

IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY
AT DAR ES SALAAM
APPEAL CASE No. 26 OF 2016-17

BETWEEN

M/S NYALINGA INVESTMENT COMPANY LTD..... APPELLANT

AND

MPANDA URBAN WATER SUPPLY
AND SANITATION AUTHORITY.....RESPONDENT

DECISION

CORAM

- | | |
|------------------------------|-------------------|
| 1. Ms. Monica P. Otaru | - Ag. Chairperson |
| 2. Mrs. Rosemary A. Lulabuka | - Member |
| 3. Eng. Francis T. Marmo | - Member |
| 4. Mr. Ole-Mbille Kissioki | - Secretary |

SECRETARIAT

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

FOR THE APPELLANT

1. Mr. Titus J. Lugoye - Technical Coordinator

FOR THE RESPONDENT

1. Mr. Jones Issack Sendoro - Advocate and Consultant –Victory Attorneys
2. Mr. Justine Wambari - Financial Manager
3. Mr. Nicodemus Komu - Procurement and Consultant
Works- Hexa Tech Consult
4. Mr. Kiwale Octavian A. – Lawyer

This Decision was scheduled for delivery today, 25th April 2017, and we proceed to deliver it as follows;

The Appeal is in respect of Tender No. MPN/UWSA/2015/16/W/01- Lot 2 for Supply of Pipes and Construction of Gravity Main from Manga intake to Mpanda District Hospital Water Storage Tank 14 KM (hereinafter referred to as “the Tender”); lodged by M/S NYALINGA INVESTMENT COMPANY LTD (hereinafter referred to as “the Appellant”) against the decision of MPANDA URBAN WATER SUPPLY AND SANITATION AUTHORITY commonly known by its acronyms MUWASA (hereinafter referred to as “the Respondent”) and together they are referred to as “the Parties”.

According to the oral submissions by the Parties and documentation submitted to the Public Procurement Appeals Authority (hereinafter

referred to as “the Appeals Authority”), the facts of the Appeal may be summarized as follows:

Tenderers were invited by the Respondent to participate in the Tender through Nipashe, Mwananchi, Daily News and the Guardian newspapers, all dated 9th June 2016; the deadline for which was 8th July 2016 whereby thirteen (13) firms submitted their tenders.

Tenders were subjected to evaluation which was conducted in three stages, namely; preliminary, detailed and post qualification. At the preliminary evaluation stage, seven (7) tenders were disqualified for being non responsive to the Tender Document. The remaining six (6) tenders were subjected to detailed evaluation, price comparison and post qualification. After completion of the evaluation process, the Evaluation Committee recommended the award of the Contract to M/s Girison Investment Co. Ltd at a contract price of TZS. 565,637,500.00 VAT exclusive which was approved by the Tender Board on 27th July 2016.

On 21st February 2017, the Respondent issued a Notice of Intention to award the Tender to M/s Girison Investment Co. Ltd at a contract price of TZS. 565,637,500.00 attaching a summary of the Evaluation Report which indicated that the Appellant was ranked second and therefore was disqualified.

Dissatisfied with the disqualification, the Appellant applied for administrative review to the Respondent vide a letter dated 25th March 2017, on grounds that;

- i. The Evaluation Committee erroneously evaluated his tender as VAT exclusive while it was neither VAT inclusive nor exclusive since its tender was quoted in compliance with Item 20 of the Preamble to the Bill of Quantities (BoQ).
- ii. If his tender was properly evaluated it should have been ranked first since he had the lowest quoted price compared to that of the proposed tenderer M/s Girison Investment Co. Ltd.

On 13th March 2017, the Respondent issued the decision, dismissing the complaint for lack of merits. Aggrieved, on 22nd March 2017 the Appellant lodged this Appeal.

SUBMISSIONS BY THE APPELLANT

The Appellant filed one (1) ground of Appeal that is; the Evaluation Committee erroneously evaluated his quoted tender price of TZS. 575,224,500.00 as VAT exclusive instead of VAT inclusive.

During the hearing, the Appellant submitted that his tender was unfairly disqualified for not stating whether its quoted tender price was VAT inclusive or exclusive. He claimed that his tender was in compliance with the requirements of Items 8 and 19 (a) (b) and (c) of the Preamble to the (BoQ), thus the Respondent should not have evaluated the Appellant's tender as VAT exclusive while it included all taxes VAT inclusive as per instructions.

In support of this ground the Appellant argued that if his tender price was properly evaluated then it should have been either TZS. 575,224,500.00

VAT inclusive or TZS. 487,478,390.00 VAT exclusive. That by all means his tender should have been the lowest evaluated tender.

In his final submission the Appellant argued that he complied with Clause 14.3 of the Instructions To Bidders (ITB) and Item 20 of the Preamble to the BoQ which clearly state that the tender price should include all duties, taxes and other levies payable by the contractor. That the Respondent's contention that the Appellant's tender was VAT exclusive is misleading hence his disqualification is unjustifiable.

Finally, the Appellant prayed for the following orders:-

- i. That the Appeal be upheld;
- ii. That the Intention to Award the Tender to M/s Girison Investment Co. Ltd be nullified.
- iii. That the Tender be awarded to the Appellant; and
- iv. Any other reliefs that the Appeals Authority deems fit to grant.

REPLY BY THE RESPONDENT

In replying to the Appellant's ground of Appeal, the Respondent submitted that:-

The Appellant's quoted price was TZS. 575,224,500.00 without indicating whether it was VAT inclusive or exclusive contrary to Clause 14.3 of the ITB and Item 20 of the Preamble to the BoQ.

During the hearing the Respondent vehemently submitted that, VAT is the Government money which must be indicated separately in the quoted price in compliance with the Value Added Tax Act of 2014. That the Appellant ought to have indicated the rate breakdown for each item but he did not do so.

It was further submitted that the Appellant's assertion that his tender was TZS. 487,478,390.00 VAT exclusive is found nowhere in his tender document; thus it was a mere afterthought by the Appellant as he did not comply with the requirements of Clause 14.3 of the ITB and Item 20 of the Preamble to the BoQ neither did he seek for clarification on the application of the above provisions. Therefore, his disqualification was justifiable for failure to comply with the requirements of the Tender Document.

Finally, the Respondent claimed that the Tender was correctly awarded to M/s Girison Investment Co. Ltd at a contract price of TZS. 565,637,500.00 VAT inclusive after being the first ranked tenderer.

Finally, the Respondent prayed for the following orders:-

- i. To dismiss the Appeal for lack of merits;
- ii. The Respondent to proceed with the Intention to Award the tender to the proposed tenderer;
- iii. To declare that the Appellant failed to meet the requirements of the Tender Document; and

- iv. The Appellant to compensate the Respondent for costs incurred in this Appeal.

ANALYSIS BY THE APPEALS AUTHORITY

The Appeals Authority is of the view that there are two triable issues to be determined namely:-

1. Whether the Appellant's disqualification is justifiable; and
2. What reliefs, if any, are the parties entitled to.

The Appeals Authority proceeds to determine these issues as follows;

1. Whether the Appellant's disqualification is justifiable

In resolving this issue, the Appeals Authority revisited the Evaluation Report and observed that the Appellant's tender was disqualified at the detailed evaluation stage for the reason that it was ranked second with the contract price of TZS. 575,224,500.00 VAT exclusive.

To ascertain the justification of the Appellant's disqualification, the Appeals Authority revisited Clause 14.3 of the ITB and Items 19 (a) (b) and (c) and 20 of the Preamble to the BoQ and observed that all duties, taxes and other levies payable by the contractor should be included in the rates, prices and total bid price that are to be submitted by the bidder. For purposes of clarity the said provision are reproduced hereunder and read as follows;

14. 3 "All duties, taxes, and other levies payable by the contractor under the Contract, or for any other cause, as of the

date 28 days prior to the deadline for submission of bids, shall be included in the rates, prices, and total bid price submitted by the Bidder.” (Emphasis added)

19. “RATES AND PRICES TO BE FULLY INCLUSIVE

In pricing the items of the Bill of Quantities the Bidder shall provide for all his costs and profit. The Employer therefore assumes that the bidder has full covered: (Emphasis added)

- (a) All work, services and materials which according to the true intent and meaning of the contract may be reasonably inferred as necessary for completion of the works described in the specifications and the Bill of quantities and drawings whether expressly mentioned therein or not.
- (b) All duties, obligations, liabilities and responsibilities, which the Contract places upon the Contractor.
- (c) All contractor profit margin.”

20. “THE BILL OF QUANTITIES.

21.1 (sic.) Depending on the nature of the bill item the Bill of Quantities is split into the following format.

(a) Supply and delivery bill items material requirement

Prices shall include inert alia (sic.), all costs of collecting information and data, the provision of all necessary material and manufacturers correspondences and testing at manufacturer’s works, including preparation, painting, protection before dispatch, packing insurance, shipping costs, port and handling dues, delivery to site, unloading into storage and all labour and carriage costs.

The prices shall also include all administration and other costs associated with customs clearance and the payment

of import duties, taxes and Government charges. (Emphasis added)

(b) Execution work items

The price shall include all labour charges, overheads, equipment/tools costs, supervision vehicles, security, insurances, overheads, profits and other miscellaneous...”

The above quoted provisions unmistakably require tenderers to include all duties, taxes and levies in their total quoted price. Nowhere in the Tender Document VAT is required to be quoted separately and the Respondent could not prove otherwise instead insisted that VAT is Government money that had to be paid by every tenderers as per the law.

When asked if the Appellant did not indicate that the price was VAT inclusive or exclusive, why did they conclude that the price was VAT exclusive; the Respondent failed to respond. The Appeals Authority noted with dismay as stated earlier that the Respondent’s own Tender Document clearly indicated that all duties, taxes, and other levies were to be included in the rates, prices, and total bid price submitted by the Bidder pursuant to Clause 14.3 of the ITB, Items 19 (a) (b) and (c) and 20 of the Preamble to the BoQ, which *inter-alia* provides that all administration and other costs were to be included in the price quoted by tenderers.

The Appeals Authority is of the view that if the Respondent sought that tenderers have to indicate VAT separately, he ought to have stated so in the Tender Document. The Appeals Authority finds the Respondent’s act of evaluating the Appellant’s tender as VAT exclusive without any justification

and contrary to Regulation 206 (1) of the Public Procurement Regulations of 2013 as amended, (GN. No. 446/2013) that requires determination of tenders' responsiveness to be based on the tender itself without any extrinsic evidence. The Respondents act also contravenes Section 72(1) of the Public Procurement Act of 2011, as amended, (the Act) and Regulation 203 of GN. No. 446/2013 which provides that the basis for tender evaluation and determination of the lowest evaluated tender shall be clearly stated in the Tender Document.

Basing on the above facts and findings, we are of the settled view that the Appellant's tender is in compliance with the Tender Document and therefore the quoted price of TZS. 575,224,500.00 is indeed VAT inclusive.

The Appeals Authority further considered the Appellant's contention that he had the lowest quoted price compared to that of the proposed successful tenderer.

To ascertain the above contention the Appeals Authority observed from the Appellants tender that he had quoted TZS. 575,224,500.00 while the tender by the proposed tenderer M/s Girison Investment Co. Ltd had quoted price of TZS. 667,452,250.00 VAT inclusive. It was further observed that, the Tender Board approved Award of the Tender to the proposed successful tenderer at TZS. 565,637,500.00 without stating whether the price was VAT inclusive or exclusive; neither does the Notice of Intention to Award the Tender. Surprisingly, the Respondent's reply indicates that the proposed successful tenderer was ranked first at TZS. 565,637,500.00 VAT inclusive. The Appeals Authority noted with dismay that the tender by the

successful tenderer was at TZS. 667,452,250.00 VAT inclusive and not TZS. 565,637,500.00 VAT inclusive. Thus the Respondent either intentionally or unintentionally erred by reducing the price of the proposed successful tenderer from TZS. 667,452,250.00 to TZS. 565,637,500.00 VAT inclusive.

The quoted prices VAT inclusive by proposed successful tenderer and that of the Appellant are TZS. 667,452,250.00 and TZS. 575,224,500.00 respectively. Prices VAT exclusive by proposed successful tenderer and that of the Appellant are TZS. 565,637,500.00 and TZS. 487,478,390.00. Therefore, without scintilla of doubt, the Appellant's price is the lowest as it is lower than that of the alleged successful tenderer by TZS. 78,159,110.00.

Therefore, from the above findings the Appeals Authority is of the firm view that, the Appellant's disqualification is not justifiable thus concludes the first issue in the negative, that the Appellant's disqualification is not justifiable.

2. What reliefs, if any are the parties entitled to

Taking cognizance of the findings made above, the Appeals Authority finds the Appeal to have merits and therefore nullifies the award made to the proposed successful tenderer. The Respondent is ordered to proceed with the tender process by post qualifying the Appellant since his quoted price is the lowest as observed under issue number one above.

With regard to the prayer by the Respondent that the Appeal be dismissed for lack of merits, the Appeals Authority cannot grant the same since the

Appeal has merits. The Appeal is hereby allowed as indicated above and the Respondent is ordered to compensate the Appellant a sum of TZS. 200.000.00 as Appeal filing fee.

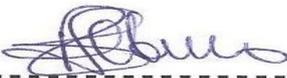
This Decision is binding and can be enforced in accordance with Section 97(8) of the Act.

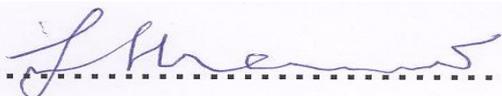
The Right of Judicial Review as per Section 101 of the Act is explained to the Parties.

This Decision is delivered this 25th April 2017 in the presence of the Parties.


.....
MONICA P. OTARU
Ag. CHAIRPERSON

MEMBERS:

1. MRS. R. A. LULABUKA 
.....

2. ENG. F. T. MARMO 
.....