

IN THE PUBLIC PROCUREMENT APPEALS AUTHORITY

APPEAL CASE NO. 27 OF 2022-23

BETWEEN

M/S ASCERICS LIMITED.....APPELLANT

AND

**DAR ES SALAAM CITY
COUNCIL.....1ST RESPONDENT**

M/S ECONEX COMPANY LTD.....2ND RESPONDENT

DECISION

CORAM

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| 1. Adv. Rosan Mbwambo | - Ag. Chairperson |
| 2. Ms. Ndeonika Mwaikambo | - Member |
| 3. Dr. William Kazungu | - 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. Seif N. Kasori | -Head of Procurement Management Unit
(HPMU) - M/S Ascerics Ltd |
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FOR THE 1ST 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 2ND RESPONDENT

- | | |
|--------------------------|------------|
| 1. Mr. Mushobozi Baitani | - Director |
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The 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 Ascerics Limited** (hereinafter referred to as "**the Appellant**") and **Dar es Salaam City Council** (hereinafter referred to as "**the 1st Respondent**"). Being interested in the Appeal, M/S Econex Company Limited applied to be joined and was accordingly joined as "the 2nd 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 21st October 2022, the 1st Respondent through Tanzania National e-Procurement System (TANePS) invited tenderers to participate in the Tender. The Deadline for submission of tenders was on 22nd November 2022. By the deadline, eight (8) tenders were received including that of the Appellant.

The received tenders were subjected to evaluation and after completion of the evaluation process, the Evaluation Committee recommended award of the Tender to the 2nd 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 21st December 2022 approved the award as recommended by the Evaluation Committee. On 23rd December 2022, the 1st Respondent issued a Notice of Intention to award the Tender. The Notice informed tenderers that the 1st Respondent intends to award the Tender to the 2nd Respondent. The Notice also informed the Appellant that its tender was disqualified for having quoted lower price compared to that of the 2nd Respondent.

Dissatisfied with the reason given for its disqualification, on 27th December 2022 the Appellant applied for administrative review to the 1st Respondent. On 6th January 2023, the 1st Respondent issued its decision dismissing the

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application for administrative review. Aggrieved further, on 16th January 2023, the Appellant filed this Appeal.

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

- 1.0. Whether the Appellant's grounds of Appeal relating to anomalies of the Tender Document are properly before the Appeals Authority and are justified;**
- 2.0. Whether award of the Tender to the 2nd Respondent 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 Mr. Seif Kasori, Head of Procurement Management Unit. In relation to the first issue, the Appellant had five points and his submissions on each of them are summarized hereunder:-

i. Failure to use Standard Tender Document issued by PPRA

The Appellant submitted that the 1st Respondent issued the Tender Document which did not comply with the standard bidding document issued by the Public Procurement Regulatory Authority (PPRA). The Appellant submitted that Section 70(1) of the Act read together with Regulations 108 and 184(3) of the Regulations requires procuring entities when floating the tenders to use the Standard Bidding Document issued by PPRA. In addition, Regulation 184(5) of the Regulations requires procuring entities to obtain PPRA's approval before using a Tender Document which did not comply with the format of the Standard Bidding Document.

The Appellant submitted that it became aware that the Tender Document did not comply with the Standard Bidding document issued by PPRA immediately after having paid the Tender purchase fee and given access through TANEPS. However, it did not challenge the said anomaly because that opportunity is only available after issuance of the Notice of Intention to award.

ii. Failure to adhere to the General Procurement Notice (GPN)

The Appellant submitted that the Tender was not among the tenders listed in the 1st Respondent's General Procurement Notice (GPN) for the financial year 2022/2023. The Appellant stated that the disputed Tender was floated on TANEPS with No. LGA/018/DCC/2022/2023/HQ/NCS/30. However, according to the GPN the correct Tender number was LGA/018/DCC/2022/2023/HQ/NCS/06. The Appellant submitted that Regulation 18(2) of the Regulations requires procuring entities to float tenders whose budget have been approved by the budget approving authority. The Appellant contended that the 1st Respondent's act of advertising the Tender which was not within the GPN implies that its budget was also not approved by the budget approving authority. Thus, the 1st Respondent's act in this regard contravened Regulation 18(2) of the Regulations.

The Appellant submitted further that, this anomaly was raised in the Appellant's application for administrative review filed on 27th December 2022. In its decision the 1st Respondent admitted the anomaly but indicated that it was a mere slip of pen. The Appellant submitted that since the 1st Respondent conceded as to the existence of the said anomaly, the

same cannot be considered as a minor omission but rather contravention of the requirements of the law.

iii. Contract Period

The Appellant commenced his submissions on this point by stating that Clause 1.0 of the Instructions To Tenderers (ITT) and Item 2 of Section IV of the Tender Document provide that the contract period for this Tender would be two years. According to the Appellant the contract period should not to have been more than one year.

The Appellant submitted that Section 49 (1), (2) and (3) of the Act requires preparation of annual procurement plan and the same has to be approved by the budget approving authority. The Appellant added that Regulation 18(2) of the Regulations prohibits procuring entities from conducting unplanned procurement.

The Appellant contended further that since the law allows preparation of annual budget and the annual procurement plan, it was not proper for the 1st Respondent to provide for two years contract while its approved budget is for one year. The Appellant also submitted that the 1st Respondent failed to indicate any provision of the law which allows issuance of two years contract instead of one year.

iv. Performance Security

The Appellant challenged the requirement in the Tender Document demanding performance security of 15% of the contract price or one month deposit of monthly commission. The Appellant submitted that according to the guideline issued by PPRA, tenders whose value do not

exceed Tanzanian Shillings Two Billion their performance security should be by way of Bid Securing Declaration. The 1st Respondent's requirements of performance security of 15% or one month deposit are contrary to the PPRA's guidelines which have been issued pursuant to Sections 9(f) and 106 of the Act. Therefore, the 1st Respondent contravened the law in this regard, the Appellant contended.

v. Closing of clarification window.

The Appellant disputes, the 1st Respondent's act of closing the clarifications window on 7th November 2022 while the deadline for submission of tenders was 22nd November 2022. The Appellant submitted that Regulation 13(1) of the Regulations requires clarification window to be open up to seven days prior to deadline for submission of tenders. The Appellant expounded that the deadline for submission of tenders was 22nd November 2022 and therefore the clarification window should have been closed by 16th November 2022. To the contrary, the 1st Respondent closed the clarification window on 7th November 2022 in contravention to the requirement of the law. The Appellant stated that the 1st Respondent ought to have adhered to the requirements of Regulation 13(1) of the Regulations as it does not provide discretion to procuring entities to choose as to when clarification window should be closed. Therefore, the 1st Respondent's act of closing clarification window before the required time contravenes the requirement of the law.

In relation to the second issue the Appellant complained that the 1st Respondent ought to have disqualified the 2nd Respondent for submitting

abnormally low tender. The Appellant submitted that the read out price for the 2nd Respondent was TZS 251,547,008.00 while the prices of other tenderers were above TZS 900,000,000.00. The Appellant contended that the 2nd Respondent's price was abnormally low and therefore pursuant to Regulation 17(1) and (6) of the Regulations its tender ought to have been disqualified. According to the Appellant the referred regulation requires procuring entities to reject abnormally low tenders.

The Appellant disputed the 1st Respondent's assertion that the 2nd Respondent's Form of Tender indicated the price of TZS 1,400,000,000. The Appellant wonders if the said price was contained in the Form of Tender the same should have been read out on the date of Tender opening.

The Appellant submitted further that since the Tender was for revenue collection, award is made to the highest evaluated tenderer. To the contrary, the 1st Respondent intends to award the Tender to the 2nd Respondent who had the lowest price.

Another complaint is that the 2nd Respondent failed to submit the required business licence. According to Clause 3.0 of the ITT, the tenderers were required to submit business licence for revenue collection. The 2nd Respondent submitted business licence for ICT which was not relevant for the Tender. The Appellant stated that if the 1st Respondent had conducted the evaluation process in accordance with criteria provided for in the Tender Document, it would have disqualified the 2nd Respondent for failure to comply with the business licence requirement.

It is also complained that the 2nd Respondent was ineligible to be proposed for award of the Tender because it is a foreign company. The 2nd Respondent has been registered in Zanzibar and operates in Tanzania Mainland using certificate of compliance issued by BRELA. The certificate of compliance indicates that the 2nd Respondent operates as a branch of a foreign company. Clause 2.3 of the ITT prohibits foreign firms from participating in the Tender. Under the circumstances the 2nd Respondent was ineligible to participate and being proposed for award of the Tender.

The Appellant submitted further that the 2nd Respondent failed to comply with experience requirement as provided under Clause 3.0 (j) (ii) of the ITT. The referred clause required tenderers to submit three contracts each with a value of TZS 100,000,000.00 to demonstrate three years working experience. The 2nd Respondent attached to its tender only one contract instead of three to demonstrate the required experience. The Appellant contended that the 2nd Respondent failed to submit three contracts to prove the required experience. Therefore, its tender should have been disqualified.

Finally, the Appellant prayed for the following orders:-

- i. "Cancellation of the Tender and re-advertise it using a proper documents issued by PPRA;*
- ii. Prohibit the Procuring Entity from acting or deciding unlawful or from following unlawful procedures;*
- iii. Set aside, vary or confirm the decision made by the Authority to blacklist; and*

iv. Any other relief the Appeals Authority may deem fit and just to grant."

REPLY BY THE 1ST RESPONDENT

In this Appeal the 1st Respondent was represented by Mr. Job Mrema, Senior State Attorney. The learned State Attorney commenced his submissions by indicating that the 1st Respondent issued the Tender Document which complied with the requirements of the latest PPRA's Standard Bidding Document issued in 2022. The learned State Attorney submitted that apart from complying with PPRA's Standard Bidding Document, the 1st Respondent complied with the requirements of Regulation 184 of the Regulations which provides guidance on the contents of the Tender Document. He submitted further that through Clarification No. 10 issued by the 1st Respondent on 1st November 2022, all tenderers were accorded an opportunity to point out parts of the Tender Document which did not comply with the PPRA's Standard Bidding Document. However, none of the tenderers, the Appellant inclusive raised any anomaly in the Tender.

As regard non-compliance with General Procurement Notice the 1st Respondent submitted that, the Tender is one of the tenders contained in the GPN save for the fact that the last numbers instead of being written 06 it was mistakenly written 30. The learned State Attorney submitted that the Appellant was aware of the said anomaly from the moment the Tender was advertised. However, the Appellant never sought for clarifications on the alleged anomaly.

The learned State Attorney submitted further that, the Tender is among the tenders whose budget and annual procurement plan have been approved by the budget approving authority. The learned State Attorney disputed the Appellant's contention that the Tender is not within the approved budget of the 1st Respondent. The learned State Attorney submitted further that an oversight in writing the correct Tender number has not affected in anyway the tenderers' right or the Tender process itself.

In relation to contract period of two years, the learned State Attorney submitted that the Act and its Regulations does not limit the contract period. The learned State Attorney submitted that Clause 20 of the General Conditions of Contract allowed the 1st Respondent to determine the time frame of the contract. The 1st Respondent's act of indicating the contract period of two years does neither affect the budget nor the procurement plan but rather save the procuring entities' costs of floating tenders in every year. Therefore, the 1st Respondent's act in this regard was in accordance with the law.

With regard to the performance security, the learned State Attorney submitted that the requirement was modified through clarifications issued whereby the tenderers were allowed to submit performance security in the form of insurance bond. The anomaly was noted and rectified before the deadline for submission of tenders.

Regarding closure of clarification window, the learned State Attorney submitted that the Tender was advertised on 21st October 2022 and the deadline for submission was set for 10th November 2022. Clarification

window was opened from the moment the Tender was advertised and ought to be closed by 1st November 2022. However, the 1st Respondent extended the clarification window up to 7th November 2022. The deadline for submission of tenders was also extended to 22nd November 2022. The learned State Attorney stated that clarification window was left open for more than six days beyond the stipulated date of closure. Therefore, the clarification window was not closed prematurely as contended by the Appellant.

With respect to abnormally low tender the learned State Attorney submitted that, the 2nd Respondent's quoted price as indicated in the Form of Tender uploaded on TANePS was TZS 1,400,000,000.00. However, during the Tender opening TZS 251,547,000.00 was read out. The read out price was the 2nd Respondent's monthly commission. The learned State Attorney expounded that during evaluation calculations were done and after completion the 2nd Respondent's monthly commission of 19.1% was arrived as TZS 267,400,000.00 whereas the monthly amount of 80.9% to be remitted to the 1st Respondent was arrived as TZS 1,132,600,000.00. Thus, the 2nd Respondent's price was not abnormal as alleged by the Appellant.

In relation to valid business licence the learned State Attorney stated that the requirement to submit business licence was provided under Clause 12.1(e) of the ITT. According to the said clause the tenderers were required to submit a valid business licence which relates to revenue collection. The 2nd Respondent attached to its tender on TANePS business licence for ICT. The learned State Attorney submitted that since revenue

collection also relates to Information Communication Technology (ICT), business licence for ICT was found to be suitable for the Tender. Thus, the 2nd Respondent complied with the business licence requirement.

On experience of the 2nd Respondent the learned State Attorney submitted that, Clause 12.1(j)(ii) of the ITT required the tenderers to demonstrate three years experience. In demonstrating the required experience, the 2nd Respondent attached to its tender one contract for revenue collection which was entered with Baraza la Manispaa Mjini Zanzibar. The attached contract was for three years from 2nd September 2019 to 1st September 2022. The learned State Attorney submitted further that much as the attached contract demonstrate three years of experience its value exceeded by far TZS 100,000,000.00 specified in the Tender Document. Thus, the 2nd Respondent complied with experience requirement.

In relation to the Appellant's complaint that the 2nd 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 eligible tenderers for this Tender were Tanzanians. According to the Constitution of the United Republic of 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 questions. The learned State Attorney stated further that, the fact that the 2nd Respondent has been registered in Zanzibar does not mean that it is a foreign company in Mainland Tanzania. Therefore, the 2nd Respondent was eligible to participate in this Tender.

1. Finally, the 1st Respondent prayed for the following orders:-

- i. "That, the Appeals Authority uphold the decision made and let the process of awarding the contract to the respective bidder to proceed;*
- ii. That, the decision made and procedures followed by the 1st Respondent were done in accordance with law;*
- iii. That, the Appeals Authority to maintain and upheld the decision of the 1st Respondent to award the tender to the 2nd Respondent who was found to be the highest evaluated bidder; and*
- iv. Dismissal of the Appeal with costs."*

REPLY BY THE 2ND RESPONDENT

In this Appeal the 2nd Respondent was represented by its Director, Mr. Mushobozi Baitani. He commenced his submission by indicating that the 1st Respondent used the latest Standard Tender Document issued by PPRA and therefore the Tender Document was in accordance with the law. The 2nd Respondent submitted further that the Appellant if at all was certain of the existed anomalies ought to have pointed them out clearly and promptly. To the contrary, the Appellant failed to state the difference between the Tender Document issued on TANEPS and the one authorized by the PPRA. The 2nd Respondent contended further that, despite the alleged anomalies the Appellant participate in the Tender and never pointed out any anomaly until it was disqualified from the Tender process. The 2nd Respondent therefore, stated that the Appellant's claims on the Tender Document have been raised as an afterthought.

In relation to the performance security the Appellant submitted that the 1st Respondent has discretion of choosing the required performance security depending on the needs of a particular tender. The performance security chosen by the 1st Respondent for this Tender was suitable under the circumstances. The 2nd Respondent added that, since the Appellant has not been proposed for award of the Tender, issues of performance security have nothing to do with it.

With regard to the contract period of two years, the 2nd Respondent submitted that it is the discretion of the procuring entity to specify the contract period. The tenderers cannot dictate the contract period as the Appellant purported it to be. The 2nd Respondent added that the Appellant relied on Section 49 of the Act; however, the provision provides guidance on routine administrative procedures in approving procurement plan and has nothing to do with contract period. Additionally, Regulation 18(2) of the Regulations does not require the procuring entities to enter into one year contract as alleged by the Appellant.

On the Appellant's assertion that the 2nd Respondent submitted abnormally low tender, the 2nd Respondent stated that the amount of TZS 251,547,000.00 was erroneously readout. According to the 2nd Respondent its price was the highest amongst all tenderers who participated in the Tender. The 2nd Respondent's Form of Tender uploaded on TANePS indicated clearly that its quoted price was TZS 1,400,000,000.00.

Regarding the requisite experience the 2nd Respondent submitted that, experience requirement was provided under Clause 12.1(j)(ii) of the ITT

which required the tenderers to have three years experience. In compliance with this criterion the 2nd Respondent attached one contract of three years for revenue collection in Zanzibar with the value of TZS 11,000,000,000.00. The 2nd Respondent elaborated further that the value of the contract executed in Zanzibar exceeds by far the value provided in the Tender Document for demonstrating experience.

The 2nd Respondent submitted further that the Appellant's assertion that three years experience was to be proved by submission of three contracts is unfounded. According to the 2nd Respondent three years experience was to be demonstrated by either presenting one contract of three years or three different contracts. The 2nd Respondent stated further that if it has one contract of three years then for it to be eligible based on the Appellant's assertion it means it would need experience of not less than five years to qualify for the Tender. This would amount to discrimination and limit participation of the tenderers on equal terms which contravenes the requirement of Section 4A (3) of the Act read together with Regulation 8(b) of the Regulations.

The 2nd Respondent disputed the Appellant's assertion regarding submission of relevant business licence. The 2nd Respondent submitted that Clause 12.1(e) of the ITT requires submission of valid business licence. According to the 2nd Respondent a valid business licence for this Tender included any kind of licence that would facilitate the collection of revenue. Since revenue collection is conducted using Point of Sale (POS) machine, ICT is one of the key requirements to be considered when tendering for

this Tender. Having so considered the 2nd Respondent attached to its tender a business licence for ICT.

The 2nd Respondent submitted further that the Electronic Postal Communication Act requires the tenderers to have business licence for applications when conducting any business that uses the applications. POS machine uses applications and therefore it was mandatory for the tenderers to have business licence for ICT or applications in order to execute the contract of the Tender under Appeal. The 2nd Respondent submitted the business licence for ICT and therefore complied with the requirement of the Tender.

The 2nd Respondent further disputed the Appellant's contention in that, it is a foreign company and therefore not eligible to participate in this Tender. The 2nd Respondent submitted that the Appellant has failed to understand the meaning of Clause 2.3 of the ITT. The said clause required tenderers to have licence and registration from the relevant legal authorities in Tanzania. The clause did not indicate that the tender was for Tanzania Mainland only. The 2nd Respondent stated further that the Act which is the main law dealing with procurement in Tanzania does not define the word foreign. In addition to that, the Act does not define foreign within the operational jurisdiction of BRELA. Due to its limited operational jurisdiction, BRELA marks Companies outside Tanzania Mainland as foreign. This does not circumvent the overarching status of Zanzibar as part of the united Republic of Tanzania but rather for its administrative integrity. The 2nd Respondent cannot be termed as a foreign company basing on BRELA's

operations. Therefore, the 2nd Respondent is a Tanzanian company and eligible to participate in this Tender.

Finally, the 2nd Respondent prayed that the Appeal be dismissed and award made to it be confirmed.

ANALYSIS BY THE APPEALS AUTHORITY

1.0. Whether the Appellant's grounds of Appeal relating to anomalies of the Tender Document are properly before the Appeals Authority and are justified;

In the Statement of Appeal the Appellant complained of the following irregularities, namely:-

- i. Failure to use Standard Tender Document issued by PPRA contrary to section 70(1) of the Act;
- ii. The Tender was not one of the tenders published in the GPN;
- iii. Contract period stated in the Tender is contrary to the law;
- iv. Performance security required is contrary to PPRA's Guidelines; and
- v. Clarification window was closed contrary to the law.

The Appeals Authority noted that all the above complained anomalies were known and or ought to have been known to the Appellant when the Tender was floated and or prior to the deadline for submission of tenders. This fact is clearly seen from the Appellant's submissions too.

From the above observation the Appeals Authority is of the view that if the Appellant was dissatisfied as indicated in its submissions It should have sought clarifications or made an application for administrative review.

According to Regulation 13(1) (a) and (2) of the Regulations a tenderer is allowed to seek for clarifications before the deadline for submission of tenders in order to clarify issues which are not clear. Regulation 13(1)(a) & (2) reads as follows:-

Reg. 13 (1)" A tenderer may request a clarification of the solicitation documents from a procuring entity, provided that such request is submitted to a procuring entity at least

(a) In the case of competitive tendering methods, seven days prior to the deadline for submission of tenders; and

(2) The procuring entity shall, within three working days after receiving the request for clarification, communicate in writing to all tenders to which a procuring entity has provided the solicitation documents without identifying the source of request so as to enable the tenderers to take into account the clarification received in the preparation of their tenders."

Where a tenderer has opted to seek clarification and is not satisfied with the responses may apply for administrative review. Another option would be for a tenderer who is dissatisfied with Tender requirements to directly challenge the anomalies by way of administrative review.

Sections 95(1), 96(1) and (4) and 97 (1) and (2) (a) and (b) of the Act read as follows:-

"Sec. 95 (1) Any tenderer who claims to have suffered or who may suffer any loss or injury as a result of a breach of a duty imposed on a procuring entity or an approving authority 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 it became aware of the circumstances giving rise to the complaint or dispute or when that tenderer should have become aware of those circumstances, whichever is earlier.

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."

The above quoted provisions indicate clearly that a tenderer dissatisfied with the procuring entities' acts or omissions is required to file an application for administrative review to the respective procuring entity within seven working days of becoming aware of the circumstances giving rise to a complaint.

The Appellant's failure to raise its grievances at the appropriate time limit prescribed in the above quoted provisions renders the grounds of Appeal relating to anomalies of the Tender Document and closure of the clarifications window to be improperly before the Appeals Authority.

From the above observations, the Appeals Authority is of the settled view that the Appellant failed to exhaust the available remedies as per Regulation 13(1)(a) & (2) and Sections 95 (1) and 96 (1) & (4) and 97 (1) & (2) (a) and (b) of the Act. Therefore, the Appellant cannot raise issues relating to anomalies of the Tender Document and the closure of the clarifications window at this juncture.

Under the circumstances, the Appeals Authority concludes the first issue in the negative that, the Appellant's grounds of Appeal relating to anomalies of the Tender Document are not properly before the Appeals Authority. The

Appeals Authority would, therefore, not consider the merits of the complained anomalies.

2.0. Whether award of the contract to the 2nd Respondent was justified.

In resolving this issue the Appeals Authority considered the Appellant's allegation against the 2nd Respondent and finds it proper to analyse each of them as hereunder:-

a) Foreign Company

The Appellant complained that the 2nd 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 1st Respondent's decision on the application for administrative review. In the circumstances and as per our findings in the decision issued with respect to Appeal Case No. 24 of 2022/23 between M/S Web Corporation Ltd versus the Dar es Salaam City Council and M/S Econex Company Ltd in which the dispute was in relation to this same Tender, this ground is expunged for being improperly raised.

b) Abnormally low tender

The Appellant challenged the 2nd 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 251,547,008.00 was pronounced. The 1st Respondent contended that the 2nd Respondent's price was TZS 1,400,000,000.00.

However, during the tender opening it was mistakenly read as TZS 251,547,008.00 which was written in the Form of Tender as the 2nd Respondent's monthly commission.

Having reviewed the 2nd Respondent's Form of Tender on TANePS it was observed that the 2nd Respondent's quoted price was TZS 1,400,000,000.00 and TZS 251,547,000.00 was indicated to be monthly commission. As per our findings in the decision issued with respect to Appeal Case No. 24 of 2022/23 cited above, the Appeals Authority agrees with the Respondents that there was a mistake in the read out price during the Tender opening.

c) Lack of requisite experience

On this point the Appeals Authority would wish to quote verbatim what was written in the Appeal Case No. 24 of 2022/23 cited above where it was stated as follows:-

"It is complained that the 2nd 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 2nd 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 2nd September 2019 to 1st 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 submission at least three contracts;
- (iii) Each of the three contracts to be attached must have a minimum value of at least TZS 100 Millions; 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 Million 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 2nd 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 2nd Respondent contravened the requirements of Clause 12.1(j)(ii) of the ITT and Regulation 203(1) of the Regulations."

d) Business licence

Requirement for submission of business licence was provided for under Clauses 3.0(d) and 12.1(e) of the ITT. In both clauses the tenderers were required to submit valid business licence. Clause 3.0(d) of the ITT reads as follows:-

Clause 3.0 "Mtoa Huduma ataambatisha nyaraka zifuatazo kwenye Zabuni yake:-

(d) Leseni halali ya Biashara (utoaji wa huduma yaUkusanyaji Ushuru); iliyothibitishwa na mwanasheria."

(Emphasis supplied)

The Appeals Authority reviewed the 2nd Respondent's tender on TANePS and observed that at the slot where the business licence was to be

uploaded it attached "*LESENI YA BIASHARA*" No. B2022-7004-073313 issued by "*Baraza la Manispaa Mjini Zanzibar, kuendesha biashara halali ya ICT katika eneo la Mlandege, Mtaa wa Mlandege*".

During the hearing both Respondents were asked to clarify if the 2nd Respondent complied with the submission of the business licence requirement. In response the 1st Respondent indicated that the 2nd Respondent complied with such a requirement as the submitted licence was valid. The 2nd Respondent also stated that since revenue collection is done through a special information communication technology (ICT) therefore a business licence for ICT was more relevant.

Clauses 3.0(d) and 12.1(e) of the ITT indicates that the relevant business licence for this Tender is one relating to revenue collection. Apparently, the business licence submitted by the 2nd Respondent is for ICT business.

From the above observation, the Appeals Authority finds the 1st Respondent to have failed to comply with the requirements of Clauses 3.0(d) and 12.1 (e) of the ITT when conducting evaluation of tenders. Therefore, the award of the tender to the 2nd Respondent contravened Regulations 203(1) and 206(2) of the Regulations which read 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".

"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 supplied)

In view of 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 2nd Respondent is not justified and is hereby annulled.

The 1st 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 Ruling is delivered in the presence of the parties this 10th day of February 2023.

ADV. ROSAN MBWAMBO



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Ag: CHAIRPERSON

MEMBERS: -

1. MS. NDEONIKA MWAIKAMBO.....

2. DR. WILLIAM KAZUNGU.....

