

IN THE PUBLIC PROCUREMENT APPEALS AUTHORITY

APPEAL CASE NO. 08 OF 2023-24

BETWEEN

M/S GJG TECHNICS COMPANY LTD.....APPELLANT

AND

TABORA MUNICIPAL COUNCIL.....RESPONDENT

DECISION

CORAM

- | | |
|-------------------------------------|---------------|
| 1. Hon. Justice (rtd) Sauda Mjasiri | - Chairperson |
| 2. Ms. Ndeonika Mwaikambo | - Member |
| 3. Dr. William Kazungu | - Member |
| 4. Mr. James Sando | - Secretary |

SECRETARIAT

- | | |
|------------------------|------------------------------|
| 1. Ms. Florida Mapunda | - Deputy Executive Secretary |
| 2. Ms. Agnes Sayi | - Senior Legal Officer |
| 3. Ms. Violet Limilabo | - Senior Legal Officer |

FOR THE APPELLANT

- | | |
|---------------------------|-------------------------------------|
| 1. Mr. Joseph Matimbwi | - Advocate, Kidumage and Associates |
| 2. Mr. Kezilahabi Mumangi | - Managing Director |
| 3. Mr. Julius Katikilo | - Director |

FOR THE RESPONDENT

- | | |
|-------------------------|--|
| 1. Mr. Robert Matungwa | - Council Solicitor |
| 2. Mr. Sylvester Mhumpa | - Head of Procurement
Management Unit |

This Appeal was lodged by **M/S GJG Technics Company Ltd** (hereinafter referred to as "**the Appellant**") against the Tabora Municipal Council (hereinafter referred to as "**the Respondent**"). The Appeal is in respect of Tender No. LGA/124/HQ/2023-2024/NC/01 for Provision of Town Cleaning Services for the Financial Year 2023/2024 (hereinafter referred to as "**the Tender**").

According to the documents submitted to the Public Procurement Appeals Authority (hereinafter referred to as "**the Appeals Authority**"), the background of this Appeal may be summarized as follows: -

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, GN. No. 446 of 2013 as amended (hereinafter referred to as "**the Regulations**").

On 11th May 2023, the Respondent through the Tanzania National electronic Procurement System (TANePS) invited tenderers to participate in the Tender. The deadline for submission of Tenders was initially set on 31st May 2023. However, it was later on extended to 9th June 2023. On the deadline, the Respondent received two tenders from the Appellant and M/S RADSA International Company Ltd.



The received tenders were subjected to evaluation. After completion of that evaluation process, all tenders were found to have higher prices than the Respondent's estimated budget. Therefore, the Evaluation Committee recommended that the Tender be re-advertised. The Evaluation Committee's recommendations were tabled before the Tender Board at its meeting held on 14th July 2023. After deliberations, the Tender Board approved the recommendations as tabled.

The Respondent through a letter dated 17th July 2023 informed the Appellant that its tender was unsuccessful due to its higher quoted price than the Respondent's estimated budget. Dissatisfied with the reason given for its disqualification, on 20th July 2023, the Appellant filed its application for administrative review to the Respondent. On its application for administrative review, the Appellant claimed to have complied with the requirements of the Tender. Thus, the Respondent ought to have invited it for negotiations.

The Respondent through a letter dated 26th July 2023, issued its decision with respect to the Appellant's application for administrative review. In the said decision the Respondent rejected the Appellant's application for administrative review for quoting a price that exceeded the Respondent's estimated budget. In addition, the Respondent stated that the Appellant had a poor performance record on the previous contract. Aggrieved with the Respondent's decision, on 1st August 2023, the Appellant lodged this Appeal before the Appeals Authority.

When the matter was called on for hearing, the following issues were framed: -

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1.0 Whether the disqualification of the Appellant was justified; and

2.0 What reliefs if any are the parties entitled to?

SUBMISSIONS BY THE APPELLANT

The Appellant's submissions were made by Mr. Joseph Matimbwi, learned advocate. He commenced his submissions by stating that the Respondent's Notice of Intention to award dated 17th July 2023, informed the Appellant that its Tender was disqualified for having a higher price than the Respondent's estimated budget. The learned counsel submitted that the reason advanced for the Appellant's disqualification indicated that its tender was evaluated up to the price comparison stage. At the price comparison stage, its quoted price was compared with the Respondent's estimated budget.

The learned counsel contended that for the Appellant's tender to have reached the price comparison stage, implies that it complied with all the requirements of the Tender. Therefore, the Appellant was the lowest evaluated tenderer. The learned counsel stated that since the Appellant was the current service provider and was found to be the lowest evaluated tenderer, the Respondent ought to have invited it for negotiations pursuant to Section 59(5) of the Act.

The learned counsel elaborated that the Appellant is aware that the law grants discretionary powers to the Respondent to decide in each tender if negotiations could be conducted or not. However, taking into consideration that the Appellant was the current service provider and was familiar with the Respondent's working environment, the Respondent ought to have invited it for negotiations. Thus, the

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Respondent's failure to do so contravenes the requirement of the law and its Regulations.

The learned counsel submitted that after being notified that its tender was disqualified for having quoted a higher price than the Respondent's estimated budget, the Appellant applied for administrative review to the Respondent. When the Respondent issued the decision on the application for administrative review, it indicated that apart from having a higher price, the Appellant had poor performance in the previous contract. Therefore, it could not have been considered for negotiations. The Appellant stated that poor performance is a new ground for its disqualification as it was not contained in the Notice of Intention to award. In addition, it was not among the evaluation criteria provided in the Tender Document. Thus, it was not to be stated as one of the grounds for the Appellant's disqualification.

The learned counsel contended that the Respondent's act of raising a new ground for the Appellant's disqualification is an afterthought. In addition, the learned counsel stated that the Respondent's act substantiates that the Appellant was unfairly disqualified. Therefore, the Appellant urged the Appeals Authority not to consider the said reason.

Finally, the Appellant prayed that the Respondent be ordered to do the following: -

- i) Re-advertise the Tender in accordance with the law; and
- ii) To refund the Appellant all costs for preparation of the submitted tender, application for administrative review and this Appeal before the Appeals Authority.



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REPLY BY THE RESPONDENT

The Respondent's submissions were made by Mr. Robert Matungwa, Council Solicitor. He commenced his submissions by stating that in rejecting the Appellant's tender the Respondent exercised its powers as stipulated under Section 59(2)(d) of the Act read together with Regulation 16(2)(e) of the Regulations. The Council Solicitor contended that the Respondent invoked the cited provisions after establishing that all tenderers' quoted prices were higher than the Respondent's estimated budget.

The Council Solicitor stated that in this Tender only two tenderers responded to the invitation by submitting their tenders. The submitted tenders were from the Appellant and M/S RADSA International Company Ltd whose quoted prices were Tanzanian Shillings Nine Million Five Hundred Sixteen Thousands Seven Hundred only (TZS 9,516,700.00) and Tanzanian Shillings Twelve Million Two Hundred Seventy Two Thousands only (TZS 12,272,000.00) respectively. The two quoted prices were above the Respondent's estimated budget of Tanzanian Shillings Eighty Million only (TZS 8,000,000.00). Thus, the Respondent rejected all the tenders for exceeding its estimated budget, the Council Solicitor contended.

The Council Solicitor submitted that according to Regulation 225(5) of the Regulations, negotiations are to be conducted with the lowest evaluated tenderer. In the Tender under Appeal, there was no lowest evaluated tenderer. The two tenderers were each found to have a higher price than the Respondent's estimated budget. Thus, none of the two tenderers was declared to be the lowest evaluated tenderer.



Therefore, the Appellant could not have been invited for negotiations, the Council Solicitor contended.

In relation to the new ground for the Appellant's disqualification, the Council Solicitor submitted that the Respondent issued its decision on the Appellant's application for administrative review that stated that apart from having a higher price, the Appellant's tender was also disqualified for having poor performance in the previous contract. The Council Solicitor contended that much as the ground of poor performance was indicated in the Respondent's decision, the same was just mentioned in passing and was not essential to the decision. The actual reason for the Appellant's disqualification was a higher quoted price than the Respondent's estimated budget. Therefore, the Appellant was fairly disqualified.

In relation to the Appellant's prayers, the Council Solicitor submitted that the Appellant's prayer on the re-advertisement of the Tender was not included in the Appellant's Statement of Appeal. Thus, it has been raised at the bar. Since it was a new prayer, the Council Solicitor urged the Appeals Authority not to consider it.

Finally, the Council Solicitor prayed for dismissal of the Appeal with costs.

ANALYSIS BY THE APPEALS AUTHORITY

1.0 Whether the disqualification of the Appellant was justified

In resolving this issue, the Appeals Authority reviewed the record of Appeal and observed that on the deadline for submission of tenders the Respondent received tenders from the Appellant and M/S RADSA International Company Ltd. According to the Respondent, the received tenders were evaluated as per the requirements provided in the Tender

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Document. After completion of the evaluation process, the Appellant's quoted price of TZS 9,516,700.00 and TZS 12,272,000.00 of M/S RADSA International Company Ltd were found to be higher than the Respondent's estimated budget. The evaluation report indicated the Respondent's estimated budget for the Tender was TZS 8,000,000.00. Following the finding that tenderers quoted prices were above the Respondent's estimated budget, the Evaluation Committee recommended for the re-advertisement of the Tender. The Evaluation Committee's recommendation was approved by the Tender Board at its meeting held on 14th July 2023.

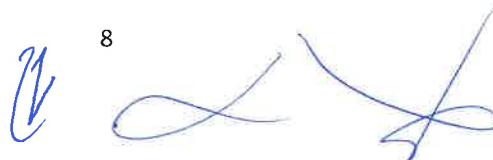
The Appeals Authority observed further that the Respondent through a letter dated 17th July 2023 informed the Appellant and M/S RADSA International Company Ltd that their tenders were unsuccessful for having higher prices than the Respondent's estimated budget. Dissatisfied with the reason given for its disqualification, the Appellant applied for administrative review to the Respondent and subsequently filed this Appeal.

In ascertaining if the Respondent's decision to disqualify the Appellant for having a higher price than the estimated budget was valid, the Appeals Authority reviewed Section 59(1) and (2)(d) of the Act read together with Regulation 16(2)(e) of the Regulations. Section 59(1) and (2)(d) of the Act read as follows: -

"59(1) Tender documents and request for proposals may provide that procuring entities reject all tenders or all proposals.

(2) The rejection of all tenders or all proposals under this section shall be justified where-

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(d) tenders or proposals involve costs substantially higher than the original budget or estimates".

(Emphasis supplied)

The above quoted provision confers procuring entities with a right of rejecting all the submitted tenders provided that such a right is specified in the Tender Document. In addition, the provision requires procuring entities to have either of the specified circumstances under Section 59(2) of the Act prior to rejection of all the tenders.

The Appeals Authority revisited Clauses 11 and 13 of the Instructions to Tenderers (ITT) which read as follows: -

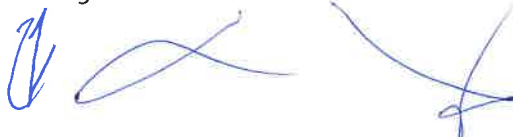
*"11. Taasisi Nunuzi itatoa Mkataba kwa Mzabuni ambaye zabuni yake imeamuliwa kuwa inafaa na **ambaye ametoa zabuni ya bei iliyotathiminiwa na kuwa ya chini kabisa.***

*13. **Licha ya yaliyotajwa hapo juu, Taasisi Nunuzi inahodhi haki ya kukubali zabuni yeyote na kukataa zabuni zote wakati wowote kabla ya kutoa Mkataba"***

(Emphasis supplied)

The above quoted provisions clearly entail that award of the Tender was to be made to the lowest evaluated tenderer as would be determined by the procuring entity. In addition, the procuring entity reserves a right, at any time prior to the issuance of a contract, of accepting or rejecting any tender or all the tenders that have been submitted.

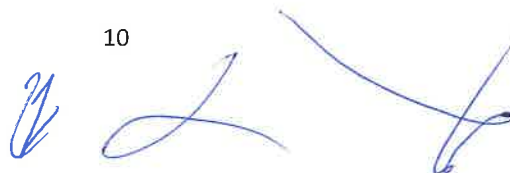
Having related the above quoted provisions to the facts of this Appeal, summarized hereinabove, the Appeals Authority is of the view that since the budget for the intended contract is determined by the Respondent, a



duty to determine the lowest evaluated tender is solely based on the Respondent. It is evident from the record of appeal that the Respondent's estimated budget for the intended work was TZS 8,000,000.00. The Appellant's quoted price was TZS 9,516,700.00 and the price for M/S RADSA International Company Ltd was TZS 12,272,000.00. Having compared the quoted prices to the Respondent's budget, it is apparent that tenderers' quoted prices were above the Respondent's estimated budget.

The Appeals Authority considered the Appellant's contention that since its tender reached the price comparison stage where its price was compared with the Respondent's estimated budget, it implies that the Appellant complied with all the requirements of the Tender. In addition, the Appellant contended that having worked with the Respondent in the previous contract and the fact that its tender was found to be substantially responsive, the Respondent ought to have invited it for negotiations. In ascertaining the validity of the Appellant's argument in this regard, the Appeals Authority revisited Regulation 225(1) of the Regulations. The Appeals Authority observed that the regulation allows procuring entities to decide whether or not to conduct negotiations. Therefore, this implies that negotiations would only be conducted if a procuring entity decides to do so.

The record of this Appeal indicates that having determined that tenderers' prices were above the estimated budget, the Respondent decided to re-advertise the Tender. Thus, if the Respondent intended to conduct negotiations, it would have done so prior to rejecting all the tenders and to re-advertise the same. In addition, Regulation 225(5) requires negotiations to be conducted with the lowest evaluated



tenderer and not by considering the relationship that existed between a tenderer and the procuring entity. The fact that the Appellant executed the contract with the Respondent cannot be the basis for the Appellant to be invited for negotiations. In view of the above observations, the Appeals Authority rejects the Appellant's proposition in this regard.

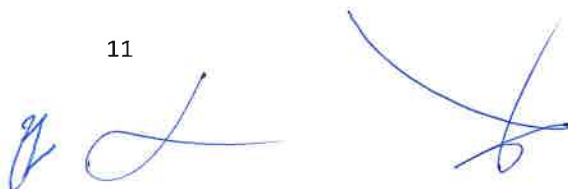
The Appeals Authority further considered the Appellant's contention that the Respondent introduced a new ground for its disqualification when issuing its decision on the Appellant's application for administrative review. The Respondent on its part stated that the alleged new ground was just a by the way and was not a basis for its decision. The actual reason for the Appellant's disqualification was having a higher price than the Respondent's estimated budget. Having observed that the Respondent withdrew the new reason for the Appellant's disqualification as contained in its Statement of Reply and the decision on the application for administrative review, the Appeals Authority would not delve into this point.

In view of the above findings that the Appellant's price was higher than the Respondent's estimated budget, the Appeals Authority finds the Respondent act of disqualifying the Appellant to be proper in law as per Section 59(1) and (2)(d) of the Act read together with Regulation 16(2)(e) of the Regulations and Clause 13 of the ITT.

Given the circumstances, the Appeals Authority answers the first issue in the affirmative.

2.0 What reliefs if any are the parties entitled to?

Taking cognizance of the findings hereinabove, the Appeals Authority hereby dismiss the Appeal and allows the Respondent to proceed with the Tender process.

The page contains two handwritten signatures in blue ink. The signature on the left is a cursive, flowing script. The signature on the right is more stylized, featuring a large, sweeping loop that crosses over itself.

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 Appellant and in the absent of the Respondent though dully notified this 1st day of September 2023.

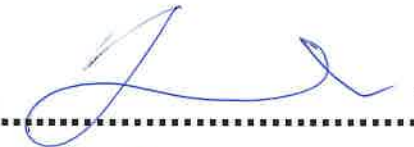
HON. JUSTICE (rtd) SAUDA MJASIRI



.....
CHAIRPERSON

MEMBERS: -

1. MS. NDEONIKA MWAIKAMBO.....



2. DR. WILLIAM KAZUNGU.....

