted any sample T-shirts. The sample T-shirts used by the Evaluators to evaluate the Appellant's quotation were those submitted in previous quotations which were cancelled by the Respondent. In addition, the Appellant's bid lacked Tables which indicate compliance with Technical Specifications.

Submitting on the second ground of Appeal the Respondent stated that, they had issued a Notice of Intention to Award on 28th February 2017 and the same was duly served to the Appellant. The said Notice contained the reasons for being unsuccessful. The award was proposed to be made to M/s Pink Diamond Company Ltd as it was the only firm which complied with the conditions provided for in the Quotation Dossier. The Respondent insisted to have complied with the requirements of the Act and its Regulations in evaluating the quotations submitted and denied to have violated the procurement laws.

With regard to the third ground of Appeal the Respondent submitted that it did not refuse/default to conduct and deliver written decision to the Appellant's request for administrative review. The Respondent argued that, after the Appellant filed Appeal No. 21 of 2016/17 it was required to suspend the procurement proceedings until the said Appeal was finalized. The Respondent by its letter dated 7th March 2017 informed the Appellant to that effect and on 8th March 2017 upon notification from the Appeals Authority that Appeal No. 21 of 2017 had been withdrawn, on 10th March 2017 the Respondent informed the Appellant it was working on their complaint. That an Independent Review Panel subsequently confirmed the Appellant to have been fairly disqualified. The findings of the Independent Review Panel were communicated to the Appellant by the Respondent's letter dated 22nd March 2017. Thus, the Respondent issued its decision with regard to the Appellant's application for administrative review as per the requirement of the law.

Finally, the Respondent prayed for the following reliefs;

- a) Appellant's Appeal be dismissed as he was fairly disqualified;
- b) The Appellant be ordered to pay costs for Appeal No. 21 of 2016-17 as it was lodged prematurely before the issuance of Notice of Intention to award; and
- c) The Appellant be ordered to bare costs for this Appeal;

ANALYSIS BY THE APPEALS AUTHORITY

In this Appeal, there are four (4) triable issues to be determined. These are:-

- Whether the disqualification of the Appellant was proper in law;
- Whether the award to the proposed successful tenderer is justified;
- Whether the Respondent's administrative review decision was in compliance with the law; and
- What reliefs, if any, are the 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

Prior to the hearing of this Appeal, the Respondent was required to present to the Appeals Authority the respective samples submitted by the bidders. So the Appeals Authority had the opportunity to view the samples the subject matter of this Appeal. In determining whether the

Appellant had been fairly disqualified, the Appeals Authority enquired from the Appellant on the actual samples it had submitted. The Appellant was not quick to pin point the samples submitted but ultimately admitted to have submitted three short sleeved T-shirts, two of which were available for viewing. The Appeals Authority took cognizance of the Appellant's admission of having submitted sample T-shirts which did not comply with the requirements of the Quotation Dossier. According to Table 1 (Cotton and Elastic fabric requirements) of the Technical Specifications (Section IV) bidders were required to submit Sample T-shirts which had Long and Short Sleeves Embroidered on front logo of TANROADS on pockets. Further, it was noted that on 27th January 2017, the Appellant by its letter Ref. KSGS/45/43/109 requested the Respondent to use the three sample T-shirts submitted on previous Quotations which were cancelled by the Respondent for being non-responsive. While the Appellant asserted to have submitted three sample T-shirts, all short sleeves, the Appellant admitted to have issued the said letter and conceded that it had not submitted any samples in relation to the quotation under Appeal. The Appellant then stated that bidders were given a very short period to submit samples and that is why it opted to request for the use of rejected samples.

When the Appeals Authority revisited the Quotation Dossier it noted that the invitation letters were issued on 23rd January 2017 and the deadline for submission was 30th January 2017. That means bidders were given seven days to prepare their quotations. Furthermore, it was observed that, the Appellant had neither requested for extension of time nor challenged the Respondent for providing insufficient time. The Appellant thus purported to have submitted its quotation by the deadline date but

based on the above facts the Appeals Authority observes that the Appellant had not submitted any sample to comply with quotation requirements and thus its disqualification is fair and proper.

Therefore, it is the Appeals Authority's conclusion that the Appellant's disqualification was fair and proper in the eyes of the law.

2.0 Whether the award to the proposed successful tenderer is justified

In order to substantiate if the tenderer proposed for the award qualifies for the same, the Appeals Authority checked the sample T-shirts submitted by M/s Pink Diamond Company Limited and observed that; they had submitted three T-shirts samples and among them, two had short sleeves and one had long sleeves as correctly requested by the Quotation Dossier. It was also observed that, the T-shirt with long sleeves had neither TANROADS Logo in front nor the Embroidery Slogan at the back as required by the technical specifications. Further, we observed that among the two T-shirts with short sleeves, one had only TANROADS Logo in front and did not have the Embroidery Slogan at the back. The T-shirt with long sleeves and the one with short sleeves which lacked the Respondent's slogan at the back did not have the vertical stripes at the right hand side as required. In addition, the two T-shirts submitted by the proposed successful tenderer which lacked vertical stripes were neither grey nor emerald green contrary to the Technical Specifications. During the hearing the Respondent was shown the anomalies in the samples submitted by the proposed successful tenderer and they admitted that the samples did not comply with technical specifications; hence, its quotation ought to have been disqualified too.

Based on the above facts and admission by the Respondent it is crystal clear that the quotation by the proposed successful tenderer ought to have been disqualified for failure to comply with Technical specifications as per Regulation 205 (c) of GN No. 446 of 2013. The Appeals Authority does not support the Respondent's act of intending to award the contract to a bidder whose quotation is non-responsive.

Therefore, the Appeals Authority's conclusion on the second issue is that the award proposed to the successful tenderer is not justified.

3.0 Whether the Respondent's administrative review decision was in compliance with the law.

In resolving this issue the Appeals Authority revisited the documents submitted and noted that, the Appellant had submitted his request for administrative review on 6th March 2017 after receipt of the Notice of Intention to Award on 2nd March 2017. It was further observed that, the Respondent vide its letter dated 7th March 2017 informed the Appellant that they could not entertain their complaint as there is pending Appeal before the Appeals Authority regarding the same matter lodged by them. On 8th March 2017, the Respondent received a letter from the Appeals Authority which informed them that the pending Appeal had been withdrawn by the Appellant. On 10th March 2017, the Respondent informed the Appellant that they were dealing with their complaint. The Respondent issued its written decision on the Appellant's request for administrative review on 22nd March 2017.

From the above sequence of events the Appeals Authority observed that the Respondent was required to entertain the Appellant's complaint after receipt of the official notification from this Appeals Authority on 8th March 2017 on the withdrawal of the Appeal. Counting from 9th March 2017, a day after notification of the withdrawal of the Appeal, the seven working days within which the Respondent ought to have issued his written decision on the request for administrative review expired on 17th March 2017. The Respondent issued his decision on 22nd March 2017 after expiry of the seven working days. It therefore goes without saying that the Respondent had contravened Section 96(6) of the Act.

The Appeals Authority observed further that, the Appellant after realizing that the Respondent had failed to issue his decision within seven working days, took proper action by lodging its Appeal directly to this Appeals Authority pursuant to Section 97 (1) and (2)(a) of the Act. The said provision allows tenderers to lodge their Appeal to the Appeals Authority if the accounting officer fails to issue his decision within the stipulated time.

Therefore, the Appeals Authority is of the settled view that much as the Respondent erred in law for failure to issue his decision within seven working days, the Appellant's right in this regard had not been prejudiced as they were able to lodge their Appeal to the Appeals Authority within the required time.

Accordingly, the Appeals Authority's conclusion with regard to the third issue is that the Respondent's administrative review decision was not in compliance with the law as their decision was issued beyond the stipulated time.

4.0 To What reliefs, if any, are the parties entitled to.

Taking cognizance of the findings made above, the Appeals Authority finds the Appeal to partly succeed. As the proposed successful bidder does not comply to the specifications of the Quotation Dossier, the proposed award cannot stand. The Appeals Authority therefore nullifies the award and orders the Respondent to re-tender afresh in observance of the law.

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 the absence of the Respondent this 3rd May, 2017.

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

CHAIRMAN

MEMBERS:

1. ENG. FRANCIS MARMO

2. MR. LOUIS ACCARO