IN THE PUBLIC PROCUREMENT APPEALS AUTHORITY

APPEAL CASE NO. 39 OF 2023-24

BETWEEN

M/S PARASOL SECURITY COMPANY LTD.....APPELLANT

AND

MINISTRY OF LANDS, HOUSING AND HUMAN SETLEMENTS DEVELOPMENT.....RESPONDENT

RULING

CORAM

1. Hon. Justice (rtd) Sauda Mjasiri - Chairperson
2. Adv. Rosan Mbwambo - Member
3. Eng. Stephen Makigo - 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. Saidi Zaidi - Chief Executive Officer
2. Mr. Kiembe Hamisi - Director

3. Ms. Prisca Charles - Manager
4. Mr. Shaban Moshi - Relation Officer

FOR THE RESPONDENT

1. Ms. Kumbukeni Kondo - State Attorney - Office of Solicitor General
2. Mr. Hassani Jahari - Legal Officer
3. Mr. Selemani Hassani - Supplies Officer

The Appeal was lodged by **M/S Parasol Security Company Ltd (**hereinafter referred to as **"the Appellant"**) against the **Ministry of Lands, Housing and Human Settlements Development** (hereinafter referred to as "**the Respondent"**). The Appeal is in respect of Tender No.48/2023/2024/NC/38 for Provision of Cleaning and Security Services (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 8th January 2024, the Respondent through the National e-Procurement System of Tanzania (NeST) invited tenderers to submit their tenders. It is indicated on NeST that there is a duplicate of the original Tender on the system. There is no indication on the system that the Tender is divided into Lots. The deadline for submission of tenders was set on 22nd January 2024. On the deadline, eleven tenders including that of the Appellant were submitted on the duplicate Tender whereas two tenders were submitted on the original tender. The opening of the Tender took place on 23rd January 2024.

The received tenders were subjected to evaluation. After completion of the evaluation process, the Evaluation Committee recommended award of the Tender to M/S Casemeile (T) Ltd. The proposed contract price was Tanzania Shillings Thirty Five Million Nine Hundred Ninety Thousand Only (TZS 35,990,000.00) VAT inclusive for provision of cleaning services. In addition, M/S Salu Security Company Ltd and M/S Suma JKT Guard Ltd were recommended for award of contract for provision of security services. The recommended contract prices were Tanzania Shillings Thirty Six Million Eighty Four Thousands Four Hundred (36,084,400.00) and Twenty One Million Eight Hundred Eighty Seven Thousand (TZS 21,887,000.00) VAT inclusive, respectively.

On 12th February 2024, the Respondent invited M/S Casemeile (T) Ltd, M/S Salu Security Company Ltd and M/S Suma JKT Guard Ltd for negotiation meeting scheduled on 14th February 2024. According to the Respondent negotiations successfully took place as scheduled and the Tender Board

approved the award of the contract to the firms that were recommended for award.

The Respondent through a letter dated 2nd March 2024 issued the Notice of Intention to award the Tender to all tenderers which participated in the Tender. The Notice informed the Appellant that the Respondent intended to award the Tender for provision of cleaning and security services to M/S Casemeile (T) Ltd. In addition, the Notice informed the Appellant that its tender was not successful for submitting a Power of Attorney that did not comply with the format provided in the Tender Document. The Notice was served to the Appellant on 18th March 2024.

Dissatisfied with the reason given for its disqualification, the Appellant through a letter dated 19th March 2024, applied for administrative review to the Respondent. The said letter was physically delivered to the Respondent on 22nd March 2024. The record of Appeal indicates that the Respondent denied to have received the Appellant's application for administrative review. However, on its part the Appellant claimed to have not received the Respondent's decision on its application for administrative review within the stipulated time limit. Thus, the Appellant lodged this Appeal on 4th April 2024.

GOUNDS OF APPEAL

The Appellant's grounds of Appeal may be summarized as follows: -

i. That, the Respondent failed to issue its decision on the Appellant's application for administrative review submitted to it on 22nd March 2024.

ii. That, reason given for disqualification of the Appellant is disputed since it attached a Power of Attorney which was in accordance with the format provided by the Respondent.

iii. That, M/S Casemeile (T) Ltd has been awarded the Tender for provision of security services while it participated in the Tender for provision of cleaning services.

iv. That, the disputed Tender was opened twice contrary to the requirements of the law. The first tender opening was with eleven tenderers while the second opening had two tenderers.

v. That, the Tender was awarded to M/S Casemeile (T) Ltd, however the Appellant was instructed by the Respondent to hand over the site to M/S Salu Security Company Ltd which was not awarded the Tender.

The Appellant prayed for the following orders: -

a) The Tender process be nullified for lack of transparency and failure to comply with procurement process;
b) The Tender be re-advertised through NeST without costs for all tenderers which participated in the Tender process;
c) Change of the Tender Board involved in the Tender process; and
d) Compensation for disturbance and costs incurred due to the Respondent's failure to comply with the Act and the Regulations.

REPLY BY THE RESPONDENT

The Respondent's reply to the Appellant's grounds of Appeal was preceded with a Notice of Preliminary objection (PO) on a point of law to wit: *"that the Appeal is time barred".*

Notwithstanding the above PO, the Respondent's reply to the Appellant's grounds of Appeal was as follows:-

i. That, the Respondent did not receive the Appellant's application for administrative review.

ii. That, the Appellant was disqualified from the Tender process for submitting an irrelevant Power of Attorney as it tendered for cleaning services while the submitted Power of Attorney was for security services.

iii. That, the Respondent properly awarded the Tender to M/S Casemeile (T) Ltd as a successful tenderer for cleaning services.

iv. That, the tender was not opened twice as claimed by the Appellant. Instead, there was one Tender with two Lots and each Lot was opened separately.

v. That, M/S Salu Security Company Ltd participated in the Lot that was for provision of security services. After completion of all internal processes, M/S Salu Security Company Ltd was found to be successful and through a letter with Ref. No. ME-017/2022-2023/NC/38/27 dated 6th March 2024 was awarded the contract.

The Respondent prayed for the following orders: -

a) A declaration that the Respondent complied with the procurement procedures and award made was lawful;
b) The Appeals Authority to find that all the remedies sought by the Appellant from paragraph 5(i) to (iv) of the Statement of Appeal are with no merit; and
c) Costs of this Appeal to follow events.

When the matter was called on for hearing, the Respondent applied to withdraw the raised Preliminary Objection. No objection was made by the Appellant and the preliminary objection was accordingly marked withdrawn.

Notwithstanding the above, the Appeals Authority informed the parties that upon reviewing the record of Appeal it observed that there was a point of law to be determined before embarking on the substantive merits of the Appeal. This was on the bid validity of the Tender. The Appeals Authority observed that the Tender validity period was 45 days from the date of the Tender opening. Thus, there was a need to ascertain the validity of the existence of the Tender under Appeal. Based on that observation, the following issue was framed, namely: -

"***Whether there is a valid Tender for consideration by the Appeals Authority***".

Addressing on the issue raised *suo motu* by the Appeals Authority, Mr. Selemani Hassani, the Supplies Officer from the Respondent's office commenced his submissions by stating that the tender validity period for

this Tender was forty five (45) days. Counting from the Tender opening date that took place on 23rd January 2024, the validity period expired on 8th March 2024. He contended that the Tender Board approved award of the Tender through Circular Resolution Number 02/02/2023-2024 dated 15th February 2024. By the time the Tender Board approved the award of the Tender, the tender validity period had not expired. Thus, there was a valid Tender in place.

In the course of his submissions, Members of the Appeals Authority required Mr. Hassani together with the Respondent's team to take into account the requirements of the law in view of what is indicated in the Circular Resolution Number 01/03/2023-2024 dated 13th March 2024, if there was a valid Tender in place. After reviewing the record of Appeal, the Respondent conceded that there was no valid Tender in place.

Mr. Saidi Zaidi, the Chief Executive Officer of the Appellant, submitted that once the tender validity period has expired the tender cannot be awarded. Therefore the Tender should be re-started in compliance with the law.

ANALYSIS BY THE APPEALS AUTHORITY ON THE POINT OF LAW

1.0 Whether there is a valid Tender for consideration by the Appeals Authority

In resolving this issue, the Appeals Authority took cognizance of the fact that the Respondent conceded that the tender validity period expired on 8th March 2024. Nevertheless, the Appeals Authority deemed it prudent to enlighten the parties on the importance of adhering to the tender validity period specified in the Tender.

In so doing, the Appeals Authority reviewed Clause 18.1 of the Instructions To Tenderers (ITT) read together with Clause 22 of the Tender Data Sheet (TDS). These Clauses provide that the tender validity period for this Tender was forty five 45 days. The Appeals Authority further reviewed Section 71 of the Act which reads as follows: -

> *"71* ***The procuring entity shall require tenderers to make their tenders*** *and tender securities including tender securing declaration* ***valid for periods specified in the tendering documents, sufficient to enable the procuring entity to complete the comparison and evaluation of the tenders and for the appropriate tender board to review the recommendations and approve the contract or contracts to be awarded whilst the tenders are still valid."***
>
> (Emphasis Added)

The above quoted provision clearly indicates that tenderers are required to make their tenders valid for a period specified in the Tender Document. In addition, a procuring entity is required to specify the tender validity period that would be sufficient to enable it to complete the evaluation of tenders. Furthermore, the time specified should be sufficient for the appropriate Tender Board to review the recommendations and approve award of the contract.

Upon reviewing the record of Appeal, the Appeals Authority observed that the Tender opening took place on 23rd January 2024. Counting from 23rd

January 2024, the validity period of forty five days expired on 8th March 2024. Before conceding to the point of validity period, the Respondent had contended that the Tender Board approved award of the Tender through Circular Resolution Number 02/02/2023-2024 dated 15th February 2024 within the validity period. In this Circular Resolution, the procurement management unit requested the Tender Board to approve the evaluation report. The request for approval did not provide the names of the tenderers that were proposed for award and the proposed contract price.

The Appeals Authority also reviewed Circular Resolution Number 01/03/2023-2024 dated 13th March 2024. It observed that the Tender Board was requested to approve award of the contract for provision of cleaning services to M/S Casemeile (T) Ltd and for the provision of security services to M/S Salu Security Company Ltd and M/S Suma JKT Guard Ltd. The proposed contract prices were also stated in the referred circular.

The Appeals Authority reviewed Section 33(1)(a) of the Act which reads as follows: -

> *"33(1)* ***The functions of the Tender Board shall be to -***
>
> ***(a) deliberate on the recommendations from the Procurement Management Unit and approve award of contracts."***
>
> (Emphasis added)

The above quoted provision entails clearly that one of the functions of the Tender Board is to approve recommendations of award of contracts from the Procurement Management Unit.

In view of the requirements of Section 33(1)(a) of the Act, Circular Resolution Number 01/03/2023-2024 dated 13th March 2024 suffices to be considered as the request and approval of award. Therefore, the approval of award in respect of the Tender under Appeal was made on 13th March 2024.

Section 71 of the Act quoted hereinabove requires approval of award of the contract to be made within the tender validity period. As stated earlier the tender validity period for the Tender was 45 days and the same expired on 8th March 2024. It is evident and as rightly conceded by the Respondent, by the time the award was approved by the Tender Board on 13th March 2024, the Tender validity period had already expired.

Therefore, the Tender under Appeal is not valid for consideration by the Appeals Authority. Under the circumstances, the Appeals Authority concludes the issue on the validity of the tender in the negative.

Given the legal position on the bid validity period, the Appeals Authority hereby nullifies the Tender and orders the Respondent to re-start the Tender process in compliance with the law. Since the point of law was raised by the Appeals Authority *suo motu*, we make no order as to costs. 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 is as provided under Section 101 of the Act.

This Ruling is delivered in the presence of the parties this 9th day of May 2024.

HON. JUSTICE (RTD) SAUDA MJASIRI

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CHAIRPERSON

MEMBERS:

ADV. ROSAN MWAMBO .....

ENG. STEPHEN MAKIGO.....