

IN THE PUBLIC PROCUREMENT APPEALS AUTHORITY

APPEAL CASE NO. 20 OF 2022-23

BETWEEN

M/S HECO SANMARK (T) LIMITED.....APPELLANT

AND

RURAL WATER SUPPLY AND SANITATION

AGENCY.....RESPONDENT

DECISION

CORAM

- | | |
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| 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. Violet Limilabo | - Senior Legal Officer |

FOR THE APPELLANT

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| 1. Mr. James N. Lyimo | - Engineer |
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FOR THE RESPONDENT

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| 1. Mr. Edwin Bantulaki | - State Attorney |
| 2. Mr. Basll J. Wamba | - Head of Procurement
Management Unit (HPMU) |

The Appeal was lodged by **M/S Heco Sanmark (T) Limited** (hereinafter referred to as "**the Appellant**") against Rural Water Supply and Sanitation Agency commonly known by its acronym as "**RUWASA**"-Mwanza (hereinafter referred to as "**the Respondent**"). The Appeal is in respect of Tender No. AE/102/2022-2023/SMY/W/03 for Construction of Old Maswa Water Supply Projects at Bariadi District in Simiyu Region (hereinafter referred to as "**the Tender**").

According to the documents submitted to the Public Procurement Appeals Authority (hereinafter referred to as "**the Appeals Authority**") the background of this Appeal may be summarized 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 as amended (hereinafter referred to as "**the Regulations**").

The Respondent floated the Tender on 12th September, 2022 through Tanzania National e-Procurement System (TANePS). The deadline for submission of Tenders was set for 4th October 2022. Tender opening took place on 5th October 2022 and eight tenders were received including that of the Appellant.

Tenders were then evaluated accordingly. After completion of the evaluation process, the Evaluation Committee recommended award of the tender to M/S Trust Building Construction Company Ltd at a contract price of Tanzanian Shillings Three Hundred Sixty Three Million Nine



Hundred Fourteen Thousand Seven Hundred Forty Three and Fifty Cents (TZS 363,914,743.50) only VAT Inclusive. The Tender Board at its meeting held on 21st October 2022, deliberated and approved the recommendation of the award subject to successful negotiations. Negotiations took place on 7th November 2022 and were successful as the proposed successful tenderer reduced its price to Tanzania Shillings Three Hundred Thirty Nine Million One Hundred Thirty Four Thousand Seven Hundred Forty Three and Fifty Cents (TZS 339,134,743.50) only VAT Inclusive. The Tender Board approved the negotiations report on 21st November 2022.

The Respondent issued the Notice of Intention to award on 22nd November 2022. The notice informed tenderers that the Respondent intends to award the Tender to M/S Trust Building Construction Company Ltd. The Notice also informed the Appellant that its tender was disqualified for having a higher price compared to the price quoted by the proposed successful tenderer. The said Notice was served to the Appellant on 28th November 2022.

Dissatisfied with the reason given for its disqualification, the Appellant claimed to have applied for administrative review to the Respondent through a letter dated 28th November 2022. The Respondent did not respond to the Appellant's application for administrative review as it claimed not to have received the same. Aggrieved further, on 15th December 2022, the Appellant lodged this Appeal to the Appeals Authority.

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When the matter was called on for hearing, the Appeals Authority observed that there is a contention between the parties regarding submission of the application for administrative review. On one part the Appellant claimed to have submitted its application for administrative review to the Respondent on 28th November 2022. On the other part the Respondent denied to have received such an application from the Appellant. The Appeals Authority therefore deemed it proper to consider this contentious argument as one of the issues in this Appeal so as to establish if the Appeal before it complied with review procedures as provided in the Act and its Regulations. In so doing 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

In this Appeal the Appellant was represented by Eng. James Lyimo. Regarding the first issue he stated that the Appellant received the Notice of Intention to award which was sent via email on 28th November 2022. The said Notice informed the Appellant that the Respondent intends to award the Tender to M/S Trust Building Construction Company Ltd and its tender was disqualified for having a higher price. Aggrieved with the



reason given for its disqualification, on 28th November 2022, the Appellant sent an application for administrative review to the Respondent through email. The Appellant claimed that the application for administrative review was sent to the Respondent through an email address which was used to communicate the Notice of Intention to award. The Appellant stated that the Respondent never made a decision within the prescribed time and it opted to file this Appeal on 15th December 2022. Therefore, the Appeal is properly before the Appeals Authority.

In relation to the second issue, the Appellant submitted that its disqualification from the Tender process is unfair as it quoted the lowest price compared to the price of the proposed successful tenderer. The Appellant claimed that the proposed successful tenderer's price was higher by TZS 98,000,000.00 compared to its price. Thus, the Appellant's price was lower and therefore deserved to be awarded the Tender.

The Appellant submitted further that, it never received any communication from the Respondent indicating that it has been disqualified from the Tender process for any other reason apart from having a higher price. The Appellant denied to have received a letter dated 14th November 2022. According to the Appellant the said letter was not communicated to it by the Respondent and was therefore not aware of its contents.

In response to the Respondent's statement of reply, the Appellant conceded not to have attached to its Tender copies of financial reports

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as required by the Tender Document. The Appellant stated further that it complied with the requirements relating to key personnel, subcontractors, banker's reference and occupational health, safety policy and environmental issues as provided under the Tender Document.

Finally, the Appellant prayed for the following orders: -

- i. The proposed tenderer M/S Trust Build Construction Company Ltd be disqualified and award of the Tender be made to the Appellant;
- ii. The Regional Manager of RUWASA- Mwanza be warned;
- iii. The Appellant be accorded back its right; and
- iv. The Respondent be ordered to pay Appeal expenses.

REPLY BY THE RESPONDENT

The Respondent was represented by Mr. Edwin Bantulaki State Attorney and Mr. Basil J. Wamba Head of Procurement Management Unit (HPMU). The learned State Attorney commenced his submissions on the first issue by stating that, the Respondent has never received an application for administrative review from the Appellant with respect to the disputed tender. The Appellant was served with the Notice of Intention to award on 28th November 2022. If it was dissatisfied, it was required to lodge an application for administrative review to the Respondent. The Appellant's purported application for administrative review was sent to a wrong email address. The Respondent stated that its official email address is mwanzarm@ruwasa.go.tz while the Appellant filed an application for administrative review through Mwanzarm@ruwasa.go.tz. The email



address used by the Appellant began with a capital letter "M" whereas the correct email address begins with a small letter "m".

The learned State Attorney contended that, since the Appellant used the wrong email address, its application for administrative review was not received by the Respondent. Therefore, in the absence of the application for administrative review this Appeal is not properly before the Appeals Authority for failure to comply with the public procurement review procedures.

In respect of the second issue, the Respondent submitted that, the Notice of Intention to award dated 22nd November 2022 contained a wrong reason for the disqualification of the Appellant. The correct reasons for the disqualification of the Appellant were stated in a letter dated 14th November 2022 titled Notice of Intention to award. However, the said letter was wrongly dated and it was not communicated to the Appellant. The Respondent attached the said letter to the documents that were submitted before this Appeals Authority in reply to the Statement of Appeal.

The Respondent submitted further that despite the fact that the Appellant was not given the correct reasons for its disqualification; the evaluation report on TANEPS indicates clearly that the Appellant was disqualified for the following reasons:-

- i. Attaching irrelevant documents on key personnel schedule and Curriculum Vitae (CV) of two staff;
- ii. Failure to attach documents of sub-contracting;



- iii. Failure to attach financial reports to prove its financial situation and performance;
- iv. Failure to produce information of its bank; and
- v. Failure to submit evidence of occupational health, safety policy and environmental issues.

Despite the fact that the said letter was not communicated to the Appellant, such an anomaly does not change the fact that the Appellant was fairly disqualified for failure to comply with requirements of the Tender Document.

The Respondent submitted further that, the fact that the Appellant has quoted a lower price than other tenderers, does not necessarily mean that it was the lowest evaluated tenderer and therefore, qualified for award. An award is normally made to the lowest evaluated tenderer and the Appellant was not amongst them as its tender was found not to have complied with some of the requirements of the Tender Document. Therefore, the Appellant was fairly disqualified at the technical evaluation stage.

Finally, the Respondent prayed that the Appeal be dismissed for not being properly before the Appeals Authority and that the Appellant is not entitled to any remedies as stated from (i), (ii), (iii) and (iv) since its claims are not justifiable.

ANALYSIS BY THE APPEALS AUTHORITY

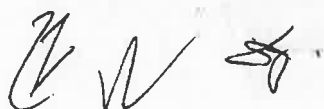
1.0 Whether the Appeal is properly before the Appeals Authority

In resolving this issue, the Appeals Authority considered the parties' contentious arguments on the filing of an application for administrative review. The Appellant contended that it filed an application for administrative review to the Respondent on 28th November 2022 through email. However, the Respondent denied to have received the Appellant's application for administrative review.

According to Sections 95(1) and 96(1) & (4) of the Act read together with Regulation 104 of the Regulations filing of an application for administrative review to the respective procuring entity is one of the mandatory steps to be invoked by a tenderer who is dissatisfied with a procurement process. The provisions read as follows:-

"Sec. 95(1) Any tenderer who claims to have suffered or that may suffer any loss or injury as a result of a breach of a duty imposed on a procuring entity by this Act may seek a review in accordance with sections 96 and 97.

Sec. 96(1) Any complaints or dispute 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.



(4) The accounting officer shall not entertain a complaint or dispute unless it is submitted within seven working days from the date the tenderer submitting the complaint or dispute or when that tenderer should have become aware of those circumstances, whichever is earlier."

"Reg. 104 A tenderer who claims to have suffered or who may suffer any loss or injury as a result of breach of a duty imposed on a procuring entity or an approving authority by the Act or these Regulations may apply for a review in accordance with section 95 of the Act."

The above quoted provisions provide clearly that if a tenderer is not satisfied with a procuring entity's acts or omissions, it is required to file an application for administrative review to the accounting officer of the respective procuring entity within seven working days of becoming aware of the circumstances giving rise to a complaint.

According to the record of Appeal, the course of action arose on 28th November 2022 when the Respondent communicated the Notice of Intention to award to the Appellant. The record indicates that the Notice was sent to the Appellant through the Respondent's email address that is mwanzarm@ruwasa.go.tz. Upon receipt of the Notice and being dissatisfied with the reason for its disqualification, the Appellant made an application for administrative review through a letter dated 28th November 2022. The Appellant claimed to have sent the application for

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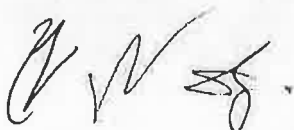
administrative review to the Respondent through the same email address that was used to communicate the Notice of Intention to award.

In order to ascertain if the Appellant submitted its application for administrative review as claimed, the Appeals Authority revisited the record of Appeal and observed that the Appellant sent its application for administrative review through an email address- Mwanzarm@ruwasa.go.tz on 28th November 2022 at 1.49 PM. Having compared the two email addresses, the Appeals Authority finds that they differ. The Respondent's email starts with a small letter "m" while the Appellant sent its application to an email starting with capital letter "M".

Having observed that the Appellant sent its application for administrative review to a wrong email address, it goes without saying that the same was not received by the Respondent. The Appeals Authority therefore accepts the Respondent's assertions that the Appellant did not file an application for administrative review.

We are of the view that an Appeal to the Appeals Authority must emanate from the decision of the Accounting Officer or where the Accounting Officer fails to deliver its decision, or where the procurement contract has entered into force pursuant to Section 97 (1) and (2) (a) & (b) and 97 (3) of the Act which provide as follows:-

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



(2) Where-

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

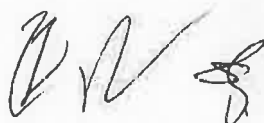
(b) the tenderer is not satisfied with the decision of the accounting officer;

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 expiry of the period within which the accounting officer ought to have made a decision.

(3) A tenderer may submit a complaint or dispute directly to the Appeals Authority if the complaint or dispute cannot be entertained under section 96 because of entry into force of the procurement or disposal contract and provided that the complaint or dispute is submitted within seven working days."

It has been clearly established that the Appellant did not submit an application for administrative review to the Respondent. Consequently, there could be no decision to Appeal against. Therefore, the Appeal is not properly before the Appeals Authority.

Based on the above findings, the Appeals Authority is of the considered view that, this Appeal has been filed in contravention of the requirements of Sections 95(1), 96(1) & (4) and 97 (1) & (2) (a) & (b) and 97 (3) of



the Act read together with Regulation 104 of the Regulations quoted herein above.

Consequently, the Appeals Authority concludes the first issue in the negative that the Appeal is not properly before it. Given the circumstances, the Appeals Authority would not delve into the other issues framed herein above. Therefore, the Appeals Authority hereby dismiss the Appeal and make no order as to costs.

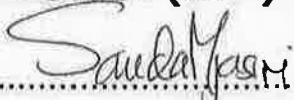
Order accordingly.

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 Respondent and in the absence of the Appellant this 19th day of January 2023.

HON. JUSTICE (RTD) SAUDA MJASIRI


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CHAIRPERSON

MEMBERS: -

1. ADV. ROSAN MBWAMBO.....


2. ENG. STEPHEN MAKIGO.....