

**IN THE PUBLIC PROCUREMENT APPEALS AUTHORITY**

**APPEAL CASE NO. 34 OF 2022-23**

**BETWEEN**

**M/S WATERWEYS HYDROTECH LIMITED.....APPELLANT**

**AND**

**BIHARAMULO URBAN WATER SUPPLY AND SANITATION  
AUTHORITY.....RESPONDENT**

**DECISION**

**CORAM**

- |                                     |               |
|-------------------------------------|---------------|
| 1. Hon. Justice (rtd) Sauda Mjasiri | - Chairperson |
| 2. Ms. Ndeonika Mwaikambo           | - 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. Stephen Otieno | - Company Secretary |
| 2. Mr. Maurus Lyamuya | - Director          |
| 3. Ms. Elizabeth Urio | - Administrator     |



## FOR THE RESPONDENT

1. Ms. Warda Mbagwa

- Accountant

This Appeal was lodged by M/S Waterways Hydrotech Ltd (hereinafter referred to as "**the Appellant**") against Biharamulo Urban Water Supply and Sanitation Authority (hereinafter referred to as "**the Respondent**"). The Appeal is in respect of Tender No. AE/110/2022/2023/G/18 for Supply and Installation of Surface Water Pump for Biharamulo Urban Water Supply and Sanitation Authority (hereinafter referred to as "**the Tender**").

According to the documents submitted to the Public Procurement Appeals Authority (hereinafter referred to as "**the Appeals Authority**") the background of this Appeal may be summarized as follows:-

The Tender was conducted through National Shopping 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 as "**the Regulations**")

On 18<sup>th</sup> January 2023, the Respondent through Tanzania National electronic Procurement System (TANePS) invited tenderers to participate in the Tender. The deadline for submission of Tenders was set for 27<sup>th</sup> January 2023. On the deadline, three tenders were received including that of the Appellant.

Tenders were then evaluated accordingly. After completion of the evaluation process, the Evaluation Committee recommended award of the



Tender to M/S Waterweys Hydrotech Ltd at the contract price of Tanzanian Shillings One Hundred Seventy Two Million Four Hundred Forty Seven Thousand Two Hundred and Six (TZS 172,447,206.00) only VAT inclusive subject to negotiations. According to the evaluation report, the Appellant's quoted price was above the Respondent's engineers estimates for about One Million Two Hundred Forty Four Thousand Two Hundred and Six only (TZS 1,244,206.00).

The Respondent through a letter dated 6<sup>th</sup> February 2023 invited the Appellant to attend negotiations scheduled to take place on 8<sup>th</sup> February 2023. The negotiations took place as scheduled and the Appellant reduced its total quoted price by 2% that is from TZS 172,447,206.00 to TZS 168,998,261.88 VAT inclusive. The negotiation report indicated that negotiations were successful and was tabled before the Tender Board at its meeting held on 9<sup>th</sup> February 2023. The Tender Board approved the negotiation report and allowed further processes to take place.

On 11<sup>th</sup> February 2023, the Respondent invited the second lowest evaluated tenderer namely M/S Equiplus Company Ltd and conducted negotiations with it. During negotiations M/S Equiplus Company Ltd reduced its quoted price by 6% that is from Tanzanian Shillings One Hundred Seventy Eight Million Seven Hundred Seventy Nine Thousand Two Hundred Forty (TZS 178,779,240.00) to Tanzania Shillings One Hundred Sixty Seven Million Four Hundred Ninety Six Thousand and Eighty only (TZS 167,496,080.00). The Tender Board at its meeting held on 13<sup>th</sup> February 2023, approved the negotiation report and awarded the Tender to M/S Equiplus Company Ltd.



On 15<sup>th</sup> February 2023, the Respondent issued the Notice of Intention to award the Tender to all tenderers who participated in the Tender process. The Notice informed the tenderers that the Respondent intends to award the Tender to M/S Equiplus Company Ltd at a contract price of Tanzanian Shillings One Hundred Sixty Seven Million Four Hundred Ninety Six Thousand and Eighty (TZS 167,496,080.00) only VAT inclusive. The Notice also informed the Appellant that its tender was disqualified as its negotiated price was found to be higher than that of the second ranked tenderer.

The Respondent vide a letter dated 15<sup>th</sup> February 2023, issued an acceptance letter to M/S Equiplus Company Ltd which informed it that its tender was accepted and therefore it was required to submit a performance securing declaration and to sign the contract on 23<sup>rd</sup> February 2023.

On 18<sup>th</sup> February 2023, the Appellant applied for administrative review to the Respondent challenging its disqualification for the reason that negotiations between it and the Respondent were successful as it reduced its quoted price by 2%. Furthermore, the Appellant claimed that it had not been informed that the negotiations were unsuccessful. Hence, at this stage it ought to have been awarded the contract. On 22<sup>nd</sup> February 2023, the Respondent issued its decision which dismissed the Appellant's application for administrative review. On 23<sup>rd</sup> February 2023, the Respondent and M/S Equiplus Company Ltd signed the contract. On 24<sup>th</sup> February 2023, the Appellant filed this Appeal to the Appeals Authority.



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

**1.0 Whether the Appellant's disqualification is 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. Stephen Otieno, its Company Secretary. He commenced his submissions on the first issue by stating that the Appellant filed this Appeal upon being dissatisfied with its disqualification from the Tender process. According to the Appellant, it complied with all the requirements of the Tender and was therefore invited for negotiations. The negotiations were basically on price and were successful as the Appellant reduced its quoted price from TZS 172,447,206.00 to TZS 168,998,261.88 VAT inclusive.

The Appellant submitted that both parties agreed and confirmed the negotiated price through the minutes of negotiations by appending their signatures. Parties agreed that the negotiated price would be the final contract price. Thus, the Appellant expected to receive the draft contract for review. Surprisingly, on 15<sup>th</sup> February 2023, the Appellant received the Notice of Intention to award which indicated that the Respondent intends to award the contract to M/S Equiplus Company Ltd. The Appellant submitted further that the Respondent did not inform it that the negotiations failed and another tenderer was invited for negotiations.



The Appellant complained of the procedural irregularities that led to the award of the contract to M/S Equiplus Company Ltd while the Respondent and the Appellant had successful negotiations. The Appellant stated that, looking at the price difference between its negotiated price of TZS 168,998,261.06 and that of M/S Equiplus Company Ltd of TZS 167,496,080.00, it is clear that the price difference was very minimal. That is to say, it could not have led the Respondent to award the Tender to M/S Equiplus Company Ltd for the reason that it had the lowest price.

Furthermore, the Appellant suspected that its price was shared to M/S Equiplus Company Ltd who was invited for negotiations after it had a successfully negotiated with the Respondent. The Appellant's suspicion arises due to a slight difference between its price and that of M/S Equiplus Company Ltd.

Finally, the Appellant prayed for the following orders:-

- i. Rejection of the Notice of Intention to award M/S Equiplus Company Ltd;
- ii. Review the Tender procedures to ascertain if the Appellant was intentionally disqualified by the Respondent;
- iii. Costs of this Appeal; and
- iv. Any other remedy, the Appeals Authority may deem fit and just to grant.

#### **REPLY BY THE RESPONDENT**

The Respondent was represented by Ms. Warda Mbagwa, an accountant from the Respondent's office. She commenced her submissions on the first



issue by stating that the Appellant was among the three tenderers who participated in the Tender. After completion of the evaluation process the Appellant was found to be the lowest evaluated tenderer and therefore was invited for negotiations because its quoted price was above the Respondent's estimated price. During negotiations the Appellant reduced its quoted price by 2% only. The Appellant refused to reduce further its quoted price on the justification that it is the prevailing market rate. The Respondent added further that, the negotiations were conducted pursuant to Section 76 (1) of the Act read together with Regulation 225 (1) (g) of the Regulations.

The Respondent submitted further that, the negotiation report was tabled before the Tender Board and it was approved as submitted. The Respondent contended that the negotiated price of the Appellant was submitted to the Procurement Officer of Ngara Urban Water Supply and Sanitation Authority so that it could be uploaded on TANEPS. The Respondent alleged that despite the Tender being conducted on TANEPS, it did not have direct access to TANEPS and therefore the Tender was conducted on the system on its behalf by Ngara Urban Water Supply and Sanitation Authority. The Respondent elaborated further that according to the Procurement Officer of Ngara Urban Water Supply and Sanitation Authority when the Appellant's price was uploaded on TANEPS the system rejected it for being above the estimated contract price. The Respondent alluded that the estimated contract price was TZS 120,000,000.00. Therefore, the Procurement Officer of Ngara Urban Water Supply and



Sanitation Authority recommended that negotiations be conducted with the second lowest evaluated tenderer.

Following the recommendation given the Respondent invited the second lowest evaluated tenderer, M/S Equiplus Company Ltd for negotiations. The negotiations were conducted successfully as M/S Equiplus Company Ltd reduced its price from TZS 178,779,240.00 to TZS 167,496,080.00. The outcome of the negotiations was tabled before the Tender Board and was approved accordingly. Thereafter, the Respondent awarded the Tender to M/S Equiplus Company Ltd.

The Respondent contended further that negotiations with the second lowest evaluated tenderer were conducted in compliance with Section 76 (4) of the Act read together with Regulation 230 of the Regulations. Thus, since the Appellant's agreed price was higher compared with the Respondent's estimated price, the Appellant's tender was disqualified based on the requirement of Regulation 209 of the Regulations. The Respondent claimed to have complied with all negotiation procedures save that the Appellant was not informed about the termination of its negotiations.

The Respondent stated further that following the issuance of the Notice of Intention to award, the Appellant lodged a complaint to the Respondent. Having determined the lodged complaint, the Respondent signed the contract with M/S Equiplus Company Ltd. However, the execution of the said contract is yet to be commenced.

Finally, the Respondent prayed that all the Appellant's prayers be rejected as it was fairly disqualified.





On its brief rejoinder the Appellant submitted that during negotiations it was disclosed that the estimated contract value was TZS 160,000,000.00 and not TZS 120,000,000.00 as contended by the Respondent during the hearing. The Appellant added that since the Respondent was aware of the estimated value of the contract it failed to comprehend the latter's act of requiring the Appellant to reduce the quoted price by 2% only. The Appellant stated further that the difference in price between the Appellant and M/S Equiplus Company Ltd was only TZS 1,000,000.00. Thus, if TANEPS rejected the Appellant's negotiated price it could have equally rejected the negotiated price of M/S Equiplus Company Ltd as it was not within the Respondent's budget.

### **ANALYSIS BY THE APPEALS AUTHORITY**

#### **1.0 Whether the Appellant's disqualification is justified**

In determining the validity of the parties' contentious arguments on this issue, the Appeals Authority reviewed Section 76(1) and (4) of the Act and Regulations 225(4) (a) and (5), 228(3) and 230 of the Regulations. The said provisions provide a clear guidance on the negotiation process in respect of tenders. That is a tenderer who has been determined to be the lowest evaluated tenderer for goods, works or services or the highest evaluated tenderer in case of revenue collection and who has been approved by the Tender Board can be invited for negotiations. If negotiations fail with the lowest evaluated tenderer, new negotiations may be commenced with the next lowest evaluated tenderer after obtaining the Tender Board's approval. In addition, the law requires a tenderer whose



negotiations have been terminated to be informed in writing the reasons for termination.

Section 76(1) and (4) of the Act and Regulations 225(4) (a) and (5), 228(3) and 230 of the Regulations read as follows:-

*"Sec.76(1) subject to the conditions stipulated in the regulations, a tenderer evaluated to have the capacity and capability to supply the goods, undertake the works, provide the services or purchase the assets shall be invited for negotiations by the procuring entity.*

**(4) *where the negotiation under subsection (2) fails to result in an acceptable contract, the procuring entity shall terminate the negotiations and after consultation with the appropriate tender board, invite the next ranked firm for negotiations.***

**Reg.225 (4) *Negotiations with a tenderer are not permitted until after the tender board has approved the evaluation committee's recommendations:-***

***(a) of the lowest evaluated tenderer in case of goods, works or services or highest evaluated tenderer in case of revenue collection, and the need to hold negotiation;***

**(5) *Negotiations shall only be held with the lowest evaluated tenderer for goods, services or***

*works, or the highest evaluated tenderer for revenue collection for national and international competitive tendering.*

Reg.228(3) ***Where the negotiation team recommends rejection of the tenderer, it may also, where appropriate, recommend inviting the next ranked tenderer for negotiation in the case of competitive methods of procurement or a new tenderer to submit a tender in the case of direct contracting.***

Reg.230 ***Where negotiations are commenced with the next ranked tenderer or a new tenderer is invited, the procuring entity shall not reopen earlier negotiations; and the original tenderer shall be informed in writing of the reasons for termination of the negotiations'***

(Emphasis supplied)

In ascertaining if the Respondent complied with the negotiations procedures as elucidated in the above quoted provisions, the Appeals Authority reviewed the record of Appeal and observed that the Appellant was the lowest evaluated tenderer and was therefore recommended for award of the contract subject to negotiations. On 8<sup>th</sup> February 2023 the Respondent conducted negotiations with the Appellant. During negotiation the Appellant reduced its quoted price from TZS 172,447,206.00 to TZS



168,998,261.88. In addition, minutes of negotiations dated 8<sup>th</sup> February 2023 indicated that negotiations were successful. The negotiation findings were tabled before the Tender Board at its meeting held on 9<sup>th</sup> February 2023 and the same were approved.

The record indicates further that on 11<sup>th</sup> February 2023 the Respondent negotiated with M/S Equiplus Company Ltd who reduced its quoted price from TZS 178,779,240.00 to TZS 167,496,080.00 VAT inclusive. The negotiations report was tabled before the Tender Board at its meeting held on 13<sup>th</sup> February 2023 and the same was approved.

The documents availed before the Appeals Authority do not indicate what led the Respondent to commence negotiations with M/S Equiplus Company Ltd and to finally award it the Tender while the Respondent had already negotiated with the Appellant. Furthermore, there are no records which indicate that negotiations with the Appellant failed or were terminated and that the Appellant was informed about the same.

During the hearing Members of the Appeals Authority required the Respondent to explain what led it to commence new negotiations with M/S Equiplus Company Ltd while it had successfully negotiated with the Appellant. In response thereof the Respondent submitted that it was compelled to negotiate with M/S Equiplus Company Ltd for the reason that the Appellant's negotiated price was above the Respondent's estimated costs of TZS 120,000,000.00. Thus, TANePS rejected the Appellant's negotiated price for being above the Respondent's estimates.



Having related the above facts to the requirements of Section 76(1) and (4) of the Act and Regulations 225(4) (a) and (5), 228(3) and 230 of the Regulations the Appeals Authority observed that the Appellant was the lowest evaluated tenderer, therefore the Respondent was correct in inviting it for negotiations. The Respondent's act in this regard was in accordance with Regulation 225(4) and (5) of the Regulations. The Appeals Authority observed further that after completion of the negotiations, minutes were prepared which indicated that the process was successful and the Tender Board approved the same. In this regard the Respondent also complied with Regulation 228(1) and (2)(a) of the Regulations.

The Appeals Authority considered the Respondent's act of negotiating with M/S Equiplus Company Ltd and observed that the said negotiations were commenced without terminating the Appellant's negotiations which were successful and approved by the Tender Board. Given the circumstances the Appeals Authority is of the firm view that the Respondent's act of negotiating with M/S Equiplus Company Ltd without indicating if negotiations with the Appellant failed, contravened Section 76(4) of the Act and Regulation 228(3) of the Regulations. The referred provisions require reasons for rejection of a tenderer during negotiation be specified by the negotiation team and the invitation of the second lowest evaluated tenderer be approved by the Tender Board prior to commencement of the new negotiations. To the contrary, the Respondent failed to adhere to this requirement of the law.

Furthermore, Regulation 230 of the Regulations requires a tenderer whose negotiations have failed to be informed in writing of the reasons which led

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to the termination of the negotiations. In this Appeal although the Appellant was invited for negotiations and the same were successful, the award was made to M/S Equiplus Company Ltd. The Appellant was not informed of the reasons which led to the termination of its negotiations. This fact was conceded by the Respondent during the hearing. Therefore, Appeals Authority finds the Respondent's act of not informing the Appellant the reasons that led to the termination of its negotiations to have contravened Regulation 230 of the Regulations.

The Appeals Authority considered the Respondent's argument that it opted to negotiate with M/S Equiplus Company Ltd because the Appellant's negotiated price was rejected by TANePS for being higher than the Respondent's estimated budget amounting to TZS 120,000,000.00. Having reviewed the record of Appeal, the Appeals Authority observed that page 3 of the evaluation report indicates that the cost estimate for the contract is TZS 160,000,000.00. Therefore, the Appeals Authority failed to comprehend why the Respondent's estimated budget presented during the hearing differed with the estimated cost specified in the evaluation report.

The Appeals Authority further considered the Respondent's argument that the award was made to the M/S Equiplus Company Ltd because it had the lowest price. This argument in the Appeals Authority's view, has no basis since negotiation procedures that led to the award of the Tender to M/S Equiplus Company Ltd were not in accordance with the law.

The Appeals Authority further observed that the Respondent Issued the Notice of Intention to award and acceptance letter on the same date that is

A handwritten signature in dark ink, consisting of a stylized 'Z' followed by a flourish.

15<sup>th</sup> February 2023. Section 60(3) read together with Regulation 231(2) of the Regulations requires a procuring entity to issue the notice of intention to award and accord tenderers seven working days for filing a complaint if any before the issuance of an acceptance letter. To the contrary, the Respondent issued the notice of intention to award and acceptance letter on the same day while the latter ought to be issued after a lapse of seven working days from the date the notice was issued. Thus, the Respondent contravened the law in this regard.

In view of the above findings, the Appeals Authority concludes the first issue in the negative that the Appellant's disqualification was not justified.

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

Taking cognizance of the findings hereinabove that the Respondent's act of negotiating with M/S Equiplus Company Ltd and awarding it the Tender was in contravention of the law, the Appeals Authority hereby allows the Appeal and nullifies the award made to M/S Equiplus Company Ltd. The Appeals Authority hereby orders the Respondent to award the Tender to the Appellant in observance of the law as was approved by the Tender Board at its meeting held on 9<sup>th</sup> February 2023 to be the lowest evaluated tenderer.

Each party is to bear its own costs. It is so ordered.

This Decision is binding on the Parties and may be executed in terms of Section 97 (8) of the Act.



The Right of Judicial Review as per Section 101 of the Act is explained to the Parties.

The Decision is delivered in the presence of the parties this 30<sup>th</sup> day of March 2023.

**HON. JUSTICE (rtd) SAUDA MJASIRI**

  
.....  
**CHAIRPERSON**

**MEMBERS:**

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

**2. MR. PIUS MPONZI** .....