

IN THE PUBLIC PROCUREMENT APPEALS AUTHORITY

APPEAL CASE NO. 19 OF 2022-23

BETWEEN

M/S KIBIBO INVESTMENT COMPANY.....APPELLANT

AND

TANZANIA NATIONAL ROADS

AGENCY- DODOMA..... RESPONDENT

DECISION

CORAM

- | | |
|------------------------|-------------------|
| 1. Adv. Rosan Mbwambo | - Ag. Chairperson |
| 2. Mr. Rhoben Nkori | - Member |
| 3. Dr. William Kazungu | - 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. Chidego Mchiwa | - Managing Director |
|-----------------------|---------------------|

FOR THE RESPONDENT

1. Mr. Peter Paul Sengelema - Senior Legal Counsel-TANROADS
2. Eng. Gama Kimoto - Ag. Head of Procurement Management
Unit- Ag. HPMU
3. Ms. Tulamwidika Mlote - Procurement Officer

M/s Kibibo Investment Company (hereinafter referred to as "**the Appellant**") has preferred this Appeal in this Public Procurement Appeals Authority (hereinafter referred to as "**the Appeals Authority**") against Tanzania National Roads Agency-Dodoma commonly known by its acronym as "**TANROADS**" (hereinafter referred to as "**the Respondent**"). The Appeal is in respect of Tender No. AE/001/2022-23/DO/W/22 for Routine/Recurrent Maintenance Works along Mtera-Dodoma Trunk Paved (Fufu-Dodoma Section) Road, T005 Labour Based (70 km) (hereinafter referred to as "**the Tender**").

A brief background of the Appeal is that on 20th July 2022, the Respondent floated the Tender through Tanzania National e-Procurement System (TANePS). The Tender was conducted through National Competitive 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, 2013 as amended (hereinafter referred to as "**the Regulations**"). Deadline for submission of Tenders was set for 5th August 2022. On the deadline, thirty tenders were received including that of the Appellant.



The Tenders were then evaluated accordingly. After completion of the evaluation process, the Evaluation Committee recommended award of the tender to M/S Xroben Company at the contract price of Tanzanian Shillings Seventy Four Million Five Hundred Fifty Nine Thousand Two Hundred Eighty (TZS 74,559,280.00) only VAT exclusive. In its meeting held on 12th and 13th September 2022, the Tender Board deliberated and approved the award as recommended by the Evaluation Committee. On 20th September 2022, the Respondent wrote a Notice of Intention to award the Tender. While the Appellant denied to have received this Notice, the Respondent insisted that it served the Notice through TANePS.

The Appellant on 1st November 2022 received through its email an acceptance letter addressed to M/S Xroben Investment Company. The said letter indicated that M/S Xroben Investment Company had been awarded the tender and contract signing date was on 13th October 2022. Having been made aware that the Tender had already been awarded, on 3rd November 2022, the Appellant wrote an email to the Respondent requesting to be availed with the Notice of Intention to award. On 4th November 2022, the Appellant went to the Respondent's office and was served with the Notice of Intention to award. The Notice indicated that the Appellant was disqualified for having insufficient annual construction turnover.

Dissatisfied with a reason given for its disqualification and taking into consideration that the contract had already been awarded and signed, on 8th November 2022 the Appellant lodged this Appeal.

The Appeals Authority notified the Respondent about the existence of the Appeal and required it to file its replies. In response thereof the Respondent filed a statement of reply. The Respondent also filed a Notice of Preliminary Objection on point of law that the Appeal is untenable in law *"... for being filed out of time contrary to Section 97(2)(b) of the Act"*.

During the hearing, the Appeals Authority directed that it would hear both the preliminary objection and the Appeal on its merits. In the course of submitting on the preliminary objection it transpired that the Respondent's concern is that the complaint in the ground of appeal relating to annual construction turnover is the one that is time barred. The Respondent conceded that the Appeal is within time save for the ground relating to annual construction turnover which is one of the grounds of Appeal. Effectively, the Respondent abandoned the preliminary objection.

Coming to the merits of the Appeal the following issues were framed for determination, namely:-

- 1.0 Whether the disqualification of the Appellant's tender was justified;**
- 2.0 Whether the award of the Tender to the successful tenderer was justified;**
- 3.0 Whether the Notice of Intention to award was issued in compliance with the law;**
- 4.0 What reliefs, if any, are the parties entitled to?**



SUBMISSIONS BY THE APPELLANT

In this Appeal the Appellant was represented by Mr. Chidego Mchiwa, the Managing Director. The Appellant commenced his submissions on the first issue by indicating that it has been unfairly disqualified from the tender process allegedly for failure to comply with annual construction turnover requirement. According to the Appellant, the Tender was labour based and therefore there was no need for annual construction turnover requirement in the first place. The Appellant submitted further that, in previous years the Respondent conducted the same tender process and there was no requirement of annual construction turnover and the projects were successfully executed. The Appellant elaborated that the project value is less than TZS 75,000,000.00 while requirement of annual construction turnover is TZS 150,000,000.00. The Appellant contended that the required annual construction turnover was higher than the project value and therefore it was unreasonable.

Having realized from the Tender Document that the required annual construction turnover was unrealistic, the Appellant immediately and before submitting its bid, applied for clarifications from the Respondent on 27th July 2022. The said request for clarifications was never responded to. Therefore, the Appellant assumed that its concerns were positively considered and it proceeded to participate in the Tender. The Appellant added that its participation in the Tender process was also intended to provide an opportunity to challenge the irregularities.



The Appellant submitted that it attached copies of completion certificates which indicate that it had executed five projects with annual construction turnover of TZS 182,760,790.00. The values of these projects are correct and payment receipts are well attached. Therefore, the Respondent's allegation that there is a forgery on the computed annual construction turnover is unfounded, the Appellant contended.

In relation to the second issue, the Appellant submitted that the proposed successful tenderer, M/S Xroben Investment Company quoted Tanzanian Shillings Seventy Four Million Five Hundred Fifty Nine Thousand Two Hundred Eighty (TZS 74,559,280.00) only while the Appellant quoted Tanzanian Shillings Sixty Eight Million One Hundred Eighty One Thousand Eight Hundred (TZS. 68,181,800.00) only. Therefore, the Appellant's price is relatively lower by Tanzanian Shillings Six Million Three Hundred Seventy Six Thousand Four Hundred Eighty (TZS 6,376,480.00) only.

In relation to the third issue, the Appellant submitted that the Respondent erred in law for not serving the Appellant with the Notice of Intention to award. According to the Appellant, the Respondent's failure in this regard contravened Section 60(3) of the Act read together with Regulation 231(4) of the Regulations. The cited provisions require the Respondent to mandatorily issue the Notice of Intention to award a tender to all tenderers. The Appellant contended that the Respondent's failure in this regard denied the Appellant a right to submit complaints within time and before the contract was signed.



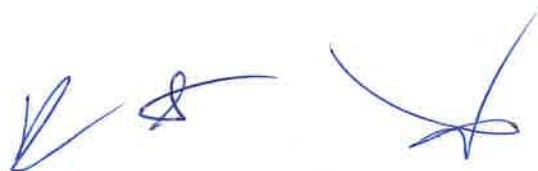
Finally, the Appellant prayed for the following orders:-

- i. The award of the contract to the successful tenderer be nullified as it quoted higher price compared to the price quoted by the Appellant which has a difference of TZS 6,376,480.00;
- ii. The award be made to the Appellant who had quoted lower price compared to the awarded tenderer;
- iii. A declaration be made that annual construction turnover should not be a criterion for award of tenders for labour based works.

REPLY BY THE RESPONDENT

The Respondent was represented by Mr. Peter Paul Sengelema, Senior legal Counsel. The learned counsel started by responding on the first issue and submitted that the Appellant has been fairly disqualified from the Tender process for failure to comply with requirement of Clause 2.7 of Section II of the Instructions To Tenderers (ITT). According to this provision tenderers were required to demonstrate that they have access to, or have available liquid assets, financial means sufficient to meet the construction of cash flow requirements estimated at annual construction turnover of TZS 150,000,000.00.

The Respondent elaborated that, during the evaluation process it transpired that the Appellant failed to comply with such a requirement. The Evaluation Committee observed the discrepancies of the figures submitted and discovered that the actual annual construction turnover of the Appellant based on the documents submitted was Tanzanian Shillings Thirty Six



Million Five Hundred Fifty One Thousand Nine Hundred Fifty Eight (TZS 36,551,958.00) only. The Appellant's annual construction turnover was below the value stated in the Tender Document. Thus, its tender was found non-responsive.

The Respondent submitted further that annual construction turnover is among the crucial requirements of the Tender. Thus, tenderers were required to comply with it, as it assures the procuring entity that the awarded tenderer would be able to execute the contract as required.

In relation to the Appellant's argument on clarifications sought for annual construction turnover, the learned counsel submitted that the Appellant's request for clarifications was submitted beyond the time stipulated on TANePS. According to TANePS, the clarifications were to be sought by 24th July 2022. The Appellant's request was submitted on 27th July 2022 beyond the stipulated time limit.

The learned counsel expounded further that, according to the Tender Document the request for clarifications was to be submitted through TANePS as the Tender was processed on TANePS. The Appellant submitted the request for clarifications through a letter which was physically delivered to the Respondent. The learned counsel contended that since the Appellant's request for clarification was submitted beyond the stipulated time limit and outside TANePS, the same could not be entertained by the Respondent. According to the Respondent if the Appellant was not satisfied



with the way the request for clarifications was dealt with it should have invoked review procedures.

In relation to the second issue, the learned counsel submitted that the award of the Tender has been made to a tenderer who complied with the requirement of the Tender. The Respondent expounded that much as the Appellant had the lower price compared to that of the successful tenderer, it could not have been awarded the tender for failure to comply with annual construction turnover requirement. According to the Respondent, lower price is not the basis for award of the tender as tenderers were required to comply with the requirements provided for in the Tender Document for them to qualify for the award. The Respondent submitted further that the Appellant's price as readout was the fourth amongst all tenderers participated in the Tender. Thus, its claim of having the lowest price amongst all tenderers is unfounded. Hence award to the successful tenderer is justified.

Regarding non-communication of the Notice of Intention to award, the Respondent submitted that the Notice was sent to all tenderers through TANEPS on 20th September 2022. None of the tenderers complained to have not received the Notice of Intention to award save for the Appellant. The Respondent submitted further that, during the cool off period within which tenderers were required to submit complaints, no complaint was received. This implied that the tenderers were satisfied with the Tender results. Thus, the Appellant's allegation that the Notice of Intention to award was not served to it timely are frivolous and vexatious.

Handwritten signature and checkmark in blue ink.

With regard to the Appellant's prayers, the Respondent submitted that, all are baseless and unfounded in law and the same should be dismissed in their entirety. Finally, the Respondent prayed for dismissal of the Appeal but did not press for costs.

ANALYSIS BY THE APPEALS AUTHORITY

1.0 Whether the disqualification of the Appellant's tender was justified

The Appellant was disqualified for failure to comply with minimum average annual construction turnover of TZS 150,000,000.00 as required under Clause 2.7 of the ITT. Clause 2.7 of the ITT provides for a minimum average annual construction turnover of TZS 150,000,000.00 within any two of the last 5 years, divided by two. Clause 2.7 reads as follows:-

*"Clause 2.7 Minimum average annual construction turnover of Tshs. 150,000,000.00 calculated as total certified payments received for contracts in progress and/or completed within any 2 of the last 5 **years**, divided by 2 years. **(Should be supported by copies of relevant documents).**"*

(Emphasis supplied)

To ascertain if the Appellant complied with the above quoted requirement, the Appeals Authority revisited its bid as submitted on TANePS and observed that at a slot where the average annual construction turnover was to be shown, the Appellant listed five projects which indicated to have average annual construction turnover of TZS 182,760,790.00. The listed



projects and their respective values were as follows:- 1st year - TZS 40,822,100.00, 2nd year - TZS 36,842,500.00, 3rd year - TZS 44,985,990.00, 4th year - TZS 30,137,200.00 and 5th year - 29,972,000.00 respectively.

From the requirement of Clause 2.7 of the ITT quoted above the Appellant was required to demonstrate a total certified payments received for contracts in progress and/or completed within any 2 of the last 5 years, divided by 2. The Appeals Authority took the highest annual construction turnover of the Appellant for 1st and 3rd year TZS 40,822,100.00 and TZS 44,985,990.00, respectively which had a total of TZS 85,808,090.00. The TZS 85,808,090.00 divide by two gives average annual construction turnover of TZS 42,904,045.00. Since the required annual construction turnover was TZS 150,000,000.00, it is obvious that the Appellant's annual construction turnover of TZS 42,904,045.00 did not comply with the requirement of the Tender Document. Therefore, the Appeals Authority is of the settled view that the Appellant failed to comply with the requirement of annual construction turnover of TZS 150,000,000.00.

Under the circumstances, the Appeals Authority finds the Respondent's act of disqualifying the Appellant to be justified and in accordance with Regulation 206(2) of the Regulations which reads as hereunder:-

"Reg.206(2) ***where a tender is not responsive to the tender document, it shall be rejected by the procuring entity, and may not subsequently be made responsive by correction or withdrawal of the deviation or reservation***".

(Emphasis Supplied)

The Appeals Authority further considered the Appellant's assertion in relation to clarifications sought from the Respondent on annual construction turnover requirement. The Appellant alleged that the clarification was sought as the required annual construction turnover was unrealistic for the Tender which is for labour based works. The Appellant claimed that it sought for clarifications through a letter dated 27th August 2022. However, the Respondent never replied. On the Respondent's side it claimed that, the request for clarifications was made beyond the stipulated time limit and not through TANePS where the Tender was processed and therefore it could not have been worked upon.

To ascertain the validity of the parties' contentions in this regard, the Appeals Authority reviewed the Tender Document and observed that Clause 19 of the ITT required tenderers to address clarifications to the Regional Manager TANROADS- Dodoma through TANePS. Clause 19 reads as follows:-

*"Clause 19 Address for clarification of Bidding Documents is addressed to **The Regional Manager TANROADS, P. O. Box 902, Dodoma, Telephone No. 026 2320392, Fax No. 026 2321257 through TANePs via www.taneps.go.tz**".*

The Appellant submitted its request for clarifications physically to the Respondent's office through a letter dated 27th July 2022. The Appeals

Authority observed further that TANEPS has indicated the deadline for submission of clarifications to be on 24th July 2022 at 1630 hours. Therefore, the Appeals Authority is of the settled view that the Appellant's request for clarifications was submitted beyond the stipulated time limit and not through TANEPS contrary to the requirements of the Tender Document. The Appeals Authority cannot in the circumstances, fault the Respondent for not responding to the Appellant's requests for clarifications. However, the Respondent should, as a matter of courtesy, have notified the Appellant in writing that its request for clarifications has been made in contravention of the ITT.

In the alternative, the Appeals Authority is of the view that, if the Appellant was not satisfied with the Respondent's act of not responding to its request for clarifications, then it should have submitted an application for administrative review in accordance with Sections 95(1) and 96(1) and (4) of the Act read together with Regulation 104 of the Regulations which read as follows:-

"Sec. 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.

Sec. 96(1) Any complaints or dispute between procuring entities and tenderers which arise in respect of procurement proceedings, disposal of public assets by tender and awards of contracts shall be reviewed and decided upon a



written decision of the accounting officer of a procuring entity and give reasons for his decision.

(4) The accounting officer shall not entertain a complaint or dispute unless it is submitted within seven working days from the date the tenderer submitting the complaint or dispute or when that tenderer should have become aware of those circumstances, whichever is earlier”.

"Reg. 104 A tenderer who claims to have suffered or who may suffer any loss or injury as result of breach of a duty imposed on a procuring entity or an approving authority by the Act or these Regulations may apply for a review in accordance with section 95 of the Act."

The above quoted provisions indicate clearly that if a tenderer is not satisfied with the procuring entity's acts or omissions, may apply for administrative review to the respective procuring entity within seven working days of becoming aware of the circumstances giving rise to a complaint.

Relating the above quoted provisions to the facts of this Appeal, the Appellant sought for clarifications from the Respondent on 27th July 2022. The Respondent ought to have issued clarifications within three working days from the date it received the Appellant's request pursuant to Regulation 13(2) of the Regulations. If the Appellant did not receive the clarifications as it claimed, it ought to have submitted an application for



administrative review to the Respondent within seven working days after the lapse of three working days within which the Respondent ought to have issued clarifications.

The Appellant sought for clarifications on 27th July 2022, the Respondent ought to have issued clarifications within three working days, latest by 1st August 2022. If the Appellant did not receive response from the Respondent as it contended, it ought to have filed an application for administrative review by 11th August 2022. To the contrary, the Appellant failed to exhaust the available remedy as per Sections 95(1) and 96(1) and (4) of the Act. Therefore, proposition relating to clarifications on annual construction turnover cannot be raised at this juncture.

The Appeals Authority further rejects the Appellant's assertion that in previous tenders annual construction turnover was not among the requirement on labour based works. The Appeals Authority rejects the Appellant's assertion on this regard on a reason that determination of a successful tender is to be based on the requirements of the current Tender and not previously floated tenders. The requirement of previously floated tenders cannot be used in the current Tender, since the procuring entity (Respondent) has a right to set criteria which suits its circumstances.

From the above findings the Appeals Authority concludes the first issue in the affirmative that the disqualification of the Appellant's tender was justified.



2.0 Whether award of the Tender to the successful tenderer is justified

The Appellant contented that the Respondent awarded the Tender to a tenderer who quoted higher price than what was offered by the Appellant. The Respondent on its part submitted that the Appellant was not the lowest evaluated tenderer.

The Appeals Authority reviewed the Tender opening record and observed that, the successful tenderer's price was TZS 74,559,280.00 while the Appellant's price was TZS 68,182,800.00. The Evaluation Report indicates that the Appellant was disqualified at the technical evaluation stage for failure to comply with average annual construction turnover of TZS 150,000,000.00. Thus, its tender did not qualify to financial evaluation stage where its price could have been compared with other tenderers who were found to have complied with the requirements of the Tender Document.

Regulation 212 of the Regulations clearly provides that, a successful tender shall be the tender with the lowest evaluated tender price for goods, works or services or the highest evaluated tender in case of revenue collection. The Regulation reads as follows: -

"Reg. 212 The successful tenderer shall be -

- (a) the tender with the lowest evaluated tender price in case of goods, works, or services, or the highest evaluated tender price in case of revenue collection but not necessarily the lowest or highest***



submitted price, subject to any margin of preference applied."

(Emphasis supplied)

From the record of Appeal and the above quoted provisions the Appeals Authority is of the firm view that the successful tenderer was the lowest evaluated tenderer and therefore entitled to be awarded the Tender. The Appeals Authority further finds that since the Appellant's tender did not qualify to the financial evaluation stage; its price could not have been compared with that of the successful tenderer and considered for award.

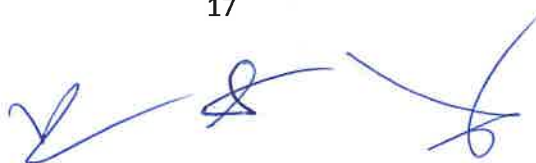
In view of the above findings, the Appeals Authority concludes the second issue in the affirmative that the award of the Tender to the successful tenderer was justified.

3.0 Whether the Notice of Intention to award was issued in compliance with the law

Section 60(3) of the Act read together with Regulation 231(2) of the Regulations read as follows:-

*"Sec. 60(3) upon receipt of notification, **the accounting officer shall, immediately thereafter issue a notice of intention to award the contract to all tenderers who participated in the tender in question giving them seven working days within which to submit complaints thereof, if any.***

Reg. 231(2) Upon receipt of the notification of award decision from the tender board, the accounting officer shall, having



*satisfied himself that the proper procedures have been followed and within three days, **issue a notice of intention to award the contract to all tenderers who participated in the tender in question giving them seven working days within which to submit a complaint, if any.***"

(Emphasis supplied)

The above provisions require the accounting officer to issue the notice of intention to award the contract to all tenderers who participated in the Tender process giving them seven working days within which to submit a complaint, if any.

In this Appeal the Appellant asserted to have not been served with the Notice of Intention to award. The Respondent on its part stated that on 20th September 2022 it issued the Notice of Intention to award to all tenderers who participated in the Tender through TANEPS.

In order to ascertain if the Notice of Intention to award was issued through TANEPS, the Appeals Authority revisited uploaded information on TANEPS and observed that there was no information which indicates that the Notice was issued through TANEPS.

During the hearing and when the Respondent's officers were asked by the members to assist the Appeals Authority on when exactly and how the Notice of Intention to award was uploaded in the TANEPS as alleged, the officers prevaricated. The Appeals Authority had to seek assistance from



the Public Procurement Regulatory Authority (PPRA). PPRA confirmed that the Respondent opted to skip the sending of notice requirements in the TANePS.

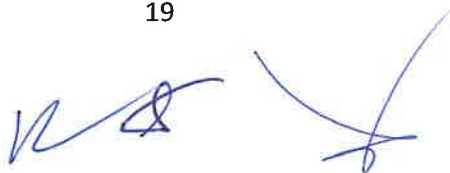
In view of the above, the Appeals Authority is of the firm view that the Respondent did not issue the Notice of Intention to award as required. The Appeals Authority finds the Respondent's act in this regard to have contravened Section 60(3) of the Act read together with Regulations 231(2) of the Regulations which require the Notice of Intention to award to be served to all tenderers who had participated in the Tender.

Under the circumstances, the Appeals Authority concludes the third issue in the negative that the Notice of Intention to award was not issued in accordance with law.

4.0 What reliefs, if any, are the parties entitled to?

Taking cognizance of the findings made on the first and second issues hereinabove that the Appellant's disqualification was justified and that the award of the Tender to the successful tenderer is proper in law, the Appeals Authority hereby declines all the Appellant's prayers.

As regards to the findings made on the third issue, the Appeals Authority observes that the purpose of issuing the Notice of Intention to award is amongst other to enable the tenderers to know the reasons for their disqualification or qualification. The Notice of Intention to award also gives an opportunity to dissatisfied tenderers to challenge their disqualification or award made timely. The Respondent's failure to serve the Notice of



Intention to award denied the Appellant the above stated opportunities. However, following the findings made on the first and second issues herein above, the Appeals Authority is of the settled view that, the current results of the Tender would not have changed.

The Appeals Authority therefore dismiss the Appeal to the extent of the findings made on first and second issues herein above. We make no order as to costs.

It is so ordered.

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 parties this 15th day of December 2022.

ADVOCATE ROSAN MBWAMBO



Ag. CHAIRPERSON

MEMBERS: -

1. MR. RHOEN NKORI



2. DR. WILLIAM KAZUNGU