

IN THE PUBLIC PROCUREMENT APPEALS AUTHORITY

APPEAL CASE NO. 29 OF 2022-23

BETWEEN

M/S AMIKAN VENTURES LIMITED.....APPELLANT

AND

**TANZANIA ELECTRICAL, MECHANICAL AND ELECTRONICS
SERVICES AGENCYRESPONDENT**

DECISION

CORAM

- | | |
|-----------------------|-------------------|
| 1. Adv. Rosan Mbwambo | - Ag. Chairperson |
| 2. Mr. Rhoben Nkori | - Member |
| 3. Mr. Pius Mponzi | - Member |
| 4. Mr. James Sando | - Secretary |

SECRETARIAT

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

FOR THE APPELLANT

- | | |
|---------------------------|----------------------------------|
| 1. Mr. Gratian Mali | - Advocate - Ardean Law Chambers |
| 2. Mr. Abdulsalam Mohamed | - Managing Director |
| 3. Ms. Salama Abeid | - General Manager |

FOR THE RESPONDENT

- | | |
|------------------------|----------------------------------|
| 1. Mr. Keneth Sekwao | - Principal Legal Officer |
| 2. Ms. Metrida Kaijage | - Procurement Management Manager |
| 3. Ms. Sarah Laizer | - Accountant Officer |
| 4. Ms. Agripina Mheni | - Supplies Officer |

M/S Amikan Ventures Limited (hereinafter referred to as "**the Appellant**") has preferred this Appeal against **Tanzania Electrical, Mechanical and Electronics Services Agency** commonly known by its acronym as "**TEMESA**" (hereinafter referred to as "**the Respondent**"). The Appeal arises from Pre-qualification of Suppliers Tender No. AE/006/2022-2023/HQ/FA/NCS/05 for Provision of Shortlisted Suppliers for Supply of Marine Spare Parts and Lubricants for Ferries for Financial year 2022-2023 (hereinafter referred to as "**the Pre-qualification**"). The Pre-qualification had lots 1 and 2. The Appellant participated in both lots.

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 30th June 2022, the Respondent through the Tanzania National e-Procurement System (TANePS) invited applicants to submit application for Pre-qualification. Deadline for submission was set for 14th July 2022. By the deadline, nineteen (19) applications for Lot 1 and four applications for Lot 2 were received, including that of the Appellant.

The applications were then subjected to evaluation and after completion, the Evaluation Committee recommended a shortlist of nine applicants for Lot 1 and four applicants for Lot 2. The Appellant was shortlisted in both lots. The Tender Board at its meeting held on 30th September 2022, deliberated and approved the recommended list of shortlisted applicants.

On 29th to 30th November 2022, post-qualification was conducted to the shortlisted applicants. During that process the Appellant was disqualified for failure to comply with the required annual sales turnover of at least TZS 0.7 billion, as it was found to have annual sales turnover of TZS 401,083,936.00. The Tender Board through Circular Resolution dated 15th December 2022, approved the post-qualification report.

On 16th December 2022, the Respondent issued a Notice of Intention to award the framework contract to five shortlisted tenderers, namely:- M/s Songoro Marine Transport Ltd, M/s Dar es Salaam Merchant Group Ltd, M/s Bankarino Enterprises, M/s Port Marine Solution Ltd and M/s Steliar Investment Company Ltd. The Notice also informed the Appellant that it was

disqualified for having insufficient turnover contrary to Clause 35.1 of the Instruction to Tenderers (ITT) as modified by Clause 32 (iii) of the Tender Data Sheet (TDS). The said letter was received by the Appellant through TANEPS on 17th January 2023.

Dissatisfied with its disqualification, on 20th January 2023 the Appellant applied for administrative review to the Respondent. On 24th January 2023, the Respondent issued its decision which dismissed the Appellant's application for administrative review. In the said decision the Appellant was informed that Clause 13.3 of the ITT as modified by Clause 14(iv) of the TDS Lot 1 and 2 required tenderers to furnish annual sales turnover of at least TZS 0.7 billion.

Aggrieved further, on 30th January 2023, the Appellant lodged this Appeal to the Appeals Authority. When the matter was called for hearing the following issues were framed:-

- 1.0. Whether the disqualification of the Appellant was justified; and**
- 2.0. What reliefs, if any, are the parties entitled to**

SUBMISSIONS BY THE APPELLANT

In this Appeal the Appellant was represented by Mr. Gratian Mali, learned advocate. He commenced his submissions by adopting the grounds of appeal as contained in the Statement of Appeal. Regarding the first issue, he submitted that the Appellant was disqualified from the Tender

process for the reason that it had insufficient annual sales turnover contrary to the requirement of Clause 13.3 of the ITT as modified by Clause 14(iv) of the TDS. The learned counsel submitted that in the Respondent's decision for administrative review it was indicated that the Appellant had the annual sales turnover of TZS 401,083,936.00 as per the submitted audited financial statements.

The learned counsel submitted that according to Clause 14(iv) of the TDS annual sales turnover was to be assessed by reviewing bank statement and bank reference letters. The learned counsel cited Section 72(1) of the Act and stated that it requires criteria for tender evaluation to be specifically provided for in the Tender Document.

In complying with requirement of Clause 14(iv) of the TDS, the Appellant attached to its tender on TANePS a reference letter from Amana Bank and two bank statements from Amana Bank and CRDB Bank. The attached documents contained the following information: -

- i. Amana Bank statement of Account No. 0011082620001 for the period of 1st July 2021 to 13th July 2022 showing the Appellant's debits of TZS 685,961,651.32 and credits of TZS 784,023,231.11.
- ii. CRDB Bank statement of Account No. 01J1027528600 for the period of 12th July 2021 to 13th July 2022

showing Appellant's debits of TZS 1,127,593,601.43 and credits of TZS 896,355,404.03.

- iii. Reference letter from Amana Bank with reference No. ABL/MD/BS/2022/00103 dated 13th July 2022 which confirmed the credit worthiness of the Appellant.

The learned counsel elaborated further that the essence of annual sales turnover was to assess the ability of the Appellant to supply the goods. The attached bank statements demonstrated the Appellant's credit worthiness; hence, there was no need of verifying the same through other documents. The learned counsel expounded that had the Respondent intended to assess the annual sales turnover requirement by using documents other than those specified under Clause 14(iv) of the TDS, the Pre-qualification Document should have categorically stated as per Section 72(1) of the Act.

The learned counsel contended that the Respondent erred in law and facts by determining the Appellant's application for administrative review and indicating that it failed to comply with annual sales turnover of at least TZS 0.7 billion contrary to Clause 14(iv) of the TDS. The Appellant stated that the submitted bank statements indicated that its annual sales turnover was over and above the required amount.

The learned counsel submitted further that the Respondent stated in its Statement of Reply that the Appellant was disqualified during

post-qualification for failure to comply with annual sales turnover requirement which was assessed through the audited financial statements. The learned counsel submitted that during post qualification the Respondent was required to verify the genuineness of the submitted bank statements.

The learned counsel added further that the Tender was for pre-qualification of suppliers for supply of marine spare parts or lubricants. Regulation 122(5) of the Regulations requires pre-qualification process not to be used to limit number of tenderers. Tenderers are to be assessed on their capability to perform the contract and if the capability is verified positively they should not to be disqualified, the learned counsel contended.

The capability of the Appellant in supply of spare parts and lubricants is unquestionable since it has been a good supplier and had rescued the Respondent in several occasions. Furthermore, the Respondent owes the Appellant a sum of about TZS 600,000,000.00 arising out of supply of spare parts and lubricants. Thus, it was improper for the Respondent to conclude that the Appellant has not met the required annual sales turnover.

The learned counsel submitted further that according to Clause 32(iv) of the TDS the required annual sales turnover was at least TZS 0.3 billion and the same was to be evidenced by bank statements and bank reference letters. The two submitted bank



statements by the Appellant complied with this requirement. Thus, the Appellant should not have been disqualified.

The learned counsel also stated that the Notice of Intention to award indicated that the Appellant was disqualified for having insufficient annual sales turnover contrary to Clause 35.1 (iv) of the TDS. According to the Appellant the said clause does not relate with annual sales turnover requirements. Clause 35.1 (iv) of the TDS provides guidance on, amongst others, the requirement of legal capacity to make binding decisions. The Appellant complied with such a requirement as it submitted all documents to prove its legal capacity which included the certificate of incorporation, the memorandum and articles of association and the Power of Attorney.

The learned counsel submitted further that the Respondent's Statement of Reply indicated that evaluation was conducted from 18th - 22nd July 2022. On 30th September 2022 the evaluation report was tabled before the Tender Board for deliberations and approval. Surprisingly, on 15th December 2022 the Respondent circulated to the Members of the Tender Board a circular resolution for approval of the verification report on annual sales turnover. The learned counsel asked for explanations on what was deliberated by the Tender Board on 30th September 2022. Furthermore, the Appellant wanted to know as who conducted the verification and for what purpose. The learned counsel submitted

that the Respondent's conduct in this Tender raises a lot of questions which suggest that the Tender process is marred with impropriety and irregularities.

Finally, the Appellant prayed for the following orders: -

- i. A declaration that evaluation proceedings in respect of the Pre-qualification are null and void for having been made in violation of Section 72 of the Act;
- ii. A declaration that the Appellant was wrongly disqualified from the Pre-qualification process;
- iii. An order quashing the evaluation proceedings of the Pre-qualification and all subsequent decisions of the Respondent;
- iv. An order to re-evaluate the submitted applications in observance of the criteria and contents of the Tender Document issued by the Respondent;
- v. Costs incurred by the Appellant; and
- vi. Any other relief(s) that the Appeals Authority may deem fit to grant.

REPLY BY THE RESPONDENT

In this Appeal the Respondent was represented by Mr. Keneth Sekwao, Principal Legal Officer, Ms. Metrida Kaijage, Procurement Management Manager and Ms. Sarah Laizer, Accountant Officer. In responding to the Appellant's submissions Ms. Matrida Kaijage commenced her submission contending that the Pre-qualification was conducted through national competitive tendering method as per the procedures provided under the Act and the Regulations. The Pre-qualification was floated through

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TANePS and evaluation was conducted from 18th – 22nd July 2022. Further that after completion of the evaluation process, the evaluation report was tabled before the Tender Board and approved on 30th September 2022. The Tender Board's approval was submitted to the Respondent's Accounting Officer who reviewed and returned the same to the Tender Board with recommendations to conduct post-qualification to all shortlisted applicants.

Post qualification was conducted and after completion the findings indicated that the Appellant had insufficient annual sales turnover and therefore, was disqualified. According to the Respondent the requirement of annual sales turnover was set in order to ensure that the shortlisted applicant are financially capable to supply the required marine spare parts and lubricants.

Ms. Sarah Laizer, the Accountant, elaborated further that, she was appointed to be among the members of the post-qualification team and were required to verify annual sales turnover from the audited financial statements and bank statements. In the course of the verification the team reviewed the applicants' submitted bank statements and the audited financial statements and observed that some applicants, including the Appellant failed to comply with annual sales turnover as required in the Pre-qualification Document. The annual sales turnover was verified through the audited financial statements as the same cannot be verified from the bank statement alone. Thus, after completion of the

verification process, the Appellant's annual sales turnover was found to be TZS. 401,083,936.00.

The Respondent disputed the Appellant's assertion that it erred in law by disqualifying the Appellant for failure to comply with the requirement of Clause 14 (iv) of the TDS which required annual sales turnover of at least TZS 0.7 billion. According to the Respondent the said requirement was clearly specified in the Pre-qualification Document and the same was to be complied by all tenderers. Thus, non-compliance by the Appellant led to its disqualification.

Regarding the referred clause in the Notice of Intention to award that the Appellant was disqualified for failure to comply with Clause 35.5 (iii) of the TDS, the Respondent pointed out that, it was a mere typographical error. The proper clause would have been Clause 14 (iv) of the TDS. Thus, the Respondent's decision to disqualify the Appellant was based on its failure to comply with annual sales turnover requirement.

Therefore, the Respondent re-affirmed its decision of disqualifying the Appellant and prayed for orders that the Appellant is not entitled to the reliefs stated in the Statement of Appeal or any other reliefs, whatsoever.

ANALYSIS BY THE APPEALS AUTHORITY

1.0 Whether the disqualification of the Appellant was justified

The Appellant was disqualified for having insufficient annual sales turnover. The Appeals Authority revisited Clause 13.3 of the ITT as modified by Clause 14(iv) of the TDS. The said clause provided for the required annual sales turnover for both Lots 1 and 2. Clause 14 (iv) of the TDS reads as follows: -

"Clause 14 The qualification criteria required from tenderers in ITT Clause 13.3 is modified as follows: -

LOT 1 SPARE PARTS FOR FERRIES:

Able to supply spare parts and accessories on credit at an agreed quantity (credit limit) to be settled within a maximum of ninety (90) days.

(iv) Annual sales turnover of at least TZS 0.7 billion (evidenced by bank statement and Bank reference letter)

Lot 2: LUBRICANTS FOR FERRIES: -

(iv) Annual sales turnover of at least TZS 0.7 billion (evidenced by bank statement and Bank reference letter)."

(Emphasis added)

The above quoted clauses indicate clearly that applicants were required to demonstrate that they have got annual sales turnover

of at least TZS 0.7 billion to be evidenced by submission of bank statement and bank reference letters.

The Appeals Authority further observed that Clause 35.1 of the ITT as modified by Clause 32(iv) of the TDS required applicants to provide evidence of at least annual sales turnover of TZS 0.3 billion at the post-qualification stage. The Clause reads as follows:-

"Clause 32 Post qualification shall be carried out using the following requirements: -

i. Financial Capability

The Tenderer shall furnish documentary evidence that it meets the following financial requirements: -

(iv) Annual sales turnover of at least TZS 0.3 billion (evidenced by bank statement and Bank reference letter)".

[Emphasis added]

Clause 13.3 of the ITT provides for requirement to establish to the procuring entity's satisfaction documentary evidence of the applicants' qualifications to perform the contract. Clause 13.3(b) of the ITT indicates that the documentary evidence should establish that the tenderer has financial, technical and production capability. Clause 13.3 of the ITT as modified by Clause 14 of the TDS provides a list of documentary evidence required to establish

financial, technical and production capability. For the Financial capability the applicants were required to submit the following documentary evidence, namely: Three years Audited Financial Statements for 2019, 2020 and 2021 (Clause 14(vi)), Current Bank Statements for the most recent twelve (12) months (Clause 14 (ix)), bank statements and bank reference letters for Lots 1 and 2 to prove annual sales turnover of at least TZS 0.7 billion (Clause 14(iv)).

From the above exposition the Appeals Authority is of the view that the qualification criteria required from the applicants to establish financial capability should not be read in isolation.

In ascertaining whether the Appellant complied with annual sales turnover requirement, the Appeals Authority reviewed the bank statements attached to the Appellant's application on TANePS. The bank statement from Amana Bank indicated debits of TZS 685,961,651.32 and credits of TZS 784,023,231.11 while the bank statement from CRDB Bank indicated debits of TZS 1,127,593,601.43 and credits of TZS 896,355,404.03.

The Appeals Authority observed that the two bank statements did not show that all entries on the credit column were from sales. For instance, a quick review of the bank statements show that on 29th April 2022 TZS 234,000,000.00 was debited from Amana Bank account and credited to the CRDB Bank account. It is,

therefore, evident that not all credits in the bank statements were from sales.

The Appeals Authority observed further that annual sales turnover was also to be evidenced by bank reference letter. The Appellant attached a bank reference letter from Amana Bank. Having reviewed the same it was observed that it is silent in relation to annual sales turnover. The reference letter just indicated that the Appellant is creditworthy and is eligible for a credit facility of TZS 4,000,000,000.00 upon meeting the bank's internal lending criteria. The Appellant did not submit bank reference letter from CRDB Bank to support the submitted bank statement from CRDB.

In the absence of proof that all entries establishing the total amount of credits in the credit column in the bank statements were from sales and the lack of reference letters which could have evidenced annual sales turnover, the Appeals Authority finds that bank statements and reference letters alone cannot provide evidence of annual sales turnover.

Clause 13.3 of the ITT as modified by Clause 14(vi) of TDS required applicants to submit three years audited financial statements. In compliance with such a requirement the Appellant attached to its tender on TANePS audited financial statements. The audited financial statements indicate annual sales turnover of TZS 401,083,936.00 for year 2021; TZS 385,983,656.00 for the year 2020; and TZS 869,445,119.00 for the year 2019. The

record of Appeal indicates that the Respondent picked the annual sales turnover from the latest audited financial statements (2021). Since the Pre-qualification Document is silent on which year the annual sales turnover should be picked from, the Respondent's act of picking year 2021 was erroneous. The Appeals Authority is of the view that in the absence of a specific year in which annual sales turnover could be picked from, a proper way of computing the same is taking the average annual sales turnover from the submitted audited financial statements. Therefore, the average annual sales turnover is TZS 552,170,904 (which is about TZS 0.5billion).

Clause 35.1 of the ITT as modified by Clause 32 of the TDS provides for post – qualification. The Respondent submitted that the Appellant was disqualified during post-qualification stage. At this stage the Respondent formed a team of three persons from accounts section to verify the information provided in the submission for pre-qualification.

Regulation 124 of the Regulations reads as follows:-

Reg.124 *"The verification of the information provided in the submission for pre-qualification shall be confirmed through a post qualification process before the notice of intention to award the tender is communicated to the tenderers and award may be denied to a tenderer*

who is assessed to have no capability or resources to successfully perform the contract".

The Appeals Authority is of the view that much as the Tender Board approved the findings of the evaluation report which recommended shortlisting of the Appellant the verification conducted and the findings made during post-qualification by the Respondent are in line with the provisions of Clause 35.1 of the ITT as modified by Clause 32(iv) of the TDS and Regulation 124 of the Regulations. They are also in line with section 72(1) of the Act.

The Appeals Authority is of the settled view that much as Clause 32(iv) of the TDS set out annual sales turnover of at least TZS 0.3 billion the same was just for verifications purposes. It did not change the criterion of at least TZS 0.7 billion required in Clause 13.3 of the ITT as modified by Clause 14 (iv) of the TDS. Therefore, the Respondent's findings during post-qualification exercise that the Appellant's annual sales turn over was less than TZS 0.7 billion is proper.

Under the circumstances the Appeals Authority concludes the first issue in the affirmative that the Appellant's disqualification is justified.

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2.0 What reliefs, if any, are the parties entitled to?

Given the findings hereinabove, the Appeals Authority hereby dismiss the Appeal and allows the Respondent to proceed with the Tender process. The Respondent did not ask for costs and 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 absence of the parties though notified, this 2nd day of March 2023.

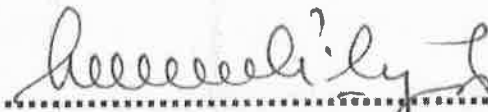
ADV. ROSAN MBWAMBO



Ag: CHAIRPERSON

MEMBERS: -

1. MR. RHOEN NKORI



2. MR. PIUS MPONZI

