

**IN THE PUBLIC PROCUREMENT APPEALS AUTHORITY**

**APPEAL CASE NO. 24 OF 2022-23**

**BETWEEN**

**M/S WEB CORPORATION LIMITED.....APPELLANT**

**AND**

**DAR ES SALAAM CITY COUNCIL.....1<sup>ST</sup> RESPONDENT**

**M/S ECONEX COMPANY LIMITED.....2<sup>ND</sup> RESPONDENT**

**DECISION**

**CORAM**

- |                           |                   |
|---------------------------|-------------------|
| 1. Adv. Rosan Mbwambo     | - Ag. Chairperson |
| 2. Ms. Ndeonika Mwaikambo | - Member          |
| 3. Dr. William Kazungu    | - Member          |
| 4. Mr. James Sando        | - Secretary       |

**SECRETARIAT**

- |                    |                              |
|--------------------|------------------------------|
| 1. Florida Mapunda | - Deputy Executive Secretary |
| 2. Violet Limilabo | - Senior Legal Officer       |

**FOR THE APPELLANT**

- |                          |                               |
|--------------------------|-------------------------------|
| 1. Mr. Bonaventure Dunda | - Advocate                    |
| 2. Mr. Khalid Suddy      | - Advocate                    |
| 3. Mr. Abdul Salum       | - Procurement Management Unit |
| 4. Mr. Octavian Godfrey  | - Chief Executive Officer     |

#### FOR THE 1<sup>ST</sup> RESPONDENT

- |                      |                                       |
|----------------------|---------------------------------------|
| 1. Mr. Job Mrema     | - Senior State Attorney               |
| 2. Ms. Flora Luhala  | - Senior State Attorney               |
| 3. Mr. Hussein Kambi | - State Attorney                      |
| 4. Mr. Khalid Myaule | - City Procurement Management Officer |
| 5. Mr. Albert Kagwo  | - Procurement Officer                 |

#### FOR THE 2<sup>ND</sup> RESPONDENT

- |                          |            |
|--------------------------|------------|
| 1. Mr. Mushobozi Baitani | - Director |
|--------------------------|------------|

This Appeal is in respect of Tender No. LGA/018/2022-2023/HQ/NCS/30 for Parking Revenue Collection in Dar es Salaam City Council (hereinafter referred to as "**the Tender**"). The Appeal is between **M/S Web Corporation Limited** (hereinafter referred to as "**the Appellant**") and **Dar es Salaam City Council** (hereinafter referred to as "**the 1<sup>st</sup> Respondent**"). M/S Econex Company Limited applied to be joined in the proceedings and was accordingly joined as "**the 2<sup>nd</sup> Respondent**".

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, GN. No. 446 of 2013 as amended (hereinafter referred to as "**the Regulations**").

On 21<sup>st</sup> October 2022, the 1<sup>st</sup> Respondent through Tanzania National e-Procurement System (TANePS) invited tenderers to participate in the Tender. The Deadline for submission of tenders was on 22<sup>nd</sup> November 2022. By the deadline, eight (8) tenders were received including that of the Appellant.

The received tenders were then subjected to evaluation and after completion of the evaluation process, the Evaluation Committee recommended award of the Tender to the 2<sup>nd</sup> Respondent at the contract price of a monthly Revenue Collection of Tanzanian Shillings One Billion One Hundred Thirty Two Million Six Hundred Thousand only (TZS 1,132,600,000.00) VAT inclusive.

The Tender Board at its meeting held on 21<sup>st</sup> December 2022 approved the award as recommended by the Evaluation Committee. On 23<sup>rd</sup> December 2022, the 1<sup>st</sup> Respondent issued a Notice of Intention to award the Tender. The Notice informed tenderers that the 1<sup>st</sup> Respondent intends to award the Tender to the 2<sup>nd</sup> Respondent. The Notice also informed the Appellant that its tender was disqualified for failure to attach Form of Tender as required by the Tender Document.

Dissatisfied with the disqualification, on 29<sup>th</sup> December 2022, the Appellant applied for administrative review. On 6<sup>th</sup> January 2023, the 1<sup>st</sup> Respondent issued its decision which dismissed the Appellant's application for

administrative review. Still aggrieved, the Appellant filed this Appeal on 13<sup>th</sup> January 2023.

When the matter was called on for hearing, the following issues were framed: -

- 1.0 Whether the disqualification of the Appellant's tender was justified;**
- 2.0 Whether the award of the Tender to the 2<sup>nd</sup> Respondent was justified; and**
- 3.0 What reliefs, if any, are the parties entitled to?**

#### **SUBMISSIONS BY THE APPELLANT**

In this Appeal the Appellant is represented by Mr. Bonaventure Dunda and Mr. Khalid Suddy, the learned Advocates. Submitting on the first issue, Mr. Bonaventure Dunda, learned advocate stated that the Appellant disputes its disqualification from the Tender on the ground that evaluation process was not conducted in accordance with the evaluation criteria provided for in the Tender Document. According to the learned counsel the Appellant was disqualified at the preliminary evaluation stage for failure to submit Form of Tender. The learned counsel expounded that Clause 12.1 of the Instruction to Tenderers (ITT) listed criteria which were to be considered during preliminary evaluation. A requirement to submit Form of Tender was not one of the listed criteria.

The learned counsel stated that the Tender Document was silent as to the submission of Form of Tender. However, knowing that the Form of Tender



is among the important documents for any tender, the Appellant attached the same along with documents showing financial capabilities.

The learned counsel submitted further that, no addendum was issued by the 1<sup>st</sup> Respondent in compliance with Regulation 350 of the Regulations. This Regulation allows a procuring entity to amend a tender document by issuing an addendum prior to the deadline for submission of tenders. The said provision also requires an addendum issued to be accessible through TANEPS to all tenderers. The 1<sup>st</sup> Respondent did not issue any addendum. It issued instead, several clarifications which could not be termed as an addendum to the Tender Document, the learned counsel contended.

The learned counsel also submitted that Section 72(2) of the Act requires criteria for the tender evaluation to be specifically provided for in the Tender Document. Further that Clause 8.2 of the Guidelines for Evaluation of Tenders in Procurement of Goods, Works and Non-consultancy Services issued by the Public Procurement Regulatory Authority (PPRA) on May 2020 requires evaluation of the tenders to be consistent and in accordance with criteria set forth in the tender document. Clause 8.2 of the same Guidelines prohibits the use of criteria which were not provided for in the Tender Document in evaluation.

It was, in addition submitted that the 1<sup>st</sup> Respondent's act of disqualifying the Appellant's tender contravened Regulation 203(1) of the Regulations. According to the learned counsel this regulation requires evaluation of tenders to be conducted in accordance with terms and conditions provided for in the Tender Document.

In support of his proposition, the learned counsel cited the case of **NATURERIPPE KILIMANJARO LTD versus AIR TANZANIA COMPANY LTD**, Appeal Case No. 12 of 2022/23. In this appeal the Appeals Authority allowed the Appeal because a tenderer was disqualified for a criterion which was not provided for in the Tender Document.

In relation to the second issue, the learned counsel submitted that, the 2<sup>nd</sup> Respondent should not have been proposed for award of the Tender due to the following reasons:-

**a) Lack of requisite experience**

The learned counsel stated that according to Clause 12.1 (j) (ii) of the ITT tenderers were required to have previous three years working experience of collecting parking revenues and also attach to their respective tenders, at least three contracts each with a value of not less than Tanzanian Shilling One Hundred Million (TZS 100,000,000).

The learned counsel submitted that in an attempt to comply with Clause 12.1(j)(ii) of the ITT, the 2<sup>nd</sup> Respondent attached to its tender a table which indicates that it has executed three different contracts with Baraza la Manispaa Mjini Zanzibar from 2<sup>nd</sup> September 2019 to 1<sup>st</sup> September 2020, 2<sup>nd</sup> September 2020 to 1<sup>st</sup> September 2021 and from 1<sup>st</sup> September 2021 to 2<sup>nd</sup> September 2022. According to the learned counsel the said table does not demonstrate that three contracts have been attached as required.

The 2<sup>nd</sup> Respondent has attached to its tender only one contract, the learned counsel insisted.

The learned counsel also referred to the Zanzibar's Controller and Auditors General Report on audit of "*MIFUMO YA TEHAMA*" for the year ended 30<sup>th</sup> June 2021. On page 62 of the said report it is stated that the 2<sup>nd</sup> Respondent entered into a contract for parking revenue collection with Baraza la Manispaa Mjini Zanzibar at a monthly remission of TZS 321,120,000.00. However, in the course of the execution of the said contract the amount of monthly remission was reduced to TZS 75,000,000.00. According to the Appellant the reduction of the monthly remission indicates that the 2<sup>nd</sup> Respondent failed to execute the contract as per the terms and conditions. Furthermore, the reduction of monthly remission also reduced the required minimum value of TZS 100,000,000.00.

The learned counsel added that the 2<sup>nd</sup> Respondent was issued with a Certificate of Compliance by Business Registration and Licensing Agency (BRELA) on 21<sup>st</sup> August 2022. From the date the Certificate of Compliance was issued to the deadline for submission of tenders, the 2<sup>nd</sup> Respondent had less than one year of operations in Mainland Tanzania. Therefore, the company lacks three years working experience.

#### **b) Foreign company**

It is contended that the 1<sup>st</sup> Respondent intends to award the Tender to the 2<sup>nd</sup> Respondent, a company which is registered in Zanzibar as per Certificate of Incorporation No. Z0000019516 issued by the Registrar of

Companies, Zanzibar. According to the learned counsel companies registration and formation are not union matters. Companies are registered and regulated under two different laws, that is the Companies Act, Cap 212 for Tanzania Mainland and the Companies Act No. 15 of 2013 for Zanzibar. A company registered in Zanzibar cannot operate in Mainland until it obtains a certificate of compliance from BRELA and vice versa.

According to the Companies Act, Cap 212, for a company incorporated outside Mainland Tanzania to carry out its business it should obtain a certificate of compliance. The 2<sup>nd</sup> Respondent attached to its tender a certificate of compliance No. 157518526 issued on 21<sup>st</sup> August 2022 by BRELA. Section 435 of the Companies Act, Cap 212, recognizes a company with a certificate of compliance as a foreign company.

The learned counsel expounded that Clause 2.3 of the ITT prohibits foreign companies from participating in the Tender. The 2<sup>nd</sup> Respondent is a foreign company and therefore, not eligible to participate in the Tender.

### **c) Read out Price**

According to the Notice of Intention to award it is indicated that the 1<sup>st</sup> Respondent is intending to award the Tender to the 2<sup>nd</sup> Respondent at the contract price of Tanzanian Shillings One Billion One Hundred Thirty Two Million Six Hundred Thousand only VAT inclusive (TZS 1,132,600,000.00). The learned counsel submitted that the read out price for the 2<sup>nd</sup> Respondent's tender during the Tender opening was Tanzania Shillings Two Hundred Fifty One Million Five Hundred Forty Seven

Thousand and Eight only (TZS.251,547,008.00). Therefore, the Appellant doubts the validity of the proposed contract price.

Finally, the Appellant prayed for the following orders:-

- i. Re- evaluation of the Tender;
- ii. Disqualify the 2<sup>nd</sup> Respondent for lack of qualification; and
- iii. Any other relief the Appeal Authority may deem fit to grant.

### **REPLY BY THE 1<sup>ST</sup> RESPONDENT**

In this Appeal the 1<sup>st</sup> Respondent was represented by Mr. Job Mrema, the learned State Attorney. Submitting on the first issue, the learned State Attorney prefaced his submissions by stating that the Tender process was conducted in accordance with the requirements of the Act and its Regulations. The learned State Attorney submitted that the Appellant was disqualified from this Tender for failure to submit the Form of Tender. A requirement to submit the Form of Tender was provided for under Clause 6.0 of the ITT. Format of Form of Tender was prescribed in Section IX of the Tender Document.

In addition, the learned State Attorney submitted that since there was no slot in TANePS where Form of Tender could have been uploaded, the 1<sup>st</sup> Respondent on 29<sup>th</sup> October 2022 issued clarification No. 9 which was communicated to all tenderers through TANePS. In the said clarification the 1<sup>st</sup> Respondent informed all tenderers that the Form of Tender should be uploaded in a slot where a bid security would be uploaded.

The learned State Attorney disputed the Appellant's assertion that the preliminary evaluation was to be conducted in observance with Clause 12.1 of the ITT only. According to the learned State Attorney, the evaluation of tenders was conducted as per the criteria provided for in the Tender Document and the clarifications issued thereafter. Thus, the Appellant was justly disqualified for failure to comply with the requirement provided for in the Tender Document.

As regards Regulation 350 of the Regulations the learned State Attorney submitted that the same was complied in issuing clarifications. All clarifications issued were posted at the relevant section on TANEPS and were accessible by all tenderers. The 1<sup>st</sup> Respondent denied to have defeated the purpose of Regulation 350 of the Regulations as contended by the Appellant.

On the second issue the learned State Attorney started by indicating that the 2<sup>nd</sup> Respondent possessed the requisite experience as it was required in the Tender Document. According to Clause 12.1(j)(ii) of the ITT tenderers were required to have three years working experience. The 2<sup>nd</sup> Respondent possessed such an experience as it has been working with Baraza la Manispaa Mjini Zanzibar from 2<sup>nd</sup> September 2019 to 1<sup>st</sup> September 2022. The 2<sup>nd</sup> Respondent has attached to its tender the said contract as proof of its experience.

The learned State Attorney added that the 2<sup>nd</sup> Respondent was incorporated on 19<sup>th</sup> February 2019. Thus, at the date when the Tender was floated, it had already secured three years of existence.

The 2<sup>nd</sup> Respondent's Certificate of Compliance No. 157518526 issued by BRELA on 21<sup>st</sup> August 2022 was not considered during evaluation of tenders, the 1<sup>st</sup> Respondent submitted.

The learned State Attorney challenged the validity of the Zanzibar's Controller and Auditors General report relied by the Appellant. He stated that the said report contained a mere opinion which was not final. The 1<sup>st</sup> Respondent therefore urged the Appeals Authority to consider the said report with precautions.

In addition to that, the learned State Attorney submitted that much as the report indicated that the contract price was reduced from TZS 321,120,000.00 to 75,000,000.00 per month, the same did not in any way affect the required value of the three contracts. According to Clause 12.1(j)(ii) of the ITT the tenderers were required to demonstrate their experience by attaching three contracts with a minimum value of TZS 100,000,000.00. The minimum value of each contract stated in the Tender Document is not monthly but for the contract term. Thus, even though the contract amount was reduced to TZS 75,000,000.00, if the same could be calculated for twelve months of year it would have exceeded the minimum required amount of TZS 100,000,000.00 per contract. Thus, the 2<sup>nd</sup> Respondent complied with experience requirement.

On the Appellant's proposition that the 2<sup>nd</sup> Respondent is a foreign company and therefore not eligible to be awarded the tender, the learned State Attorney submitted that according to Clause 2.3 of the ITT the eligible tenderers for this Tender were Tanzanians. According to the

Constitution of the United Republic Tanzania, Tanzania includes both Mainland and Zanzibar. Therefore, a company which is registered in Zanzibar can operate in Mainland and vice versa save for compliance of other specific laws over the subject matter in question.

The learned State Attorney stated further that, the fact that the 2<sup>nd</sup> Respondent has been registered in Zanzibar does not mean that it is a foreign company in Tanzania. Much as companies' matters in Tanzania Mainland are governed by the Companies Act, Cap 212 while in Zanzibar they are governed by the Companies Act, No. 15 of 2013 it does not change the fact that Zanzibar is part of the united Republic of Tanzania. Therefore, the 2<sup>nd</sup> Respondent was eligible to participate in the Tender.

With regard to the read out price, the learned State Attorney submitted that, according to the Form of Tender the 2<sup>nd</sup> Respondent offered a price of TZS 1,400,000,000.00. However, during the Tender opening TZS 251,547,000.00 which was the 2<sup>nd</sup> Respondent's monthly commission was mistakenly read out as its quoted price instead.

The learned State Attorney expounded that the 2<sup>nd</sup> Respondent quoted TZS 1,400,000,000.00 as its tender price. After deducting the 2<sup>nd</sup> Respondent's monthly commission of 19.1% (267,400,000.00), the monthly amount of 80.9% to be remitted to the 1<sup>st</sup> Respondent would be TZS 1,132,600,000.00. Thus, the 2<sup>nd</sup> Respondent deserved to be awarded the Tender as it was found to be the highest evaluated bidder.

Finally, the 1<sup>st</sup> Respondent prayed for the following orders:-

- i. The 1<sup>st</sup> Respondent's decision be upheld and let the process of awarding the contract to the 2<sup>nd</sup> Respondent proceed as the Tender process complied with the requirements of the law.
- ii. The Appeal should be dismissed for want of merits.

### **REPLY BY THE 2<sup>ND</sup> RESPONDENT**

In this Appeal the 2<sup>nd</sup> Respondent was represented by its Director Mr. Mushobozi Baitani. On the Appellant's complaint that the 2<sup>nd</sup> Respondent failed to comply with requisite experience requirement, he submitted that the said requirement was duly met. The 2<sup>nd</sup> Respondent submitted that, experience requirement as stated in Clause 12.1(j)(ii) of the ITT requires tenderers to have three years working experience. In compliance with this criterion the 2<sup>nd</sup> Respondent attached one contract of three years for revenue collection in Zanzibar with the value of TZS 11,000,000,000.00. Therefore, the 1<sup>st</sup> Respondent was correct in proposing the award of Tender to the 2<sup>nd</sup> Respondent.

According to the 2<sup>nd</sup> Respondent the required three years experience need not necessarily be demonstrated by attaching three contracts. Even one contract of three years term like the one attached to the 2<sup>nd</sup> Respondent's tender is sufficient. Disqualifying the 2<sup>nd</sup> Respondent on this reason amounts to discrimination as it would limit participation of tenderers. The disqualification on this criterion would contravene the requirement of Section 4A(3) of the Act read together with Regulation 8(b) of the

Regulations, the 2<sup>nd</sup> Respondent contended. The referred provisions read as follows:

*"Sec. 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."*

*"Reg. 8 in order to ensure widest possible participation by tenderers on equal terms in inviting tenders for goods, works, services, provision of consultancy services or disposal of assets, procuring entities shall take the necessary measures to-*

*(b) eliminate discriminatory practices, technical specifications or description of services which may limit participation on equal terms."*

Regarding the Appellant's proposition that the 2<sup>nd</sup> Respondent is a foreign company, the 2<sup>nd</sup> Respondent submitted that the Appellant failed to understand the meaning of Clause 2.3 of the ITT. The 2<sup>nd</sup> Respondent submitted that the said clause requires tenderers to have licence and registration from the relevant legal authorities in Tanzania. The Clause does not indicate that the tender is for Tanzania Mainland only.

The 2<sup>nd</sup> Respondent expounded further that the Act which is the main law governing procurement in Tanzania neither define the word foreign nor provide for any territorial limits in Tanzania. Much as BRELA has limited

operational jurisdiction it does not circumvent the overarching status of Zanzibar as part of the United Republic of Tanzania.

The 2<sup>nd</sup> Respondent challenged the Appellant's submissions in relation to the Companies Act, Cap 212 and the Companies Act, No. 15 of 2013, of Tanzania Mainland and Zanzibar, respectively. According to the 2<sup>nd</sup> Respondent, much as the said laws govern companies' affairs in the Mainland and Zanzibar, the Appellant failed to indicate the provisions which stated categorically that if a company is registered in Zanzibar it would be treated as a foreign company in Mainland and vice versa.

With regard to the 2<sup>nd</sup> Respondent's quoted price, he submitted that its Form of Tender uploaded on TANEPS indicated clearly that the quoted price was TZS 1,400,000,000.00. This price was the highest amongst all tenderers who participated in the Tender. However, during the Tender opening its price was erroneously read as TZS 251,547,000.00. The read out price was the monthly commission to be paid to the 2<sup>nd</sup> Respondent. The error was noted and corrected by the 1<sup>st</sup> Respondent during evaluation of tenders.

Finally, the 2<sup>nd</sup> Respondent prayed for dismissal of the Appeal and that it should be awarded the Tender since 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.**

The Appellant complained that it was unfairly disqualified at the preliminary evaluation stage on the ground that it failed to attach the Form of Tender while such a requirement was not amongst the criteria to be evaluated at the preliminary evaluation stage. According to the Appellant the preliminary evaluation was to be conducted as per the criteria provided for under Clause 12.1 of the ITT. Looking at Clause 12.1. of the ITT the Form of Tender was not among the criterion to be evaluated at that particular stage. The Appellant submitted further that the requirement to attach the Form of Tender was not provided for in the Tender Document.

The 1<sup>st</sup> Respondent on its part stated that the Form of Tender was provided for under Clause 6.0 of the ITT. Further that, Clarification No. 9 issued to all tenderers on 29<sup>th</sup> October 2022 through TANEPS indicated that the tenderers were required to upload their Forms of Tender along with tender security into a slot where Tender Security was to be uploaded.

To ascertain the validity of these rival arguments the Appeals Authority reviewed the Tender Document and observed that Clause 6.0 of the ITT required tenderers to submit the Form of Tender. The format of the Form of Tender was provided under Section IX of the Tender Document. Clause 6.0 of the ITT reads as follows:-

***"Clause 6.0 Mzabuni atakamilisha kujaza fomu ya kuwasilisha Zabuni ambayo imeambatanishwa katika sehemu ya Tisa. Fomu ya kuwasilisha Zabuni ni lazima ijazwe kikamilifu bila kubadili chochote katika muundo wake na hakuna fomu mbadala itakayokubaliwa".***

(Emphasis supplied)

The Appeals Authority also revisited Clarification No. 9 issued on TANePS by the 1<sup>st</sup> Respondent. The Clarification reads as follows:-

***"Fomu ya kuwasilisha maombi ya zabuni iambatanishwe pamoja na fomu ya tamko la dhamana ya zabuni kwa kuwa katika mfumo wa taneps hakuna dirisha la kuweka fomu hiyo."*** (Emphasis supplied)

The above quoted Clause 6.0 of the ITT states clearly that the Form of Tender was among the documents which were to be attached to the tenderers' bids. In addition, Clarification No. 9 indicated a place where the Form of Tender was to be uploaded since there was no specific slot provided in the TANePS.

The Appeals Authority further revisited Clause 12.1 of the ITT and observed that it provided guidance on how the preliminary evaluation of tenders would be conducted. The said clause listed criteria which would be considered during that stage of evaluation. The criteria include Bid Security under Clause 12.1(h) of the ITT which reads as follows:-

Clause 12.1 *"Tathimini ya awali ili kuamua ni Zabuni zipi zitakazokidhi matakwa ya msingi ya Nyaraka za Zabuni kama vile zilizosainiwa kwa usahihi na zilizotimiza vigezo na masharti ya Mwaliko wa Zabuni vinavyohitajika. Vigezo vifuatavyo vitaangaliwa wakati wa Tathimini ya Awali.*  
*(h) Tamko la Dhamana ya Zabuni katika muundo ulioainishwa katika Sehemu ya Nane"*

As correctly submitted by the Appellant, the Form of Tender was not listed in Clause 12.1 of the ITT. However, since as per Clarification No. 9 the Form of Tender was to be uploaded along with the Bid Security, it follows that preliminary evaluation of the Bid Security would include the Form of Tender. The Appeals Authority is of the settled view that the Form of Tender was amongst the documents which were to be evaluated during preliminary evaluation. The 1<sup>st</sup> Respondent's act of disqualifying the Appellant was therefore in accordance with Regulations 206(2) of the Regulations which reads as follows:-

**"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)

Under the circumstances the Appeals Authority concludes the first issue in the affirmative that the disqualification of the Appellant was justified.

**2.0 Whether the award of the Tender to the 2<sup>nd</sup> Respondent was justified.**

In view of the nature of the Appellant's complaints against the 2<sup>nd</sup> Respondent the Appeals Authority finds it appropriate to determine each of them as follows:-

**a) Foreign Company**

The Appellant complained that the 2<sup>nd</sup> Respondent is a foreign company and thus not eligible for the award. Having reviewed the documents attached to the Appellant's Statement of Appeal, the Appeals Authority noted that this complaint was not raised in the Appellant's application for administrative review. Neither does it feature in the 1<sup>st</sup> Respondent's decision on the application for administrative review. In the circumstances, the Appeals Authority finds that this grounds has been improperly raised. It is thus accordingly expunged.

**b) Read out Price**

The Appellant challenged the 2<sup>nd</sup> Respondent's proposed award price of TZS 1,132,600,000.00 as it differs with the price read out during the tender opening where TZS 251,547,000.00 was pronounced. The 1<sup>st</sup> Respondent contended that the 2<sup>nd</sup> Respondent's price was TZS 1,400,000,000.00. However, during the tender opening it was mistakenly read as TZS 251,547,000.00 which was written in the Form of Tender as the 2<sup>nd</sup> Respondent's monthly commission.

The Appeals Authority reviewed the 2<sup>nd</sup> Respondent's Form of Tender on TANePS and observed that it states clearly that the quoted price was TZS 1,400,000,000.00 and TZS 251,547,000.00 was indicated to be monthly commission. The Appeals Authority observed further that during evaluation the correction of errors was done to the 2<sup>nd</sup> Respondent's price whereby the monthly remittance of 80.9% of TZS 1,400,000,000.00 was calculated as TZS 1,132,600,000.0 while the 2<sup>nd</sup> Respondent's monthly commission of 19.1% of TZS 1,400,000,000.00 was calculated as TZS 267,400,000.00.

From the above facts the Appeals Authority is of the settled view that the 2<sup>nd</sup> Respondent's read out price was mistakenly read and the proposed award price is proper.

**c) Lack of requisite experience**

It is complained that the 2<sup>nd</sup> Respondent lacked the requisite experience as required in Clause 12.1(j)(ii) of the ITT. The Respondents contend that Clause 12.1(j)(ii) of the ITT was complied.

Clause 12.1(j)(ii) of the ITT reads as follows:-

*"12.1(j) Nyaraka nyingine zitakazo hitajika.*

*(i) ...*

*(ii) 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 Tshs 100,000,000.00 na pia awe mzoefu wa kukusanya mapato kwenye Manispaa ama Majiji.*" [Emphasis Added]

The Appeals Authority reviewed the 2<sup>nd</sup> Respondent's tender on TANePs and observed that it attached only one contract entered between it and Baraza la Manispaa Mjini Zanzibar. The attached contract was for three years term from 2<sup>nd</sup> September 2019 to 1<sup>st</sup> September 2022. According to the Respondents since the requirement in Clause 12.1(j)(ii) of the ITT was to demonstrate three years experience, one contract which ran for three years met the requirement.

The Appeals Authority observes that reading Clause 12.1(j)(ii) of the ITT as a whole, tenderers were required to have previous three years working experience in parking revenue collections. This clause also required tenderers to demonstrate previous three years experience by attaching to their respective tenders at least three contracts. Each of the three contracts should have a value of not less than Tanzanian Shilling One Hundred Million (TZS 100,000,000). Tenderers were also required to demonstrate that they had experience of collecting revenue in municipalities or cities.

From the above observations it is evident that Clause 12.1(j)(ii) of the ITT carries with it four components, namely:-

- (i) Previous three years working experience in parking revenue collections;

- (ii) The previous three years experience must be demonstrated by the submission of at least three contracts;
- (iii) Each of the three contracts to be submitted must have a minimum value of at least TZS 100,000,000.00; and
- (iv) The three years experience must be of collecting revenues in municipalities or cities.

Having considered the above requirements of Clause 12.1(j)(ii) of the ITT the Appeals Authority finds that the requisite experience requirements was not only on the number of years. It also has a requirement of number of contracts of at least three contracts of TZS 100,000,000.00 each. What is more is that the Tender Document required a demonstration of collecting revenues in municipalities or cities. This, in the Appeals Authority view, indicates that tenderers were required to demonstrate that in those three years, they have worked with more than one municipality or city. This is also echoed by the requirement of submission of three contracts.

Regulation 203(1) of the Regulations reads as follows:-

Reg.203(1) *"The tender evaluation shall be consistent with terms and conditions prescribed in the Tender Document and such evaluation shall be carried out using the criteria explicitly stated in the tender document".*

The above cited Regulation provides that evaluation of tenders should be consistent with the terms and conditions provided for in the Tender Document and shall be carried out using criteria explicitly stated therein.

Apparently, the 2<sup>nd</sup> Respondent demonstrated experience of three years of working with municipality of Zanzibar. It did not attach the required minimum number of three contracts. Neither did it demonstrate that it had worked with more than one municipality or city.

The Appeals Authority therefore finds that award of the Tender to the 2<sup>nd</sup> Respondent contravened the requirements of Clause 12.1(j)(ii) of the ITT and Regulation 203(1) of the Regulations.

From the above findings, the Appeals Authority concludes the second issue in the negative.

### **3.0 What reliefs, if any, are the parties entitled to?**

Given the findings hereinabove, the Appeals Authority partly allows the Appeal to the extent that the award of the Tender to the 2<sup>nd</sup> Respondent is not justified and is hereby annulled.

The 1<sup>st</sup> Respondent is ordered to re-evaluate the remaining four tenders that reached the price comparison stage in accordance with the requirements of the Tender Document and 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 10<sup>th</sup> day of February, 2023.

**ADV. ROSAN MBWAMBO**



**Ag: CHAIRPERSON**

**MEMBERS: -**

**1. MS. NDEONIKA MWAIKAMBO.....**

**2. DR. WILLIAM KAZUNGU.....**