

IN THE PUBLIC PROCUREMENT APPEALS AUTHORITY

APPEAL CASE NO. 32 OF 2023 - 2024

BETWEEN

M/S SINOTEC - HWCEB JV.....APPELLANT

AND

MWANZA URBAN WATER SUPPLY AND

SANITATION AUTHORITY.....RESPONDENT

RULING

CORAM

- | | |
|-------------------------------------|---------------|
| 1. Hon. Justice (rtd) Sauda Mjasiri | - Chairperson |
| 2. Eng. Stephen Makigo | - Member |
| 3. Mr. Pius Mponzi | - 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 |
| 4. Mr. Venance Mkonongo | - Legal Officer |



FOR THE APPELLANT

- | | |
|-----------------------------|------------------------------------|
| 1. Mr. Benedict Chang'ambwe | - Advocate, Jamhuri & Co. Advocate |
| 2. Mr. Benson Vedasto | - Advocate, Jamhuri & Co. Advocate |
| 3. Mr. Zhang Jianguang | - Legal Representative |
| 4. Mr. Ragha Arkasali | - Marketing Manager |

FOR THE RESPONDENT

- | | |
|-------------------------|---|
| 1. Mr. Oscar Twakazi | - State Attorney |
| 2. Mr. Celestine Mahubi | - Project Manager |
| 3. Mr. Emmanuel Janga | - Director of Procurement
Management Unit (DPMU) |

This Appeal was lodged by **M/S SINOTEC - HWCEB JV** (hereinafter referred to as "**the Appellant**") against **Mwanza Urban Water Supply and Sanitation Authority** commonly known by its acronym as "**MWAUWASA**" (hereinafter referred to as "**the Respondent**"). The Appeal is in respect of Tender No. MWAUWASA/LVWATSAN/AFD/WSS/1A/001/2023 for Water Supply Systems for Buhongwa, Kishiri, Kisesa and Usagara Wards in Mwanza City and Neighbouring areas, Stage 1A: Construction of Pump Stations, Transmission Mains and Reservoirs (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: -



On 21st August 2023, the Respondent through the Daily News Newspaper invited eligible tenderers to participate in the Tender. The deadline for submission of the tenders was set on 17th October 2023. Nevertheless, it was extended up to 31st October 2023. On the deadline, the Respondent received eleven tenders including that of the Appellant.

The received tenders were subjected to evaluation. After completion of the evaluation process, the Evaluation Committee recommended award of the Tender to M/S Sinohydro Corporation Ltd - HLBD joint venture. The recommended contract price was Euro Eighteen Million Four Hundred Ninety Four Thousand Three Hundred Seventy Nine Cents Eighty Two only (Eur 18,494,379.82) VAT exclusive. The Tender Board at its meeting held on 22nd December 2023, deliberated and approved the award of the Tender as recommended by the Evaluation Committee.

On 23rd December 2023, the Respondent issued the Notice of Intention to award the Tender. The Notice informed tenderers that the Respondent intends to award the Tender to M/S Sinohydro Corporation Ltd - HLBD joint venture. The proposed contract price was Euro Eighteen Million Four Hundred Ninety Four Thousand Three Hundred Seventy Nine Cents Eighty Two only (Eur 18,494,379.82) VAT exclusive. The Notice also informed the Appellant that its tender was disqualified for failure to provide manufacturers' authorization, technical brochures and details of major materials and equipment as required by the Tender Document.



Dissatisfied with the reasons given for its disqualification, on 29th December 2023, the Appellant applied for administrative review to the Respondent. On 3rd January 2024, the Respondent issued its decision which dismissed the Appellant's application for administrative review. The Respondent's decision was received by the Appellant on 5th January 2024. According to the Appellant, it noted that the Respondent's decision contained new reasons for its disqualification. Consequently, on 8th January 2024 through a letter dated 5th January 2024 the Appellant submitted another application for administrative review to the Respondent. On 15th January 2024 through a letter with reference No. SINOTECH-HWCEB-B-CLA-0115, the Appellant reminded the Respondent to determine the second application for administrative review submitted by it. Having not received any response from the Respondent, the Appellant on 23rd January 2024 filed this Appeal to the Appeals Authority.

When the matter was called on for hearing, the Appeals Authority *suo motu* brought to the attention of the parties that there was a point of law to be determined. The point of law relates to the limitation of time in filing of an Appeal in line with the requirements of Section 97(1) and (2) of the Public Procurement Act, No. 7 of 2011 as amended (hereinafter referred to as "**the Act**"). Given this observation, the following issues were framed: -

- 1.0 Whether the Appeal is properly before the Appeals Authority;**
- 2.0 Whether the disqualification of the Appellant's tender was justified; and**
- 3.0 What reliefs, if any, are the parties entitled to?**



SUBMISSIONS BY THE APPELLANT

The Appellant's submissions were made by Mr. Benedict Chang'ambwe, learned advocate. He commenced his submissions on the first issue by stating that on 23rd December 2023, the Appellant received the Notice of Intention to award the Tender from the Respondent. The Notice informed the Appellant that its tender was disqualified for failure to submit manufacturers' authorization, technical brochures and details of major materials and equipment as required by the Tender Document. Dissatisfied with the reasons given for its disqualification, on 29th December 2023, the Appellant applied for administrative review to the Respondent. On 5th January 2024, the Appellant received the Respondent's decision on its application for administrative review.

The learned counsel contended that the Respondent's decision contained new grounds for the Appellant's disqualification. Being aggrieved with the new reasons given for its disqualification, the Appellant submitted a second application for administrative review to the Respondent. The said application was submitted to the Respondent on 8th January 2024 through a letter dated 5th January 2024. Having not received any decision thereof, the Appellant through a letter dated 15th January 2024 reminded the Respondent about its second application for administrative review. However, there was no response from the Respondent. On 23rd January 2024, the Appellant filed this Appeal to the Appeals Authority in compliance with the requirements of Section 97(2)(a) of the Act.



The learned counsel submitted further that, the Respondent's failure to issue its decision on the Appellant's second application for administrative review portrays that it deliberately intended to disqualify the Appellant from the Tender process. He asserted that the Respondent's act in this regard contravened Section 96(6) of the Act. The referred provision requires the Respondent's accounting officer to issue its decision within seven working days from the date the application for administrative review is filed.

In view of these submissions, the learned counsel stated that the Appeal is properly before the Appeals Authority. He urged the Appeals Authority to consider the substantive merits of the Appeal.

On the second issue, the learned counsel submitted that, the Respondent's act of disqualifying the Appellant on new grounds which were not provided under Clause 11.1 (i) of the Instructions To Bidders (**ITB**) as modified by Clause 11.1 (vi) of the Bid Data Sheet (**BDS**) contravened the requirements of Section 4A(3) of the Act. He elaborated that the Appellant submitted the manufacturers' authorization for major materials and plant as required so its tender complied with the requirements of Clause 11.1 (vi) of the BDS. The learned counsel elaborated that in complying with the manufacturers' authorization requirement, the Appellant mistakenly submitted a document titled "Power of Attorney" instead of "Manufacturers Authorization". Nonetheless, the information contained in the referred Powers of Attorney indicated that the Appellant has been authorized to



submit the required materials for the Tender. Thus, the submitted Power of Attorney served the same purpose as the manufacturers' authorization, save for the heading of the letter that was mistakenly written.

The learned counsel expounded that the anomaly by the Appellant of naming the manufacturers' authorization as Power of Attorney cannot be considered as a material deviation. Further, it could not have led to the disqualification of the Appellant from the Tender process. The said anomaly would not have affected the scope, quality or performance of the works as provided under Clause 29.2(a)(i) of the ITB. The learned counsel contended that this oversight could have been considered as a minor deviation as per the requirements of Regulation 207(2)(b) of the Public Procurement Regulations, GN. No. 446 of 2013 as amended (hereinafter referred to as "**the Regulations**").

The learned counsel stated further that the Respondent ought to have sought for clarification from the Appellant in compliance with Clause 27.1 of the ITB and Regulation 207(1) of the Regulations. The Respondent could have also contacted the issuer of the Power of Attorney so as to verify if the Appellant has been authorized to supply the itemized materials. The Respondent's verification process could be done in accordance with Regulation 124 of the Regulations. However, the Respondent neither sought clarification from the Appellant nor contacted the manufacturer.

The learned counsel contended that Clause 11.1(vi) of the BDS did not require the manufacturers' authorization to be signed or stamped by the



issuer. He further stated that the Tender Document did not provide a format of the required manufacturer's authorization. Thus, in the absence of the specific format of the required manufacturers' authorization, the Appellant should not have been disqualified from the Tender process, he asserted.

In support of his argument on this point, the learned counsel cited the case of ***Yohana Musa Makubi and Another versus Republic***, Criminal Appeal No. 556 of 2015, Court of Appeal of Tanzania (unreported), on page 80. In the referred case, the court stated that it was not proper to disregard the appellant's claim due to lack of a stamp. The signature contained therein signifies the authenticity of the disputed document.

The learned counsel stated further that the Respondent was required to conduct the evaluation process as per Regulation 203(1) of the Regulations. The referred provision requires evaluation of tenders to be in accordance with the terms and conditions which are explicitly provided in the Tender Document. Since the requirement that a manufacturers' authorization should be signed and stamped was not explicitly provided in the Tender Document, the same ought not to be the basis for the Appellant's disqualification, the learned counsel contended.

The learned counsel asserted that in complying with the requirements of the Tender, the Appellant submitted additional documents which included a supplier introduction, business license, production license, ISO Certificate, products specification catalogue, CCC compulsory products certificate and



national compulsory product test report. According to the Appellant, the additional documents were submitted for the purpose of giving the Respondent more information about the manufacturers and their products. The learned counsel contended that in view of the availability of other manufacturers information, the absence of the manufacturers' authorization should not have led to the disqualification of the Appellant. The Respondent should have waived the Appellant's non-conformity as per the discretion vested under Clause 30 of the ITB.

The learned counsel submitted that the Respondent intends to award the Tender to the proposed successful tenderer who has a higher price of Euro Eighteen Million Four Hundred Ninety Four Thousand Three Hundred Seventy Nine Cents Eighty Two (Eur 18,494,379.82) compared to the Appellant's of Euro Seventeen Million Nine Hundred Eighty One Thousand Eight Hundred Ninety Four Cents Sixteen (Eur 17,981,894.16). The difference in price of the two firms is Euro 512,485.66. Thus, the Respondent ought to have considered the Appellant's price over that of the proposed successful tenderer.

Finally, the Appellant prayed for the following orders: -

- i. A declaration that the evaluation proceedings in respect of the Tender is null and void for having considered criteria that were not provided in the Tender Document;
- ii. A declaration that the Appellant was wrongly disqualified from the Tender process;



- iii. Re-evaluation of the Tender in compliance with the criteria provided in the Tender Document;
- iv. Compensation of all legal expenses involved in the Appeal;
- v. Payment of transport costs incurred by the Appellant in attending the Appeal; and
- vi. Award of the Tender to the Appellant in the event the Appeal succeeds.

REPLY BY THE RESPONDENT

The Respondent's submissions were made by Mr. Oscar Twakazi, learned State Attorney. He commenced his submissions on the first issue by stating that the Appeal is improperly before the Appeals Authority for being filed out of the prescribed time under the law. The learned State Attorney submitted that the Respondent's decision on the Appellant's application for administrative review was issued through a letter dated 3rd January 2024. The decision was communicated to the Appellant on 5th January 2024. Had the Appellant been dissatisfied with the Respondent's decision; it ought to have filed its Appeal within seven working days as required by the law. However, the Appellant filed this Appeal on 23rd January 2024 out of the prescribed time limit.

The learned State Attorney contended that the Respondent's letter dated 3rd January 2024 was a decision capable of being appealed against by the Appellant as it complied with the requirements of Section 96(6) of the Act. To the contrary, the Appellant submitted a second application for



administrative review to the Respondent. The learned State Attorney stated that the Appellant's second application for administrative review was null and void as it is not recognized under the governing law. Therefore, he prayed that the Appeal be dismissed for being improperly before the Appeals Authority.

On the second issue, the learned State Attorney submitted that the Tender was conducted under the International Competitive Tendering method and all eligible tenderers were invited to participate in the Tender. On the deadline for submission, the Respondent received eleven tenders. He elaborated that the received tenders were evaluated in accordance with the requirements of the Tender Document, the Act and its Regulations. After completion of the evaluation process, M/S Sinohydro Corporation Ltd - HLBD joint venture was found to be the lowest evaluated tenderer. Therefore, it was recommended for award of the Tender.

The learned State Attorney submitted further that the Appellant was disqualified from the Tender process for failure to comply with the requirements of Clause 11.1(vi) of the BDS. The Appellant failed to submit manufacturers' authorization and technical brochures for major materials and plant (pipes and fittings, valves, meters, pumps and motors, control panels, transformers and power cables) as required under Clause 11.1 (vi) of the BDS. The said Clause contained the word "shall" which meant that tenderers were mandatorily required to submit manufacturers' authorization. He stated that in complying with the requirement of the



referred Clause, the Appellant submitted only one manufacturer's authorization for steel pipes from Tanzania Steel Pipes Ltd and Powers of Attorney for the remaining eight items. In view of this fact, the Appellant's tender was disqualified for failure to comply with the requirements of Clause 11.1(vi) of the BDS, the learned State Attorney contended.

The learned State Attorney added that, the Respondent did not issue new reasons for the disqualification of the Appellant from the Tender process as alleged. The reasons that disqualified the Appellant were clearly provided in the Evaluation Report. The same reasons were communicated to the Appellant through the Notice of Intention to award. In addition, when the Respondent issued its decision in respect of the Appellant's application for administrative review, the Respondent stated in detail the basis of the Appellant's disqualification. Therefore, the disqualification of the Appellant's tender complied with Regulation 206 of the Regulations. Hence, the evaluation process did not contravene Section 4A(3) of the Act as alleged by the Appellant.

On the contention that the Appellant's quoted price was lower to that of the proposed successful tenderer, the learned State Attorney stated that the law does not allow award of tender to the lowest quoted price. It, rather awards a tender to the lowest evaluated tenderer who is found to have complied with all the requirements of the Tender Document. Hence, the Appellant's tender did not to comply with requirement of Clause 11.1(vi) of the BDS, and was disqualified at the earliest stage. Thus, its



quoted price could not have been compared to other tenderers who were found to have complied with requirements of the Tender.

Finally, the Respondent prayed for the following orders: -

- i. The Appeal be dismissed outright for lack of merit; and
- ii. The Appellant to cover costs for transportation, meals and accommodation incurred by the Respondent in this Appeal;

ANALYSIS BY THE APPEALS AUTHORITY

1.0 Whether the Appeal is properly before the Appeals Authority

In resolving this issue, the Appeals Authority revisited Sections 96(1) & (6) and 97(1) and (2) (a) and (b) of the Act. These provisions provide guidance on the time limit for determination of complaints before the accounting officer and filing of an appeal to the Appeals Authority. Sections 96(1) & (6) and 97(1) and (2) (a) and (b) of the Act read as follows: -

"96(1) Any complaints or disputes 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.



(6) The accounting officer shall, within seven working days after the submission of the complaint or dispute deliver a written decision which shall: -

(a) State the reason for the decision; and

(b) If the complaint or dispute is upheld in whole or in part indicate the corrective measures to be taken.

97(1) A tenderer who is aggrieved by the decision of the accounting officer may refer the matter to the Appeals Authority for review and administrative decision.

(2) Where-

(a) the accounting officer does not make a decision within the period specified under this Act; or

(b) the tenderer is not satisfied with the decision of the accounting officer,

the tenderer may make a complaint to the Appeals Authority within seven working days from the date of communication of the decision by the accounting officer or upon the expiry of the period within which the accounting officer ought to have made a decision.

(Emphasis provided)

The above quoted provisions indicate clearly that the accounting officer is required to issue its written decision within seven working days from the



date of receipt of the tenderer's application for administrative review. If a tenderer is not satisfied with the procuring entity's decision a tenderer is required to file an Appeal to the Appeals Authority within seven working days from the date it receives the accounting officer's decision. Furthermore, if the accounting officer does not make a decision within the prescribed time under the Act, a tenderer is required to file an Appeal to the Appeals Authority within seven working days upon expiry of the period within which the accounting officer ought to have issued a decision.

In ascertaining if the Appeal has been lodged as per the requirements of the law, the Appeals Authority revisited the record of this Appeal. It observed that the Appellant received the Notice of Intention to award through a letter dated 23rd December 2023. The Appellant was dissatisfied with the reasons given for its disqualification as contained in the said Notice. It, therefore, filed an application for administrative review to the Respondent on 29th December, 2023. As per Section 96(4) of the Act, the application for administrative review was filed within seven working days.

On 3rd January 2024, the Respondent issued its decision in respect of the Appellant's application for administrative review. The Respondent's decision was received by the Appellant on 5th January 2024. The Appeals Authority observed that the Respondent's decision was issued within seven working days as per Section 96(6) of the Act.

The record of Appeal indicates further that after receipt of the Respondent's decision, the Appellant submitted a second application for



administrative review through a letter dated 5th January 2024 which was served to the Respondent on 8th January 2024. During the hearing of this Appeal the Appellant alleged that it submitted the second application for administrative review on the grounds that the Respondent's decision on the first application for administrative review, contained new reasons for the Appellant's disqualification to those stated in the Notice of Intention to award. The record of Appeal indicates that the Respondent did not reply to the Appellant's second application for administrative review. Consequently, the Appellant filed this Appeal on 23rd January 2024.

The Appeals Authority related the above sequence of events to the requirements of Section 97(2)(b) of the Act. It observed that, after receipt of the Respondent's decision on 5th January 2024 with respect to the first application for administrative review and being dissatisfied with the same, the Appellant ought to have lodged its Appeal to this Appeals Authority. Section 97(2)(b) of the Act requires a tenderer who is dissatisfied with the procuring entity's decision on the application for administrative review, to file its Appeal directly to this Appeals Authority. Counting from 5th January 2024 when the Appellant received the Respondent's decision with respect to its application for administrative review, the Appellant was required to file its Appeal by 17th January 2024. To the contrary, the Appellant filed its Appeal on 23rd January 2024, after a lapse of eleven working days.

The Appeals Authority considered the Appellant's contention that it submitted the second application for administrative review following the



Respondent's act of issuing a decision on its first application for administrative review that contained new grounds on the Appellant's disqualification to those stated in the Notice of Intention to award. Having considered the Appellant's contention in this regard, the Appeals Authority is of the firm view that, if the Appellant was dissatisfied with the Respondent's decision, it ought to have lodged its Appeal to the Appeals Authority. To the contrary, the Appellant submitted a second application for administrative review to the Respondent. In view of the requirements of Section 97(2)(b) of the Act, a tenderer who is dissatisfied with the accounting officer's decision, is required to file an appeal to the Appeals Authority. The provision does not allow a tenderer to file a second application for administrative review to the procuring entity.

Given the above position, the Appeals Authority is of the settled view that the Appeal is improperly before it for being filed contrary to the requirements of Section 97 (1) and (2) (b) of the Act.

Taking cognizance of the findings on the first issue, the Appeals Authority would not delve into the remaining issues. The Appeal is hereby dismissed with no order as to costs since the point of law was raised *suo motu* by the Appeals Authority. It is so ordered.

This Ruling 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 Ruling is delivered in the presence of the parties this 22nd day of February 2024.

HON. JUSTICE (rtd) SAUDA MJASIRI



.....
CHAIRPERSON

MEMBERS: -

1. ENG. STEPHEN MAKIGO.....

2. MR. PIUS MPONZI.....