

IN THE PUBLIC PROCUREMENT APPEALS AUTHORITY

APPEAL CASE NO. 17 OF 2023-24

BETWEEN

M/S KGG INVESTMENT LTD.....APPELLANT

AND

RURAL WATER SUPPLY AND SANITATION

AGENCY - KATAVI.....RESPONDENT

DECISION

CORAM

- | | |
|-------------------------------------|---------------|
| 1. Hon. Justice (rtd) Souda Mjasiri | - Chairperson |
| 2. Mr. Pius Mponzi | - 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. Richard Mlay | - Managing Director |
| 2. Mr. James Kasusura | - Advocate - Kasubagi Attorney |

 1

FOR THE RESPONDENT

1. Mr. Edwin Bantulaki - State Attorney - RUWASA
2. Ms. Regina Kazimili - Procurement Officer - RUWASA

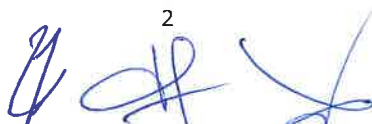
This Appeal was lodged by **M/S KGG Investment Ltd** (hereinafter referred to as "**the Appellant**") against the **Rural Water Supply and Sanitation Agency - Katavi** commonly known by its acronym as "**RUWASA**" (hereinafter referred to as "**the Respondent**"). The Appeal is in respect of Tender No. AE-102/2022-2023/KTV/W/02 for Construction of Treatment Plant and Raising Main at Nsenkwa Dam at RUWASA Mlele (hereinafter referred to as "**the Tender**").

The background of this Appeal may be summarized from the documents submitted to the Public Procurement Appeals Authority (hereinafter referred to as "**the Appeals Authority**") 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 25th June 2023, the Respondent through the Tanzania National electronic Procurement System (TANePS) invited eligible tenderers to participate in the Tender. The deadline for submission of tenders was 10th July 2023. On the deadline, the Respondent received six tenders including that of the Appellant.

2



The received tenders were subjected to evaluation which was conducted into three stages namely; preliminary, technical and financial evaluation. At the preliminary evaluation stage, all tenders were found to be eligible and subjected to technical evaluation. At the technical evaluation stage, three tenders were disqualified for being non-responsive to the requirements of the Tender. The remaining three tenders were subjected to financial evaluation. After completion of the evaluation process, the Evaluation Committee recommended award of the Tender to the Appellant at the contract price of Tanzania Shillings Two Billion Nine Hundred Forty Nine Million Nine Hundred Eighty Seven Thousand Nine Hundred Fifty One and Two Cents only (2,949,987,951.02) VAT inclusive.

The record of Appeal indicates that the evaluation report was submitted to the Procurement Management Unit (PMU) for review. After completion of the review process, the PMU recommended to the Tender Board that the Appellant who has been proposed for award had quoted a higher price compared to other tenderers. Therefore, the PMU recommended that the award be made to M/S AMTEC Consulting Co. Ltd which was the lowest evaluated tenderer. The recommended contract price was Tanzania Shillings Two Billion Four Hundred Ninety Four Million Three Hundred Twenty One Thousand Six Hundred Ninety Nine and Eighty Cents only (2,494,321,699.80) VAT inclusive. The PMU recommendations were submitted to the chairperson of the Tender Board through a letter dated 9th August 2023.



According to the Respondent, the Tender Board at its meeting held on 9th August 2023, deliberated and disapproved the award to the Appellant for the reason that it lacked the requisite experience. Thus, the Tender Board directed that the tenders be re-evaluated.

The record of Appeal indicates that the tenders were re-evaluated as ordered by the Tender Board. The re-evaluation report indicates that five tenders including that of the Appellant were disqualified at the technical evaluation stage for failure to comply with experience requirement. M/S Deep Construction Ltd was found to have complied with all the requirements of the Tender and was recommended for award. The recommended contract price was Tanzania Shillings Two Billion Seven Hundred Seven Million Seven Thousand Four Hundred Twenty Six and Twenty Cents only (2,707,007,426.20) VAT inclusive.

According to the Respondent, the Tender Board approved the recommendation as proposed by the Evaluation Committee. The PMU through a letter dated 12th August 2023, informed the Respondent's Regional Manager that the Tender Board deliberated and approved the award to M/S Deep Construction Ltd. The approved contract price was Tanzania Shillings Two Billion Seven Hundred Seven Million Seven Thousand Four Hundred Twenty Six and Twenty Cents only (2,707,007,426.20) VAT inclusive.

On 24th August 2023, the Respondent post-qualified M/S Deep Construction Ltd and found it to be eligible for award of the Tender. According to the Respondent, the post-qualification findings were approved by the Tender

4



Board. The Tender Board also approved award of the Tender to M/S Deep Construction Ltd.

On 11th September 2023, the Respondent issued the Notice of Intention to award which informed tenderers that the Respondent intends to award the Tender to M/S Deep Construction Ltd. The approved contract price was Tanzania Shillings Two Billion Seven Hundred Seven Million Seven Thousand Four Hundred Twenty Six and Twenty Cents only (2,707,007,426.00) VAT inclusive. The Notice also informed the Appellant that its tender was disqualified for failure to attach contracts of similar nature which demonstrated its experience.

Dissatisfied with its disqualification, on 13th September 2023, the Appellant applied for administrative review to the Respondent challenging its disqualification. On 14th September 2023, the Respondent issued its decision which dismissed the Appellant's application for administrative review. Aggrieved further, on 18th September 2023, the Appellant filed this Appeal to the Appeals Authority.

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

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

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

5



SUBMISSIONS BY THE APPELLANT

The Appellant's submissions were made by Mr. James Kasusura, learned advocate. He commenced his submissions on the first issue by stating that on 25th June 2023 the Respondent through TANePS invited the registered civil contractors under class V and above to participate in the Tender. The Appellant was amongst the tenderers that responded to the invitation by submitting its tender. The deadline for submission of tenders was on 10th July 2023 and thereafter the tenders were opened as scheduled.

The learned counsel submitted that on 13th September 2023, the Appellant received through email the Notice of Intention to award the Tender. The Notice indicated that the Respondent intends to award the Tender to M/S Deep Construction Ltd. In addition, the Appellant was informed that its tender was disqualified for failure to attach contracts that demonstrated experience in construction of water treatment plant.

The learned counsel contended that the Appellant had the required experience in construction of water treatment plant. Contracts for demonstrating such experience were duly attached to its tender submitted on TANePS. The learned counsel elaborated that the attached contracts confirmed clearly that the Appellant has experience in construction of water works projects which included construction of water treatment plant.

The learned counsel submitted that the reason given for the Appellant's disqualification contravened the Contractors Registration Act No. 17 R.E 2019. The referred Act does not provide for a registration category which relates to construction of water treatment plant. The Act recognizes the

6



registration category that relates to water works which includes water treatment plant. Expounding his argument on this point, the learned counsel stated that the proposed successful tenderer, M/S Deep Construction Ltd, also lacked the requisite experience. It does not possess the registration certificate from the Contractors Registration Board which allows it to execute works relating to construction of water treatment plant.

The learned counsel stated further that during the evaluation process, it was notified through a mobile phone that its tender had arithmetic errors. The observed errors led the original quoted price of TZS 2,886,036,529.12 to change to TZS 2,949,987,951.02. This act implied that the Appellant's tender complied with the eligibility and technical requirements. Thus, its tender was subjected to financial evaluation. Based on this fact, the learned counsel contended that if the Appellant's tender reached the financial evaluation stage, how was it later on considered to have failed to comply with technical requirements. Had the Appellant been disqualified at the technical evaluation stage, its quoted price could not have been subjected to financial evaluation that led to correction of errors. Thus, the Appellant doubts if its disqualification from the Tender process was justified, the learned counsel contended.

The learned counsel submitted that, it managed to have access to the first evaluation report. Table 3b of the said evaluation report indicated that the Appellant's tender was found responsive and was recommended for award. The evaluation report indicated that the Appellant was recommended for award after it was found that its quoted price was within fifteen percent (15%) of the Respondent's engineers' estimates. According to Table 3b of

7



the first evaluation report, the Appellant's price had 13.31% which was within 15% of the engineers' estimates. Thus, the Evaluation Committee recommended it for award of the Tender.

The learned counsel submitted that Section 74(4) and (5) of the Act, requires that after completion of the evaluation process, the evaluation report should be submitted to the PMU for review and recommendations. Section 75 of the Act requires recommendations of the PMU to be tabled before the Tender Board for deliberations and decision. The learned counsel contended that the Tender Board may either approve or reject the recommendations. The decision of the Tender Board has to be uploaded on TANePS. To the contrary, in the Tender under Appeal, the Tender Board decision was not uploaded on TANePS. Thus, denying the Appellant the right to know the status of the Tender.

The learned counsel stated that the Respondent claimed to have re-evaluated the tenders using the same Evaluation Committee which evaluated the tenders in the first round. Amazingly, the Evaluation Committee came up with different findings which disqualified the Appellant's tender. The Appellant failed to comprehend the Evaluation Committee's conduct on the second round of the evaluation process. That is, how could the same evaluation team come up with a different finding from the first evaluation report while the reviewed information in the two rounds of evaluations were the same. Based on the Evaluation Committee's conduct, the Appellant believed that its disqualification from the Tender process was led by ill motive that amounted to injustice.

8



The learned counsel stated further that during the first evaluation process, it was notified through mobile phone that its tender had arithmetic errors. These were corrected and the original quoted price adjusted from TZS 2,886,036,529.12 to TZS 2,949,987,951.02. Thus, this meant that the Appellant's tender complied with eligibility and technical requirements. Surprisingly, the Respondent's reason that disqualified the Appellant's tender is under the technical evaluation stage. Hence, if the Appellant was disqualified at that stage, its quoted price could not have been corrected.

The learned counsel concluded his submissions by stating that based on the Respondent's conduct in this Tender the Appellant's disqualification was unfair and unreasonable leading to injustice.

On the second issue the learned counsel prayed for the following orders: -

- i. The Tender process be reviewed and award be made to the Appellant;
- ii. Any other order the Appeals Authority may deem fit and just to grant.

REPLY BY THE RESPONDENT

The Respondent's submissions were made Mr. Edwin Bantulaki, learned State Attorney from the Respondent's office. He commenced his submissions on the first issue by stating that the Respondent floated the Tender through TANEPS and all criteria for evaluating tenders were provided in the Tender Document. The learned State Attorney submitted that the Appellant was among the tenderers which participated in the Tender. After the tender opening, the received tenders were subjected to evaluation. After completion of the evaluation process, the Evaluation

9



Committee found the Appellant's tender to be successful. Therefore, it recommended the award of the Tender to the Appellant.

The learned State Attorney submitted that the evaluation report was submitted to PMU for review. The PMU observed that the Appellant's quoted price of TZS 2,949,987,951.02 was higher compared to the quoted price of TZS 2,494,321,699.80 by M/S AMTEC Consulting Co. Ltd. Therefore, the PMU recommended that award be made to M/S AMTEC Consulting Co. Ltd as it was the lowest evaluated tenderer. The PMU's recommendations were made in accordance with Section 74(5) of the Act. The learned State Attorney stated further that the PMU's recommendations were tabled before the Tender Board. After deliberations, the Tender Board ordered for re-evaluation of tenders in accordance with Section 53(3) of the Act. Thus, the Respondent's act in this regard was done in accordance with Section 75 (a) and (b) of the Act and Regulations 52(1) and 220(1) and (2) of the Regulations.

The learned State Attorney contended that during re-evaluation of tenders, the Appellant's tender was found to have not complied with Item 4.2 (a) of the Qualification and Evaluation Criteria. The referred criterion required tenderers to demonstrate their experience by attaching three recent performed contracts of similar nature to the Tender Document. In complying with such criterion, the Appellant attached three contracts of civil water project. Thus, the Appellant's tender was disqualified at the technical evaluation stage for failure to comply with the experience criterion.

The learned State Attorney stated that, after completion of the re-evaluation process M/S Deep Construction Ltd was found to be the lowest evaluated tenderer. Therefore, it was recommended for award of the Tender. Furthermore, he contended that the recommendations of the Evaluation Committee were approved by the Tender Board subject to post-qualification. The learned State Attorney stated that post-qualification was carried out to M/S Deep Construction Ltd. After completion of the post-qualification process, the firm was found eligible for award of the contract. Thereafter, the Tender Board approved the award to it. Thus, the Tender process was conducted in accordance with the requirements of the law. Hence, the Appellant was fairly disqualified, the learned State Attorney contended.

The learned State Attorney submitted further that the Appellant has indicated when making submissions in chief that the Appellant is in possession of the first evaluation report. The learned State Attorney contended that Regulation 200(1) of the Regulations prohibits evaluation report and any other information relating to evaluation of tenders to be communicated to tenderers or any other person not officially concerned with the Tender process, prior to communication of the award. The learned State Attorney submitted that the Appellant's act of possessing the first evaluation report prior to communication of award implies that it had used an informal means of obtaining the same from the Respondent's office. The learned State Attorney urged the Appeals Authority to seriously consider the Appellant's conduct in this regard and take appropriate measures thereof.

In relation to the Appellant's contention that correction of errors on its quoted price that was communicated to it through mobile phone implied that its tender reached financial evaluation stage. The learned State Attorney stated that during the re-evaluation of tenders the Appellant's tender was disqualified at the technical evaluation stage. The Respondent denied to have made correction of errors on the Appellant's quoted price by communicating to it through mobile phone. The learned State Attorney submitted that Regulation 12 of the Regulations requires all communications between tenderers and procuring entities during procurement process to be in writing or in an electronic form which provides record of the contents of the communication. Thus, the Appellant's contention in this regard is baseless.

Regarding the Appellant's contention that after it filed an application for administrative review, the Respondent ought to have invited it for discussion and arbitration. The learned State Attorney submitted that Section 96 of the Act provides for procedures to be followed by the procuring entity after receipt of the application for administrative review from a tenderer. The provision does not allow discussion or arbitration with a tenderer rather it requires the procuring entity to determine the submitted complaint as per the provided procedures.

On the second issue the learned State Attorney prayed for the following orders: -

- i. That M/S Deep Construction Ltd be awarded the Tender as it was the only tenderer that complied with the evaluation criteria; and

 12

- ii. A declaration that the Appellant failed to comply with the experience criterion and therefore its disqualification is justified.

ANALYSIS BY THE APPEALS AUTHORITY

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

In resolving this issue, the Appeals Authority reviewed the Notice of Intention to award. It observed that the Appellant's tender was disqualified for failure to comply with the experience requirement. In ascertaining if the reason given for disqualification of the Appellant's tender was justified, the Appeals Authority reviewed the Tender Document. It observed that Item 4.0, 4.1 and 4.2 of Section IV – Qualification and Evaluation Criteria provide guidance on the required experience for this Tender. Item 4.0, 4.1 and 4.2 read as follows: -

"4.0 Experience

4.1 (a) Construction Experience

Construction contracts in the role of prime contractor, JVCA member, subcontractor, or management contractor for at least the last 3 years, starting 1st January 2019.

4.2 (a) Specific Construction & Contract Management Experience

(i) A minimum number of similar contracts specified below that have been satisfactorily and substantially completed as a prime contractor, JVCA member,

management contractor or sub-contractor between 1st January 2019 and application submission deadline: (i) 3 contracts, each of minimum value Tshs 66,000,000/=."

(Emphasis supplied)

The above quoted provisions require tenderers to demonstrate their experience by submitting three contracts of similar nature. The submitted contracts should be those entered from 1st January 2019 up to the deadline for submission of tenders. Each contract should have a value of Tanzania Shillings 66,000,000.00.

In substantiating if the Appellant complied with the experience criterion, the Appeals Authority reviewed its tender on TANEPS. It observed that at the slot where it was required to attach three contracts of similar nature, the Appellant attached various contracts, some of them are listed as follows: -

- i. Contract No. AE.102/2021-2022/PWN/W/27 for Construction of Water Supply project at Kinvinja Village in Kibiti District, with a value of TZS 1,374,672,497.85. The contract was signed on 15th July 2022.
- ii. Contract No. AE-102/2021-22/TAG/W/44 for Construction of Water Supply project at Mronzo Village in Pangani District Council, with a value of TZS 825,587,254.56. The contract was signed on 18th May 2022.
- iii. Contract No. 102/2021-2022/SGD/W/04 for Construction of Minyinga, Sakaa and Mkunguakiendo Water Supply Scheme in



Ikungi District with a value of TZS 999,593,791.00. The contract was signed on 5th August 2022.

- iv. Contract No. AE.102/2021-2022/PWN/W/20 for Construction of Water Supply project at Chumbi Village in Rufiji District, with a value of TZS 599,746,314. The contract was signed on 24th March 2022.

The above listed contracts were entered between the Appellant and RUWASA on various water projects. Having reviewed the contracts attached to the Appellant's tender, the Appeals Authority observed that all relate to construction of water project. However, the Tender under Appeal relates to construction of a water treatment plant.

During the hearing Members of the Appeals Authority required parties to clarify the difference between construction of water project and water treatment plant. In response thereof, the Appellant stated that there is no difference between the two as all involve construction of water projects. The Appellant expounded that water projects encompass a range of activities including construction of water treatment plant. Therefore, a tenderer with experience in water project would also be able to execute works relating to construction of water treatment plant. The Respondent on its part stated that construction of water treatment plant is different from other water projects. Thus, in this tender it was indicated specifically that tenderers were required to demonstrate their experience relating to the Tender. Since the Tender is for construction of water treatment plant, the required experience should relate to it.

In view of the above, the Appeals Authority is of the settled view that tenderers were required to prove their experience in executing projects similar to the Tender under Appeal. Having reviewed the Appellant's submitted contracts, the Appeals Authority is of the firm view that the same did not comply with the experience requirement as provided in the Tender Document. The Appellant's attached contracts related to construction of water projects while the Tender under Appeal relates specifically to construction of a water treatment plant.

The Appeals Authority considered the Appellant's contention that the proposed successful tenderer, M/S Deep Construction Ltd also lacked the requisite experience. In ascertaining the validity of the Appellant's contentions in this regard, the Appeals Authority reviewed the tender submitted by M/S Deep Construction Ltd on TANEPS. It observed that at the slot where it was required to attach contracts for demonstrating experience, it attached several documents. Among the attached documents there was a certificate of completion issued by AVICL indicating that M/S Deep Construction Ltd had successfully completed the sub contracting work. There was no contract attached to support the issued certificate. In addition, the value of the subcontract works was not disclosed. Other documents attached in that particular slot were not demonstrating experience in construction of a water treatment plant and they related to construction of water projects.

During the hearing Members of the Appeals Authority required the Respondent to clarify the basis of intending to award the Tender to M/S Deep Construction Ltd. This was due to the failure of the firm to submit

three recent contracts with a value of Tanzania Shillings 66,000,000.00 as required by Item 4.2 (a)(i) of Section IV – Qualification and Evaluation Criteria. In response thereof, the Respondent conceded that M/S Deep Construction Ltd did not comply with the criterion requirement as specified in the Tender Document. However, during post-qualification M/S Deep Construction Ltd was found to have experience in construction of water treatment plant. Thus, the Respondent decided to award it the Tender.

In view of the above observations, the Appeals Authority is of the settled view that the Respondent ought to have equally disqualified M/S Deep Construction Ltd for failure to comply with the experience requirement. The Appeals Authority finds the Respondent's act of intending to award the Tender to M/S Deep Construction Ltd while the firm lacked the requisite experience to have contravened Regulation 206(2) of the Regulations. The referred Regulation requires a tender which is not responsive to the requirements of the Tender Document to be rejected. Regulation 206(2) of the Regulations reads as follows: -

"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 added)

Notwithstanding the above, the Appeals Authority noted with concern the award proposal contained in the first evaluation report. The award proposal indicated that award was to be based above or below fifteen percent (15%) of the engineers' estimates. The Appeals Authority is of the

17


view that since the Tender is for construction of water treatment plant, award was to be made to the lowest evaluated tenderer as required by Regulation 212(a) of the Regulations which reads as follows:-

"212. The successful tender 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."

The Appeals Authority considered the Appellant's contention that since its tender was found successful and being recommended for award in the first evaluation report, it should have been awarded the Tender. The Appeals Authority observed that despite its non-compliance with experience requirement, its quoted price was higher compared to the price quoted by other tenderers. Thus, it was not eligible for award.

Regarding the Appellant's act of possessing the Evaluation Report, the Appeals Authority finds the Appellant to have contravened Regulation 200(1) of the Regulations which prohibits tenderers from having information relating to evaluation, clarification and comparison of tenders before award of the contract. Regulation 200(1) of the Regulations reads as follows: -

"200.(1) An information relating to the examination, tabulation, clarification, evaluation and comparison of tenders and recommendations concerning the intention

to award of the contract shall not, before the announcement of the award of contract to the successful tenderer, be disclosed or communicated to tenderers or any person or persons not officially concerned with such process."

In view of the above quoted provision, the Appeals Authority noted with concern the Appellant's act of possessing the first evaluation report. This raises a concern on the conduct of both the Respondent and the Appellant.

The Appeals Authority considered the Appellant's argument that after it filed its application for administrative review to the Respondent, it ought to have been invited for discussion and arbitration. The Appeals Authority observes that Section 96 of the Act requires a procuring entity, after it received an application for administrative review, to determine the same by reviewing the available documents only. It is evident from Section 96 of the Act that there is no room for discussion or arbitration. Thus, the Appeals Authority rejects the Appellant's contention in this regard.

Under the circumstances, the Appeals Authority concludes the first issue in the affirmative that the Appellant's disqualification was justified.

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

Taking cognizance of the findings hereinabove, the Appeals Authority partly allows the Appeal to the extent that the award proposed to M/S Deep Construction Ltd was not justified. Given the above findings the Appeals Authority nullifies the proposed award of the Tender to M/S Deep

Construction Ltd and orders the Respondent to re-start the Tender process in observance of the law.

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 26th day of October 2023.

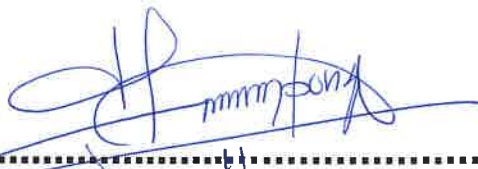
HON. JUSTICE (rtd) SAUDA MJASIRI



CHAIRPERSON

MEMBERS: -

1. MR. PIUS MPONZI.



2. DR. WILLIAM KAZUNGU.

