

IN THE PUBLIC PROCUREMENT APPEALS AUTHORITY

APPEAL CASE NO. 39 OF 2022-23

BETWEEN

M/S RED JACKET GROUP LIMITED.....APPELLANT

AND

MINISTRY OF HEALTH.....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. Agnes Sayi | - Senior Legal Officer |
| 2. Ms. Violet Limilabo | - Senior Legal Officer |

FOR THE APPELLANT

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| 1. Mr. Rickson Kimaro | - Chief Executive Officer |
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FOR THE RESPONDENT

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| 1. Mr. Isaya Makoko | - Senior Legal Officer |
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2. Mr. Edwin Elias - Supplies Officer
3. Mr. Ally Magori - Supplies Officer

Before this Public Procurement Appeals Authority (hereinafter referred to as "**the Appeals Authority**") is an appeal by M/s Red Jacket Group Limited (hereinafter referred to as "**the Appellant**") against the Ministry of Health (hereinafter referred to as "**the Respondent**"). The Appeal is in respect of Tender No. ME/007/2022-2023/HQ/G/154 for Supply, Installation, Commissioning, Testing and Training of Bricks Machines MAT Project for Three Sites (Itenga -Dodoma, Bombo-Tanga and Mt. Meru-Arusha) (hereinafter referred to as "**the Tender**").

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 as "**the Regulations**"). Background of this Appeal may be summarized as follows:-

On 1st November 2022, the Respondent through Tanzania National electronic Procurement System (TANePS) invited tenderers to participate in the Tender. Deadline for submission of tenders was on 15th November 2022. On the deadline, six tenders were received including that of the Appellant. The tenders were accordingly evaluated, and the Evaluation Committee recommended an award of the contract to M/s Masenga Industries Ltd at the contract price of Tanzanian Shillings Two Hundred

Forty Six Million Three Hundred Twenty Thousand only (246,320,000.00) VAT inclusive.

The Tender Board through a Circular Resolution No. MOH/2022-2023/HQ/G/159 dated 10th February 2023 approved the award of the contract as recommended by the Evaluation Committee subject to negotiations. The negotiations successfully took place on 9th March 2023 and the results were approved by the Tender Board through a Circular Resolution No. MOH/2022-2023/HQ/G/188 dated 14th March 2023.

On 31st March 2023, the Respondent issued a Notice of Intention to award the Tender. The Notice informed tenderers that the Respondent intends to award the contract to M/s Masenga Industries Limited at the contract price of Tanzanian Shillings Two Hundred Forty Six Million Three Hundred and Twenty Thousand only (TZS 246,320,000.00) VAT inclusive. The Notice also informed the Appellant that its tender was disqualified for having declared that it has a conflict of interest.

Dissatisfied, the Appellant applied for administrative review to the Respondent on 4th April 2023, challenging the reason given for its disqualification. On 8th April 2023, the Respondent through TANEPS issued its decision dismissing the Appellant's application for administrative review. Aggrieved further, on 14th April 2023 the Appellant lodged this Appeal.

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; and

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

SUBMISSIONS BY THE APPELLANT

Mr. Rickson Kimaro, the Appellant's Chief Executive Officer represented the Appellant. He commenced his submissions on the first issue by stating that it is dissatisfied with the reason given for its disqualification. He contended that through the Notice of Intention to award the Appellant was informed that its tender has been disqualified for having conflict of interest. The Appellant denied to have any conflict of interest.

The Appellant stated in the Statement of Appeal in paragraph 3 (b) that *"the document provided by PE as response to my complaint is none existence in the record of document I submitted for this tender and also none existence on tender document."*

The Appellant expounded that the Tender was floated through TANePS which uses Java Programming Language. According to Java Programming Language once the system is configured with a particular data such as values or variables the output will depend on what has been fed in the system. For instance, if the system is configured with the input of a range of numbers, then it will accept only the number within the range so specified. Any number or information out of the configured range will not be accepted. He added that, if the information required by the system will not be properly fed, the system will not allow the user to go into the next stage.

The Appellant submitted that if conflict of interest requirement was part of the criteria for this Tender on TANEPS, it was not possible for it not to be seen by the Appellant and responded accordingly. The Appellant contended that conflict of interest was not part of the requirement of the Tender as a result the Appellant never responded to it. If the conflict of interest was one of the requirements the Appellant would not have overlooked it and the system could not have allowed it to proceed to the next stage. The Appellant elaborated that if conflict of interest criterion is currently available on TANEPS as one of the criteria for this Tender, it is more likely that the Respondent amended the requirements after the Appellant had already downloaded the tender package. Thus, the Appellant's package lacked the said criterion due to likely amendments that the Respondent might have made.

The Appellant stated further that much as conflict of interest requirement was not seen on its downloaded tender package, such an anomaly might have been caused by TANEPS as it may have encountered a system glitch that led the said requirement not to appear on the Appellant's tender package. Thus, the Appellant ought not to have been disqualified for such anomaly.

The Appellant submitted that assuming conflict of interest was one of the criteria, yet the proposed answers "Comply" or "Not comply" have no relevance to the posed question. The question posed on TANEPS on declaration of conflict of interest required the answer to be "YES" or "NO". The Appellant added that since the question on conflict of interest was straightforward the Appellant could not have responded to it by selecting

to have a conflict of interest if at all such a requirement was in the downloaded tender package. The Appellant further stated that it failed to recall whether or not it responded to the question relating to conflict of interest by selecting "Not comply".

The Appellant submitted further that, the Respondent intends to award the contract to M/s Masenga Industries Limited who had quoted higher price of Tanzanian Shillings Two Hundred Forty Six Million Three Hundred and Twenty Thousand only (TZS 246,320,000.00) VAT inclusive compared to the price quoted by the Appellant of Tanzanian Shillings One Hundred and Seventy Million only (TZS 170,000,000.00) VAT inclusive. Thus, the Appellant should be considered for award taking into consideration that it complied with the requirements of the Tender Document and it submitted the form of integrity and the anti bribery policy.

Finally, the Appellant prayed for the following orders:-

- i. The Respondent's decision of awarding the contract to the proposed tenderer be set aside;
- ii. The Appeal be allowed;
- iii. The contract be awarded to the Appellant; and
- iv. Any other order or reliefs the Appeals Authority may deem fit to be granted.

REPLY BY THE RESPONDENT

In this Appeal the Respondent was represented by Mr. Isaya Makoko, Senior Legal Officer, Mr. Edwin Elias and Mr. Ally Magori both Supplies Officers. On the first issue the Respondent submitted that the Appellant was one of the tenderers participated in the Tender and was disqualified for failure to comply with conflict of interest requirement.

According to the **Evaluation Criteria for Use in the TANePS Based on PPRA's Standard Tender Document for Health Sector Goods Without Pre-qualification** issued by the Public Procurement Regulatory Authority (PPRA) on February 2022 (hereinafter referred to as "**the Evaluation Guideline**") declaration of conflict of interest is one of the requirement in the Tender. In the Tender Document, conflict of interest was provided for under Clause 3.7 of the Instructions To Tenderers (ITT) read together with Item 3.1.2 of Section IV-Qualification and Evaluation Criteria of the Tender Document.

The Respondent submitted that in order for tenderers to declare their conflict of interest status they were required to answer by stating "Comply" meaning "YES" or "Not comply" meaning "NO" in response to the question as posed on TANePS. If a tenderer states "Not comply" TANePS automatically rejects the tender for having conflict of interest. In the Appellant bid the answer given was "Not comply". Consequently, its tender was rejected for being non-responsive.

According to the Respondent, conflict of interest and Anti-Bribery Policy are two different requirements and all were to be complied with by all the tenderers. Therefore, much as the Appellant submitted its declaration in compliance with Anti-Bribery Policy the same could not be used to meet the conflict of interest requirement.

The Respondent submitted that tenders were evaluated based on the criteria set in the Tender Document as per Section 72 of the Act read together with Regulations 203 and 354(3) of the Regulations. Thus, the Appellant was disqualified for failure to comply with conflict of interest criterion in accordance with Regulation 204(2)(b) of the Regulations.

The Respondent submitted that an online extract from TANePS attached to the Respondent's decision on application for administrative review was a print out of what was submitted by the Appellant on its bid. The online extract is automatically generated by TANePS and neither the Respondent nor PPRA have access of changing the information submitted by a tenderer. The online extract contains actual information submitted by the Appellant on its tender. The online extract indicates that the Appellant answered the question on conflict of interest criterion by stating "Not comply". The Appellant should blame itself either by mistake or lack of know how that led it to answer "Not comply" hence indicating that it has got conflict of interest in the Tender. Therefore, the disqualification of the Appellant on this point is justified.

Regarding the Appellant's argument on the amendment of the Tender Document, the Respondent stated that the Tender Document issued was

not amended. Had the Tender Document been amended, the amendments would have been communicated on TANEPS to all tenderers through an addendum. In addition, TANEPS by itself does not have a capacity of amending the Tender Document and that there was no system error that affected the Tender Document as the Appellant contended.

The Respondent submitted further that, tenderers were allowed to seek clarifications if the Tender requirement were ambiguous or not clear pursuant to Clause 13(1) (a) of the Tender Document. However, the Appellant did not seek any clarifications.

Finally, the Respondent prayed for dismissal of the Appeal as the Appellant's disqualification was due to its failure to comply with the requirement of the Tender Document on the conflict of interest criterion.

ANALYSIS BY THE APPEALS AUTHORITY

1.0 Whether the disqualification of the Appellant's tender was justified

According to the Evaluation Report and the Notice of Intention to award, the Appellant's tender was disqualified at the preliminary evaluation stage because in its bid as filled and submitted on TANEPS the Appellant declared to have a conflict of interest.

Interestingly, the Appellant submitted that conflict of interest criterion was not one of the requirements in the Tender Document. The Tender package that the Appellant downloaded, filled and submitted did not include such a requirement. According to the Appellant probably this requirement was

added by the Respondent after the Appellant had downloaded the Tender package. The Appellant contended further that conflict of interest requirement was probably omitted from the Tender Document due to TANEPS glitch that might have occurred before it downloaded the Tender package. The Appellant added in the alternative that, if such a requirement existed then the answer "Comply" or "Not comply" does not make any relevance to the posed question.

Clause 3.7 of the ITT provides guidance on conflict of interest requirement. It reads as follows:-

"3.7 A tenderer shall not have a conflict of interest. All tenderers found to have conflict of interest shall be disqualified ..."

Item 3.1.2 of Section IV-Qualification and Evaluation Criteria specifically required tenderers to declare their conflict of interest status through submission of the Form of Tender. The Appeals Authority reviewed the Tender Document under Section V - Tendering Forms, particularly the Form of Tender and observed that one of the paragraphs of the said Form bears a declaration on conflict of interest. The said paragraph reads as follows:-

"We declare that, as tenderer (s) we do not have conflict of interest with reference to ITT Clause 3.7."

The Appeals Authority reviewed the Tender on TANEPS and observed that there is a slot whereby tenderers were required to declare their conflict of interest status. The said slot had the following question:-

A handwritten signature in dark ink, appearing to be a stylized 'N' followed by a flourish and a '2'.

"Do you Declare that you have no Conflicts of Interest in accordance with ITT 3.7 in compliance with Item 3.1.2 of Section IV Qualification and Evaluation Criteria? YES/NO."

Upon further review of TANePS, the Appeals Authority observed that the above quoted question was to be answered by selecting "Comply" or "Not comply." Evaluation Report and online extract all indicate that this criterion existed and that it was equally evaluated to all tenderers.

From the above observations the Appeals Authority is satisfied that declaration by tenderers as to their conflict of interest status was one of the mandatory requirements in the Tender. The Appellant's proposition that conflict of interest requirement was not one of the requirements in the Tender is accordingly rejected. The Appeals Authority equally rejects the Appellant's contention that there was an error on TANePS, in that, had it been that the alleged error existed, the whole Tender including the tenders submitted by other tenderers would have been affected, particularly on the conflict of interest criterion.

Looking at the Appellant's tender on TANePS and the evaluation report it is apparent that in a slot where the above quoted question and answer on declaration of conflict of interest the Appellant answered by selecting "Not comply".

The Appellant submitted that it was not certain whether or not it responded to the question relating to conflict of interest by selecting "Not

comply". In view of what is indicated in the TANePS evaluation report and the Appellant's online bid on TANePS the Appeals Authority finds that this argument lacks legs to stand on.

The Appeals Authority also considered the Appellant's proposition that it submitted the Anti-Bribery Policy and therefore the contents therein suffices to indicate that it does not have conflict of interest. The Appeals Authority agrees with the Respondent that conflict of interest and Anti-bribery Policy are two distinct requirements and therefore, each one of them has to be complied with as per the requirements provided for in the Tender Document.

The Appeals Authority agrees with the Appellant that the proposed answers "Comply" or "Not comply" have no relevance to the posed question. However, the Appeals Authority is of the considered view that the Appellant should have sought clarifications from the Respondent.

The Appeals Authority further considered the Appellant's contention that the Respondent intends to award the contract to the tenderer with the highest quoted price compared to its quoted price. According to Regulation 212 of the Regulations, a successful tenderer is one with the lowest evaluated tender price for goods, works or services or the highest evaluated tender in case of revenue collection. The Regulation reads as follows: -

"212 The successful tenderer shall be -

- (a) the tender with the lowest evaluated tender price in case of goods, works, or services, or the**

highest evaluated tender price in case of revenue collection but not necessarily the lowest or highest submitted price, subject to any margin of preference applied."

The evaluation report indicates that the Appellant was disqualified at the preliminary evaluation stage and thus did not reach price comparison stage. Consequently, the Appellant's quoted price was not evaluated. The Appellant is therefore, not the lowest evaluated bidder and its quoted price could not have been considered for award.

From the above analysis the Appeals Authority is of the firm view that the Appellant failed to comply with conflict of interest requirement. The Respondent's act of disqualifying the Appellant is therefore justified and is in line with Regulation 206(2) of the Regulations. This Regulation reads as follows:-

"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."

In view of the above findings, the Appeals Authority concludes the first issue in the affirmative that the disqualification of the Appellant's tender was justified.

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

Taking cognizance of the findings hereinabove, the Appeals Authority hereby dismiss the Appeal. The Respondent is allowed to proceed with the Tender process.

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 Respondent and absence of the Appellant though duly notified on the hearing date this 19th day of May 2023.

ADVOCATE ROSAN MBWAMBO



Ag. CHAIRPERSON

MEMBERS: -

1. MS. NDEONIKA MWAIKAMBO.....

2. DR. WILLIAM KAZUNGU.....