

IN THE PUBLIC PROCUREMENT APPEALS AUTHORITY

APPEAL CASE NO. 37 OF 2023 - 2024

BETWEEN

M/S EFFECTIVE MODERNIZATION GROUP

COMPANY LIMITED.....APPELLANT

AND

TANZANIA GEOTHERMAL DEVELOPMENT

COMPANY LIMITED.....RESPONDENT

DECISION

CORAM

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| 1. Hon. Justice (rtd) Sauda 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. Agnes Sayi | - Senior Legal Officer |
| 3. Ms. Violet Limilabo | - Senior Legal Officer |
| 4. Mr. Venance Mkonongo | - Legal Officer |

FOR THE APPELLANT

- | | |
|--------------------------|-------------------------------|
| 1. Ms. Elizabeth Kagembe | - Advocate - MMT Law Chambers |
| 2. Mr. Safa Erzurumlugil | - Managing Director |
| 3. Mr. Washington John | - Operations Manager |



FOR THE RESPONDENT

- | | |
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| 1. Mr. John Ndumbaro | - State Attorney and Manager of Legal Affairs |
| 2. Mr. Zua Mgweni | - Ag. Manager of Procurement |
| 3. Mr. Fredy Moshi | - Accountant |
| 4. Ms. Sada Swahibu | - Legal Officer |
| 5. Mr. Rashid Ngaganda | - Human Resource Officer |
| 6. Ms. Oliver Paul | - Procurement Officer |

M/S Effective Modernization Group Company Ltd (hereinafter referred to as **"the Appellant"**) has lodged this Appeal against **Tanzania Geothermal Development Company Ltd** (hereinafter referred to as **"the Respondent"**). The Appeal is in respect of Tender No. PA/131/2022-2023/HQ/NC/10/02 for Provision of Catering Services for Ngozi Geothermal Drilling Program in Mbeya Region (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 as **"the Regulations"**).



The Respondent advertised the Tender through the Tanzania National electronic Procurement System (TANePS) on 22nd June 2023. The deadline for submission of tenders was set on 24th July 2023. On the deadline, the Respondent received thirteen tenders including that of the Appellant.

The received tenders were subjected to evaluation, which was conducted into three stages namely preliminary, technical and financial evaluation. During the preliminary evaluation stage ten tenders were disqualified for failure to comply with the requirements of the Tender. The remaining three tenders were subjected to technical evaluation stage. At this stage, two tenders including that of the Appellant were disqualified for being non-responsive to the requirements of the Tender. The remaining tender of M/S Ako Group Ltd was subjected to financial evaluation stage. After completion of the evaluation process, the evaluation committee recommended award of the Tender to M/S Ako Group Ltd. The recommended contract price was Tanzania Shillings Seven Hundred Sixty Nine Million Two Hundred and Two Thousand Three Hundred Fifty Two only (TZS 769,202,352.00) VAT inclusive.

The Tender Board approved the award of the Tender to M/S Ako Group Ltd as recommended by the Evaluation Committee through Circular Resolution No. 066 dated 21st February 2024. On 4th March 2024, the Respondent issued the Notice of Intention to award the Tender to the Appellant. The Notice informed the Appellant that, the Respondent intends to award the Tender to M/S Ako Group Ltd. In addition, the Notice stated that the Appellant's tender was not successful due to quoting a higher price compared to the proposed successful tenderer.

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Dissatisfied with the reasons given for its disqualification, on 13th March 2024 the Appellant applied for administrative review to the Respondent. On 18th March 2024, the Respondent issued its decision which dismissed the Appellant's application for administrative review. Aggrieved further, on 22nd March 2024 the Appellant lodged 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?

SUBMISSIONS BY THE APPELLANT

The Appellant's submissions were made by Ms. Elizabeth Kagembe, learned counsel. She commenced her submissions on the first issue by stating that the Notice of Intention to award the Tender indicated that the Appellant was disqualified for quoting a higher price compared to the lowest evaluated tenderer. The learned counsel submitted that the Respondent's decision in this regard was tainted with illegality as the Appellant quoted a price of TZS 656,000,000.00 which was lower to that of the proposed successful tenderer of TZS 769,202,352.00.

The learned counsel elaborated that the Appellant erroneously indicated the Tender price as Tanzania Shillings One Billion Six Hundred Fifty Six Million (TZS 1,656,000,000.00) in the Form of Tender uploaded on TANePS. However, the learned counsel claimed that the correct price was indicated in the Price Activity Schedule. Thus, the Respondent when



carrying out financial evaluation was required to consider the Appellant's detailed price in the Price Activity Schedule.

The learned counsel submitted further that after receiving the Notice of Intention to award and being dissatisfied with the reasons for its disqualification, on 13th March 2024 the Appellant filed an application for administrative review to the Respondent. On 18th March 2024, the Respondent issued its decision thereof which dismissed the Appellant's application for administrative review. Additionally, the Respondent stated that the Price Activity Schedule that provided a breakdown of the unit price was not attached to the Appellant's tender as contended. The learned counsel challenged the Respondent's position in this regard by insisting that the Appellant's quoted price was TZS 656,000,000.00 as indicated in the Price Activity Schedule.

The learned counsel stated that the Price Activity Schedule indicated a unit price of TZS 2,760,000.00 per day which is equivalent to TZS 656,000,000.00 per year. Thus, if during financial evaluation the Respondent had done a correction of arithmetic errors on the price quoted by the Appellant in the Price Activity Schedule, it would have realized that the price in the Appellant's Form of Tender was erroneously quoted. That means the Respondent would have been in a position to compare the price quoted by the Appellant and to that of the proposed successful tenderer. In so doing, the Respondent would have realized that the Appellant quoted a lower price to that of the proposed successful tenderer. Therefore, the Respondent would have recommended the Appellant for award of the Tender.



The learned counsel further challenged the decision of the Respondent's Accounting Officer for approving the resolution of the Tender Board which failed to adhere to the mandatory requirements of Item 10.5 and 16(1)(a) of the Guidelines for Evaluation of Tenders in Procurement of Goods, Works and Non-consultancy Services.

Finally, the Appellant prayed for the following orders: -

- i. The Appeals Authority to review the online system to ensure that the Price Activity Schedule was submitted by the Appellant;
- ii. Award of the Tender to the Appellant.

REPLY BY THE RESPONDENT

Mr. John Ndumbaro, learned State Attorney and Manager of Legal Affairs from the Respondent's office commenced his submissions on the first issue by stating that the Tender was advertised through TANEPS and by the deadline thirteen tenders were received including that of the Appellant. The learned State Attorney contended that the whole process of receiving and opening of tenders was done through TANEPS. There was no human intervention. He contended that the online Tender opening report indicates that the Appellant's quoted price was TZS 1,656,000,000.00 VAT inclusive.

The learned State Attorney elaborated that the received tenders were subjected to evaluation which was conducted as per the criteria set in the Tender Document. After completion of the evaluation process, M/S Ako Group Ltd emerged as the lowest evaluated tenderer. Its quoted price was Tanzania Shillings Seven Hundred Sixty Nine Million Two Hundred and Two Thousand Three Hundred Fifty Two only (TZS 769,202,352.00) VAT



inclusive. The Appellant was disqualified for quoting a higher price of Tanzania Shillings One Billion Six Hundred Fifty Six Million (TZS 1,656,000,000.00) VAT inclusive, the learned State Attorney contended.

The learned State Attorney contended further that the Tender was evaluated through TANEPS and there was no Price Activity Schedule that was submitted by the Appellant. The Appellant's contention that it submitted the Price Activity Schedule was an afterthought as the said document was not found on TANEPS. The learned State Attorney asserted that the Appellant's disqualification complied with the requirements of Regulation 206(1) and (2) of the Regulations which states clearly that determination of the tender's responsiveness should be based on the contents of the tender itself without recourse to extrinsic evidence. In addition, the provision requires a tender which is not responsive to the requirements of the Tender to be rejected and should not be made responsive by correction or withdrawal of the deviation.

The learned State Attorney argued that, since the Price Activity Schedule was not attached on TANEPS as one of the Appellant's documents, it could not be considered during the evaluation process. Therefore, the Respondent's decision to disqualify the Appellant's tender for having a higher price was legally justified as it is based on the documents uploaded on TANEPS.

The learned State Attorney submitted further that the Respondent's Tender Board did not err by approving the award recommendation to the proposed successful tenderer. The recommendation of award was made in



accordance with the requirements of the law after completing the evaluation process.

The learned State Attorney added that as per the evaluation report, the Appellant failed to attach compliance sheet and a detailed delivery schedule contrary to the requirements of the Tender Document. The anomalies in this regard were noted during the technical evaluation stage, thus the Appellant was technically and financially non-responsive. Hence, its disqualification is justified.

Finally, the learned State Attorney prayed for dismissal of the Appeal in its entirety with costs. He added that as the Tender under Appeal is one of the strategic projects in Mbeya Region, it needs to be implemented immediately. Thus, he prayed that the Respondent be allowed to proceed with the signing of the contract with the proposed successful tenderer.

REJOINDER BY THE APPELLANT

The learned counsel made a brief rejoinder by stating that the Appellant was unable to access the Price Activity Schedule submitted on TANePS at the time of the hearing of this Appeal, as the system was down. However, she insisted that the Price Activity Schedule was submitted as required since TANePS could not have allowed it to proceed to the next stage if they had not attached the required document.

The learned counsel also submitted that; the Appellant was surprised by the new reasons for its disqualification that were pointed out by the Respondent during the hearing of this Appeal. The Respondent ought to have informed the Appellant all the reasons that led to its disqualification. The learned counsel finally prayed that the Appeal be allowed, the award



made to Ako Group Ltd be nullified and the award be made to the Appellant as it complied with all the requirements of the Tender Document.

ANALYSIS BY THE APPEALS AUTHORITY

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

In this Appeal, the Appellant challenges its disqualification from the Tender process for having a higher quoted price compared to the proposed successful tenderer. The Appellant claimed that its quoted price of TZS 656,000,000.00 as indicated in the Price Activity Schedule was lower to that of the proposed successful tenderer of TZS 769,202,352.00. The Appellant's Price Activity Schedule indicated TZS 2,760,000.00 per day which summed to a total of TZS 656,000,000.00 per year. The Appellant added that the quoted price of TZS 1,656,000,000.00 in the Form of Tender uploaded on TANePS was mistakenly written. The actual tender price was in the Price Activity Schedule. Thus, the Appellant ought to have been proposed for award of the Tender for having a lower price to that of the proposed successful tenderer.

The Respondent on its part stated that the Appellant's Form of Tender submitted on TANePS indicated the quoted tender price as TZS 1,656,000,000.00. The alleged Price Activity Schedule which the Appellant relied upon and has the quoted tender price as TZS 656,000,000.00 was not submitted on TANePS as one of the Appellant's documents for this Tender. Thus, the Appellant was fairly disqualified for having a higher price than the proposed successful tenderer.



In ascertaining if the disqualification of the Appellant's tender was justified, the Appeals Authority reviewed the Appellant's tender on TANePS. It observed that the Appellant's Form of Tender indicates that the quoted price for the Tender was TZS 1,656,000,000.00 in figures and words.

The Appeals Authority reviewed the evaluation report provided on TANePS. It observed that the Appellant was disqualified at the technical evaluation stage for failure to comply with the requirements of the Tender Document. The evaluation report indicates clearly that the Appellant was disqualified for failure to include a compliance statement in the performance specifications and attach a sheet for activity schedule. The Evaluation Report indicates further that the Appellant provided a general comment without a detailed delivery and completion schedule. The Appeals Authority observed further from the record of Appeal that the Tender Board on 7th January 2024 deliberated and approved the reasons for the Appellant's disqualification as contained in the evaluation report.

During the hearing, Members of the Appeals Authority required the Respondent to clarify the actual reasons for the disqualification of the Appellant. In response thereof, the Respondent indicated that the Appellant was disqualified for failure to comply with some of the technical requirements of the Tender as well as for having a higher price.

In verifying if the reasons for the disqualification of the Appellant as indicated in the evaluation report were justified; the Appeals Authority revisited Section V and Section VII of the Tender Document. It observed that Section V provides for a sample format of the Price Activity Schedule that was to be filled by the tenderers. Section VII provides for an Activity



Schedule and Performance Specifications that were to be complied by tenderers. The Appeals Authority further reviewed TANEPS at the technical evaluation stage and observed that tenderers were required to submit a properly filled and signed specifications and compliance sheet. In addition, tenderers were also required to submit a properly filled and signed delivery and completion schedule.

In complying with Section VII, the Appellant attached a sheet indicating to have complied with all the required performance specifications. There was no requirement in the Tender Document for tenderers to attach a compliance statement in support of performance specifications. The requirement to attach a compliance statement in support of compliance specifications was stated on TANEPS and not in the Tender Document. Thus, since TANEPS is a system that assists in processing of tenders, it cannot contain requirements which were not explicitly stated in the Tender Document. In this regard, the Appeals Authority is of the view that it was not proper for the Respondent to disqualify the Appellant for failure to include a compliance statement in the performance specifications.

The Appeals Authority also observed that the Appellant was disqualified for failure to attach activity schedule as stated under page 55 of Section VII of the Tender Document. After reviewing TANEPS, the Appeals Authority could not find a specific slot where the activity schedule was to be uploaded. The Respondent did not state categorically a slot where an activity schedule was to be uploaded.

On the requirement for submission of a completion schedule as provided under page 39 - Section V of the Tender Document, the Appeals Authority noted that there was no specific format that was provided for submission



of delivery and completion schedule. TANEPS indicates that the Appellant attached a compliance sheet which confirms that it would do the delivery of the required items according to the prescribed timetable and schedule. In view of the fact that there was no specific format of how the delivery and completion schedule should be, the Appeals Authority is of the settled view that, the Appellant could not have been disqualified for failure to attach delivery and completion schedule while there was no specific format to that effect. Lack of format or guidance on how delivery and completion schedule should be, implies that the Respondent was ready to accept any document that would be submitted in compliance with such a requirement.

In view of the above findings, the Appeals Authority is of the settled view that the Tender Document issued by the Respondent was required to provide criteria that would be taken into consideration during evaluation of tenders. The criteria set by the Respondent at the technical evaluation stage could not be evaluated or quantified as there was no baseline on how tenderers would be evaluated. Based on this fact, the Appeals Authority finds the Respondent's Tender Document to have contravened the requirement of Section 72(1) and (2) of the Act which requires Tender Document to specify factors to be considered during evaluation of tenders. Section 72(1) and (2) of the Act reads as follows: -

"72. -(1) The basis for tender evaluation and selection of the successful tenderer shall be clearly specified in the tender document.

(2) The tender documents shall specify factors, in addition to price, which may be taken into account in



evaluating a tender and how such factors may be quantified or otherwise evaluated."

Given the above findings, the Appeals Authority is of the settled view that the grounds that disqualified the Appellant as stated in the evaluation report were not justified.

The Appeals Authority further noted with concern, the Respondent's act of communicating different reasons that led to the disqualification of the Appellant. The evaluation report indicates that the Appellant was disqualified at the technical evaluation stage. However, the Notice of Intention to award indicates that the Appellant was disqualified for having a higher price compared to the successful tenderer. As per the evaluation report, the Appellant was disqualified at the technical evaluation stage and therefore its tender was not subjected to financial evaluation stage. The evaluation report indicates that only one tenderer, M/S Ako Group Limited was subjected to financial evaluation stage. Under the circumstances the Appeals Authority fails to comprehend how the Respondent managed to compare the price of the Appellant and that of M/S Ako Group Limited while the Appellant did not reach the price comparison stage.

Moreover, since the Appellant was disqualified at the technical evaluation stage and was not subjected to financial evaluation stage, the Appeals Authority is unable to establish that the Appellant's Price Activity Schedule indicated the quoted price for the Tender to be TZS 656,000,000.00. In addition, during the hearing the Appellant failed to substantiate that it attached a Price Activity Schedule which indicates the quoted price to be TZS 656,000,000.00. The Price Activity Schedule could be reviewed if the



Appellant would have reached the financial evaluation stage. In view of this position, the Appellant's price for this Tender would be the read-out price as contained in the Form of Tender. That is, TZS 1,656,000,000.00.

In view of the above findings, that the Respondent communicated different reasons for the disqualification of the Appellant in the Notice of Intention to award, its decision for administrative review and that the actual reasons for disqualification of the Appellant as stated in the evaluation report were not quantifiable, the Appeals Authority is of the settled view that the tender process was marred with irregularities.

Under the circumstances the Appeals Authority concludes the first issue in the negative that the disqualification of the Appellant's tender was not justified.

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

Taking cognizance of the findings made hereinabove, the Appeals Authority hereby allow the Appeal. The Respondent is ordered to re-start the Tender process by issuing a Tender Document that would comply with the requirements 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 24th day of April 2024.

HON. JUSTICE (rtd) SAUDA MJASIRI



.....
CHAIRPERSON

MEMBERS: -

1. MR. PIUS MPONZI.....



2. DR. WILLIAM KAZUNGU.....

