

IN THE PUBLIC PROCUREMENT APPEALS AUTHORITY

APPEAL CASE NO. 13 OF 2022-23

BETWEEN

M/S BAMB SOLUTION (T) LTD.....APPELLANT

AND

KINONDONI MUNICIPAL COUNCIL.....RESPONDENT

DECISION

CORAM

- | | |
|------------------------|-------------------|
| 1. Adv. Rosan Mbwambo | - Ag. Chairperson |
| 2. Eng. Stephen Makigo | - Member |
| 3. Dr. William Kazungu | - Member |
| 4. Ms. Florida Mapunda | - Ag. Secretary |

SECRETARIAT

- | | |
|------------------------|------------------------|
| 1. Ms. Agnes Sayi | - Senior Legal Officer |
| 2. Ms. Violet Limilabo | - Senior Legal Officer |

FOR THE APPELLANT

- | | |
|-------------------------------|-------------------------|
| 1. Mr. Kuzeny Ephasony Msungu | - Managing Director |
| 2. Mr. Seif N. Kasori | - Procurement Officer |
| 3. Ms. Salma A. Swavillah | - Procurement Officer |
| 4. Mr. Juma Kasika | - Accountant Technician |

FOR THE RESPONDENT

1. Mr. Jumanne Mtwangu - Municipal Solicitor
2. Ms. Vumilia Tigwela - Head of Procurement Management Unit (HPMU)
3. Ms. Renatha Nicolas - Procurement Officer

This appeal arises from Tender No. LGA/017/2021-22/HQ/NCS/25 for Parking Revenue Collection in Kinondoni Municipality (hereinafter referred to as "**the Tender**"). It is between **M/S BAMB Solution (T) Ltd** (hereinafter referred to as "**the Appellant**") and **Kinondoni Municipal Council** (hereinafter referred to as "**the Respondent**"). According to the documents submitted to the Public Procurement Appeals Authority (hereinafter referred to as "**the Appeals Authority**") its background is as follows: -

The Respondent using the National Competitive Tendering method floated the Tender on 28th June 2022 through Tanzania National e-Procurement System (TANePS). Deadline for submission of Tenders was set on 13th July 2022 and twelve tenders were received including that of the Appellant.

Upon completion of evaluation process, the Evaluation Committee recommended award of the tender to M/S Econex Company Limited at a contract price of a monthly Revenue Collection of TZS 350,000,000.00 (Tanzanian Shillings Three Hundred Fifty Million only) VAT inclusive. On 11th August 2022, the Respondent issued a Notice of Intention to award the Tender to M/S Econex Company Limited. The Notice also informed the Appellant that it was disqualified because only one instead of three

contracts required in the Tender Document to demonstrate requisite experience was submitted.

Being dissatisfied the Appellant on 16th August 2022 successfully applied for administrative review. In its decision dated 19th August 2022, the Respondent indicated that the Appellant having been found to have the requisite experience, its tender was re-instated in the evaluation process. However, the Appellant was subsequently disqualified at the price comparison stage on the ground that it quoted the lowest price compared to the price quoted by the proposed successful tenderer. Still aggrieved the Appellant filed this Appeal on 1st September 2022.

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?

Before the hearing commenced, Mr. Jumanne Mtwangu, Municipal Solicitor representing the Respondent raised an objection on a point of law that the reliefs sought as per paragraph 5 of the statement of appeal do not fall under the purview of section 97(5) of the Public Procurement Act, No. 7 of 2011 as amended (hereinafter referred to as "**the Act**"). Therefore, according to the Respondent the Appeal is incompetent for want of reliefs as prescribed by law.

In response to the raised objection the Appellant, represented by Mr. Kuzeny Msungu, Managing Director submitted briefly that all the reliefs

sought in paragraph 5 of the statement of appeal are well captured in subsection (5) of section 97 of the Act.

Section 97(5) reads: -

(5) The Appeals Authority may, unless it dismisses the complaint or dispute, issue one or more of the following remedies-

(a) declare the legal rules or principles that govern the subject matter;

(b) prohibit the procuring entity from acting or deciding unlawfully or from following an unlawful procedure;

(c) require the procuring entity that has acted or proceeded in an unlawful manner, or reached an unlawful decision, to act or proceed in a lawful manner or to reach a lawful decision;

(d) annul in whole or in part an unlawful act or decision of the procuring entity;

(e) revise an unlawful decision by the procuring entity or substitute its own decision for such a decision; or

(f) require the payment of reasonable compensation to the tenderer submitting the complaint or dispute as a result of an unlawful act, decision or procedure followed by the procuring entity."

The Appeals Authority have carefully looked at the above quoted provisions. Reading paragraphs (a) to (f) of subsection (5) of section 97 of the Act it is the Appeals Authority's considered view that the remedies prescribed therein are coached in a very general form.

In paragraph 5 of the statement of appeal the Appellant has asked this Appeals Authority to issue the following remedies, namely that: -

"(1) The procuring entity to submit contracts showing experience of the intended Tenderer to be awarded.

(2) The Authority to conduct due diligence and determine the same.

(3) PE to be warning for partial evaluation and its failure to comply to regulations and

(4) Re-evaluation to be conducted and successful bidder be awarded"

Looking at the above quoted reliefs vis-à-vis the provisions of section 97(5)(a)-(f) of the Act, the Appeals Authority is of the settled view that these reliefs sought in the statement of appeal can all be captured in the prescribed remedies. As observed herein above the prescribed remedies in section 97(5) of the Act are general. This section is not expected to provide for all specific orders and or reliefs that the Appeals Authority may be asked to issue. It is also the finding of the Appeals Authority that it has the powers to grant the sought reliefs in an appropriate case. The objection is, for the above reasons, overruled.

SUBMISSIONS BY THE APPELLANT

Submitting on the first issue the Appellant contended that the Respondent failed to comply with the requirements of Regulations 203, 204, 205, 206, 211, 212 and 214 of the Public Procurement Regulations, GN. No. 446 of 2013 as amended by GN. No. 333 of 2016 (hereinafter referred to as "**the Regulations**") while conducting evaluation of the Tender. The Appellant submitted that, had the evaluation process been conducted in accordance with the cited regulations the Respondent would neither have disqualified the Appellant nor would it have awarded the Tender to the intended awardee.

It is the Appellant submission that Clause 12(h)(ii) of the Tender Document required tenderers to have three years experience in parking revenue collection. As proof of such experience, the said clause required tenderers to submit at least three copies of contracts with a value of not less than TZS 100,000,000.00 each. The submitted contracts should also indicate experience of parking revenue collection in cities and municipal councils. The Appellant submitted that it attached to its tender copies of three contracts which indicate that the Appellant has got experience of parking revenue collection in cities and municipalities.

The Appellant submitted further that the intended awardee lacks the requisite experience. Had the Respondent adhered to the requirements of the law when conducting evaluation, it would have disqualified the intended awardee pursuant to Regulation 204(2)(h) of the Regulations. According to the Appellant, the intended awardee has neither worked in cities nor municipal councils in Tanzania as required by the Tender Document.

Regarding the Respondent's proposition that the intended awardee has been awarded the contract because it quoted a higher price than the Appellant, it was submitted that the proposed successful tenderer would not have reached the stage of price comparison had the evaluation process been conducted according to the law. Therefore, the issue of price would not have arisen.

The Appellant submitted further that the Respondent failed to comply with Regulation 231 (4) (b) of the Regulations. This regulation according to the Appellant requires that a Notice of Intention to award should indicate, amongst others, completion or delivery period. The Appellant asserted that the Notice of Intention to award did not indicate completion period. Neither did it state the commission to be paid to the proposed successful tenderer.

The Appellant submitting on the complaint that there are contradictory grounds for the Appellant's disqualification contended that the Notice of Intention to award indicates that it was disqualified for attaching one contract instead of three contracts as required. The decision on the application for administrative review shows that the Appellant's tender was disqualified for having quoted lower price.

Having so submitted the Appellant prayed for the reliefs as prayed in the statement of appeal quoted hereinabove.

REPLY BY THE RESPONDENT

Mr. Jumanne Mtwangu, the municipal solicitor commenced his submissions by pointing out that the Appellant has raised a new ground of appeal in his submissions in chief which was neither in the application

for administrative review nor in the statement of appeal. The raised new ground relates to the three years' experience requirement of the proposed successful tenderer. The Respondent asked the Appeals Authority not to consider the newly introduced ground.

The Respondent submitted that it complied with all requirements of the law in the tendering process. According to the Respondent the Tender process was conducted in compliance with Section 47 of the Act and Regulation 7 of the Regulations. Further that the evaluation was carried out in compliance with Regulations 203, 204, 205, 206, 211, 212 and 214 of the Regulations.

Upon completion of evaluation process the Respondent issued the Notice of Intention to award the contract to M/S Econex Company Limited. The Appellant was also informed that its tender was unsuccessful as it attached one contract instead of three contracts required to prove three years' experience. Having been dissatisfied the Appellant successfully applied for administrative review. The Respondent re-instated the Appellant into the evaluation process. After completion of re-evaluation the Appellant's tender was disqualified once again on reason that it quoted the lowest price in a tender for revenue collection. According to Regulation 214 of the Regulations award is made to the highest evaluated tenderer and not the lowest evaluated tenderer. In this Tender M/S Econex Company Limited was found to be the highest evaluated tenderer and therefore, was recommended for award.

The Respondent submitted that the proposed successful tenderer possesses the required experience as it attached to its tender three contracts with "Baraza la Manispaa Mjini Zanzibar." According to the

Respondent the first contract was entered on 2nd September 2019 - 1st September 2020. The second one was from 2nd September 2020 - 1st September 2021 and the last was on 2nd September 2021 to 1st September 2022. According to the Respondent each of the contracts of the proposed successful tenderer has a value of TZS 3,853,440,000.00. The Respondent therefore insisted that the proposed successful tenderer complied with the experience requirement as provided for in the Tender Document.

Regarding the complaint that there was no compliance with Regulation 231(4)(b) of the Regulations, the Respondent submitted that the Notice of Intention to award contained the contract sum and completion or delivery period as well as commission to be paid.

The Respondent submitted in response to the complaint that it issued contradictory reasons that the Appellant was initially disqualified for failure to submit the required number of contracts. After a successful application for administrative review the Appellant was re-instated and later on disqualified for having quoted the lowest price. Therefore, there were no contradictory reasons as to the disqualification of the Appellant, the Respondent insisted.

In the end the Respondent prayed for an order dismissing the Appeal for lack of merits. The Respondent also asked the Appeals Authority to uphold the decision made by the Respondent and let the contract with the intended awardee proceed it being the highest evaluated bidder; and any other remedy that the Appeals Authority may deem fit and just to grant.

ANALYSIS BY THE APPEALS AUTHORITY

The Appeals Authority has considered the Respondent's concerns that the complaint that the intended awardee is not qualified for want of requisite experience is a new ground. According to the Respondent this ground was not put up in the application for administrative review and in the statement of appeal.

This concern should not detain us. The application for administrative review dated 16-08-2022 clearly states that the Appellant disputes award of the contract to the intended awardee. It reads in Swahili "*... tunapinga kusudio la kumtunuku zabuni tajwa M/s ECONEX COMPANY LIMITED*".

It was also complained in the application for administrative review that the Respondent failed to comply with the requirements on evaluation of the Tender as provided for under Regulations 203, 204, 205, 206, 211, 212 and 214 of the Regulations. This failure according to the Appellant led to awarding the contract to the intended awardee unjustifiably.

In the Appeals Authority's view these complaints also feature in the statement of appeal and in the Appellant's submissions at the hearing. This objection, therefore, is overruled.

Whether the disqualification of the Appellant's tender was justified

The Appellant has strenuously submitted that the evaluation process was conducted in contravention of the law. Consequently, the Appellant was unjustifiably disqualified and a tenderer that is not qualified for want of the requisite experience was awarded the contract.

The Respondent on its part contended that the evaluation process was conducted in accordance with the law; and that the disqualification of the Appellant as well as award to the proposed successful tenderer is justified.

It is on record that the Appellant was initially disqualified from the Tender process for submitting one contract instead of three contracts as required in the Tender Document. It is also on record that the Appellant was reinstated in the tender process following a successful application for administrative review only to be disqualified once again for having quoted the lowest price.

The record further shows that the Appellant offered to collect TZS 245,000,000.00 (Tanzanian Shillings Two Hundred Forty Five Million only) per month while the proposed successful tenderer offered to collect TZS 350,000,000.00 (Tanzanian shillings Three Hundred Fifty Million only) per month. Further that after deducting expenses and commissions the Appellant and the intended awardee would remit to the Respondent TZS 196,000,000.00 and TZS 264,936,000.00, respectively per month. The Appeals Authority observed further that M/S Web Corporation Limited offered to remit TZS 258,966,7780.00 after computation and deduction of all other costs. The three tenderers reached the price comparison stage and amongst them the Appellant was the lowest evaluated bidder.

Regulation 212 of the Regulations clearly provides that, successful tender shall be the tender with the lowest evaluated tender price for goods, works or services or the highest evaluated tender in case of revenue collection. The Regulation reads as follows: -

"212. The successful tenderer 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."*

(Emphasis supplied)

The Tender in dispute is for revenue collection and therefore an award must be made to the highest evaluated tenderer. It goes without much saying that the Appellant's disqualification on the ground that it has the lowest evaluated tender price is justified.

The Appeals Authority considered the Appellant's contention that the proposed successful tenderer lacked the requisite experience and therefore it should not have been recommended for award of the Tender. The Respondent on its side insisted that the proposed successful tenderer had the requisite experience. The Respondent indicated that the proposed successful tenderer has executed three different contracts for the past three years with a total value of TZS 11,560,320,000.00. Therefore, the firm qualifies for award of the Tender.

The Appeals Authority revisited Clause 12(h)(ii) of the Tender Document which provides guidance on the experience required for this Tender. The Clause reads as follows:-

"Mzabuni anatakiwa kuwa na uzoefu wa kukusanya mapato ya maegesho katika kipindi cha miaka mitatu ya nyuma kwa kuonyesha mikataba angalau mitatu kila mmoja usiopungua thamani ya TZS 100,000,000.00 na pia awe mzoefu wa kukusanya mapato kwenye manispaa ama majiji."

(Emphasis supplied)

From the above quoted provision, it is crystal clear that tenderers were required to submit evidence to prove that they have got experience in parking revenue collection for the past three years. To prove the required experience tenderers were required to submit at least three contracts with value not less than TZS 100,000,000.00 each.

The Appeals Authority reviewed the intended awardee's tender on TANePs and observed that it attached a summary of previously performed contracts. The summary indicates that it has executed three different contracts with "Baraza la Manispaa Mjini Zanzibar." The three contracts according to the summary ran from 2nd September 2019 - 1st September 2020, 2nd September 2020 – 1st September 2021 and 2nd September 2021 to 1st September 2022. The summary indicates further that each contract had a value of TZS 3,853,440.000.00.

The Appeals Authority also observed that the summary was accompanied by a copy of one contract entered between "Baraza la Manispaa Mjini Zanzibar" and the proposed awardee. Item 8 of the said contract indicates that the contract period was from 2nd September 2019 to 1st September 2022.

It is not disputed and as per the record that the deadline for submission of tenders was on 13th July 2022. In view of this undisputed fact the Appeals Authority is of the settled view that at the deadline for submission of tenders, the experience of the proposed successful tenderer was less than three years. It only had two years and ten months experience. It is also evident that the proposed successful tenderer attached to its tender only one contract while Clause 12(h)(ii) requires tenderers to attach at least three contracts.

In view of the above the Appeals Authority finds that the proposed successful tenderer failed to comply with requirements of Clause 12(h)(ii) of the Tender Document and therefore its tender should have been disqualified.

The Appeals Authority also finds that the Respondent's act of awarding the Tender to the intended awardee contrary to the requirement of the Tender Document contravened the provisions of Section 4A-(3)(a) & (b) of the Act and Regulation 206(2) of the Regulations. These provisions read as follows:-

S.4A(3) "*Procuring entities shall in the execution of their duties, undertake to achieve the highest standard of equity, taking into account-*

a) equality of opportunities to all tenderers;

b) fairness of treatment to all parties; and

c) the need to obtain the value for money in terms of price, quality and delivery having regards to prescribed specifications and criteria."

Reg. 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)

The Appellant also complained that the Respondent's notice of intention to award failed to comply with Regulation 231(4)(b) of the Regulations. The said regulation reads as follows:-

Reg. 231(4) "*The Notice referred to in sub-regulation (2) shall contain:-*

- (a) name of the successful tenderer;*
- (b) The contract sum and **completion** or delivery period*
- (c) Reasons as to why the tenderers were not successful."*

Having related the Notice of Intention to award to the above quoted provision the Appeals Authority is of the settled view that the completion period was not disclosed as required. The Appeals Authority observed further that the Appellant was notified of the completion period through the Respondent's decision on its application for administrative review. Nevertheless, it is the Appeals Authority view that the Appellant has not been prejudiced by that omission.

What reliefs, if any, are the parties entitled to

In the event and given the findings hereinabove, the Appeals Authority partly allows the Appeal to the extent that the award to the proposed the successful tenderer is not justified and is hereby annulled.

The Respondent is ordered to re-evaluate the tenders in accordance with 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 Ruling is delivered in the presence of the parties this 7th day of October 2022.

ADV. ROSAN MBWAMBO



Ag: CHAIRPERSON

MEMBERS: -

1. ENG. STEPHEN MAKIGO

2. DR. WILLIAM KAZUNGU