

IN THE PUBLIC PROCUREMENT APPEALS AUTHORITY

APPEAL CASE NO. 42 OF 2022-23

BETWEEN

M/S ENGLISH PRESS LIMITED.....APPELLANT

AND

TANZANIA INSTITUTE

OF EDUCATION.....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. Florida Mapunda | - Deputy Executive Secretary |
| 2. Agnes Sayi | - Senior Legal Officer |
| 3. Violet Limilabo | - Senior Legal Officer |

FOR THE APPELLANT

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| 1. Mr. Daudi Maneno | - DS Consult Law Chambers |
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FOR THE RESPONDENT

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| 1. Mr. Ayoub Sanga | - State Attorney |
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| 2. Ms. Jacqueline Kinyasi | - State Attorney |
| 3. Mr. George Magambo | - State Attorney (TIE) |
| 4. Mr. Michael Kanyela | - State Attorney (TIE) |
| 5. Mr. Leopold Kaswezi | - Corporate counsel (TIE) |
| 6. Mr. William Masanja | -Head of Procurement Management Unit |

Before this Public Procurement Appeals Authority (hereinafter referred to as **"the Appeals Authority"**) is an appeal by **M/S English Press Limited** (hereinafter referred to as **"the Appellant"**) against **Tanzania Institute of Education** commonly known by its acronym as "TIE" (hereinafter referred to as **"the Respondent"**). The Appeal originates from procurement process in Tender No. PA/070/2022/2023/G/16 LOT 1-3 for Printing and Supply of Mathematics and Science Subjects Textbooks and Braille Printing Materials for Secondary School Form 1-4 SEQUIP Project (hereinafter referred to as **"the Tender"**).

The Tender was conducted through National Restricted 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 28th February 2023, the Respondent floated the Tender through the Tanzania National electronic Procurement System (TANePS). Deadline for submission of Tenders was on 9th March 2023. On the

deadline, the Respondent received eight tenders including that of the Appellant.

The received tenders were accordingly evaluated. Evaluation Committee recommended award of the Tender for LOT-1 to M/S Mbasa Books Distributors Limited while award for LOT-2 was recommended to M/S Nyambari Nyangwine Group of Companies Ltd. The contract price for both awards was Tanzanian Shillings Three Billion Seven Hundred Million only (TZS 3,700,000,000.00) VAT exclusive for LOT-1 and Tanzanian Shillings Five Billion Three Hundred Million Eight Hundred Sixty Seven Thousand Two Hundred Fifty only (TZS 5,300,867,250.00) VAT exclusive for LOT-2 respectively. None of the tenderers participated in LOT 3 complied with the requirements of the Tender. Therefore, the Evaluation Committee recommended re-advertisement of LOT-3.

The recommendations of the Evaluation Committee for the awards of LOT-1 and LOT- 2 were tabled before the Tender Board at its meeting held on 6th April 2023. After deliberations the Tender Board approved the recommendations for both awards subject to negotiations. The negotiations successfully took place on 18th April 2023. Then the Tender Board through Circular Resolution No. 2022/2023/47 circulated on 20th April 2023 approved the awards.

On 21st April 2023, the Respondent issued a 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 LOT-1 to M/S Mbasa Books Distributors Limited at the contract price of Tanzanian

Shillings Three Billion Seven Hundred Million only (TZS 3,700,000,000.00) VAT exclusive and LOT-2 to M/S Nyambari Nyangwine Group of Companies Ltd at the contract price of Tanzanian Shillings Five Billion Three Hundred Million Eight Hundred Sixty Seven Thousand Two Hundred Fifty only (TZS 5,300,867,250.00) VAT exclusive. The Notice also informed the Appellant that its tender was disqualified because the Appellant " ... *did not submit scanned copies of the cover page, Title page, Copyright page, and Acknowledgement page showing the ISBN of sample Books*".

Dissatisfied with the said reason, on 24th April 2023, the Appellant applied for administrative review to the Respondent. The Appellant complained that it submitted the sample books as required in the Tender Document. On 26th April 2023, the Respondent issued its decision and dismissed the application for administrative review. In this decision the Respondent stated that the sample books were submitted but were not published by the Appellant as required on TANEPS and Tender Document. Still dissatisfied, on 2nd May 2023 the Appellant lodged this Appeal on the following grounds, namely that: -

- i) The disqualification is unfair and unreasonably defeating the purpose of competition, equality, fairness, and transparency;
- ii) There are conflicting reasons for the Appellant's disqualification;
- iii) Criterion used to disqualify the Appellant's bid was not one of the evaluation criteria provided for in the Tender Document; and
- iv) The Respondent used evaluation criteria which had been amended through Clarifications No. 4 and No. 5.

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

**1.0 Whether the Appellant's disqualification 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. Daudi Maneno, learned counsel. He commenced his submissions on the first ground of Appeal by stating that the disqualification of the Appellant's tender for failure to attach scanned copies of the cover page, title page, copyright page and acknowledgement page showing the ISBN of sample Books is unfair and unreasonably defeating the purpose of competition, equality, fairness and transparency as provided under Regulation 4(2)(b) and (c) of the Regulations. The learned counsel contended that the above itemized documents were all attached to the Appellant's tender and uploaded on TANePS. The Respondent acknowledged this fact through its decision on the Appellant's application for administrative review dated 26th April 2023.

Addressing the second ground of Appeal, the learned counsel submitted that, the Respondent issued two different reasons for the Appellant's disqualification. The Respondent through the Notice of Intention to award stated that the Appellant's tender was disqualified for failure to submit scanned copies of the cover page, title page, copyright page, and acknowledgement page showing the ISBN of sample Books. Interestingly, in the Respondent's decision on the Appellant's application for

administrative review changed the reason for disqualification. It stated that the Appellant was disqualified for submitting sample books that were not published by it as required in the Tender Document.

The learned counsel submitted that due to the different reasons given, it is uncertain whether the reason for its disqualification is as stated in the Notice of Intention to award or the one stated in the Respondent's decision on the application for administrative review. On that basis, the learned counsel submitted that the Appellant's disqualification was unfair and uncertain. Further that the Respondent's act defeats the purpose of competition, equality, fairness and transparency as provided under Regulation 4(2)(b) and (c) of the Regulations.

Submitting on the third and fourth grounds of appeal, the learned counsel stated that criterion used to disqualify the Appellant's tender was not part of the evaluation criteria provided under Section IV of the Tender Document and responses to Clarifications No. 4 and 5 as provided by the Respondent.

According to Clause 11.1(h) of the Instruction To Tenderers (ITT) as modified by Clause 15(ix) of the Tender Data Sheet (TDS), tenderers were required to demonstrate experience in publishing and printing books in the United Republic of Tanzania. Prior to the deadline for submission of tenders the Appellant and other tenderers sought for clarifications from the Respondent on various provisions including Clause 15(ix) of the TDS pursuant to Clauses 8.2, 8.3, 9.1 and 9.2 of the ITT and Regulation 13(2), (3) and (4) of the Regulations. When responding to the tenderers' requests for clarifications the Respondent through Clarifications No. 5 informed the

tenderers that the required experience was for printing and supplying of textbooks only. Therefore, tenderers were not required to have experience in publishing, the learned counsel contended.

The learned counsel contended further that the modifications made through Clarifications No.5 automatically became binding to both the Respondent and the tenderers. Surprisingly, during evaluation the Respondent proceeded to use Clause 15(ix) of the TDS without taking into consideration the changes introduced through Clarifications No. 5. The Respondent ought to have adhered to the changes introduced through Clarification No.5 as per the guidance provided under Clauses 8.2, 8.3, 9.1 and 9.2 of the ITT and Regulation 13(2),(3) and (4) of the Regulations, the learned counsel insisted.

The learned counsel also submitted that in this Tender the Respondent used the new Standard Tender Document issued by the Public Procurement Regulatory Authority (PPRA) on February 2022. The new Standard Tender Document requires all the evaluation criteria to be specified under Section IV-Qualification and Evaluation Criteria. Specifically, in this Tender, Clause 32.6 of the ITT requires all the evaluation criteria to be set out under Section IV-Qualification and Evaluation Criteria. It was the learned counsel's submissions that the requirement under Clause 15(ix) of the TDS that has been used to disqualify the Appellant was not among the evaluation criteria provided under Section IV-Qualification and Evaluation Criteria. Based on that fact the learned counsel submitted that, the Respondent's act of disqualifying the Appellant contravened Clause 32.6 of the ITT and Sections 40(7), 72(1) and (2) of the Act and Regulation 203(1)

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of the Regulations. According to the referred provisions, evaluation should be conducted in accordance with terms and conditions provided for in the Tender Document.

Regarding the publishing requirement, the learned counsel submitted that even though tenderers were required to submit sample pages of ten (10) titles of textbooks published and supplied by the respective tenderer, the Tender was not for publishing purposes. The purpose of the Tender was only for printing and supply of Mathematics and Science subjects Textbooks and Braille printing Materials for Secondary schools. The title of the Tender, description of the Tender, Invitation for Tenders, Tender Data Sheet, Schedule of Requirement, Technical Specifications, Special Conditions of the Contract and various forms of the Tender Document do not indicate that the Tender was for publishing.

The learned counsel elaborated that publishing and printing are two distinct activities. Publishing includes actively seeking out manuscripts to publish and then guide those manuscripts through the whole editing and designing process. Ready for printing documents are then handed over to the book printers that would print and produce the finished product. Once this process is completed, the publisher takes over again to market the publication through bookstores, wholesalers and online marketplaces. Publishers focus on acquiring and marketing the new content. Printers specialize in the actual printing and binding of books. Thus, based on the requirements provided for in the Tender Document, publishing activities were not part of the Tender. Therefore, the requirement that tenderers should also be publishers was irrelevant.

The learned counsel further submitted that the Tender was preceded by a pre-qualification process which was conducted competitively, fairly and openly. The Appellant was among the pre-qualified tenderers for participating in tenders relating to printing and supplying of primary and secondary school textbooks only. When the Tender was floated, the Respondent invited tenderers who were pre-qualified for printing and supplying of textbooks. Thus, the Appellant failed to comprehend the Respondent's interest of including publishing qualification requirement in the Tender while the pre-qualification was not for publishing of textbooks.

The learned counsel added that the contents of the required books were to be provided by the Respondent. As per the procedure, the said contents were to be approved by the Ministry of Education. Therefore, the role of the tenderers is to print and supply books which have been published by the Respondent because it is only the Respondent that has been mandated to publish and produce books for primary and secondary schools in Tanzania.

The learned counsel submitted that the Appellant has been printing and supplying to the Respondent textbooks published by the Respondent. In the previously awarded contracts which are of a similar nature to the Tender the Appellant's role was only for printing and supplying. Publishing was not part of the said contracts.

The learned counsel concluded his submissions by stating that basing on the above, it is certain that the Appellant's disqualification was not justified. The learned counsel contended that since the Appellant's tender is

responsive, the firm deserves to be considered for award of the Tender as its tender price is lower than the prices quoted by proposed awardees. In LOT- 1, the Appellant quoted USD 1,517,227.97 which is equivalent to TZS. 3,641,347,128.00 while M/S Mbesa Books Distributors Limited quoted TZS 3,700,000,000.00. Likewise, in LOT-2, the Appellant quoted USD 1,939,896.75 which is equivalent to TZS. 4,655,752,000.00 while M/S Nyambari Nyangwine Group of Companies Limited quoted TZS 5,300,867,250.00.

Finally, the Appellant prayed for the following orders, namely that: -

- i) The procurement process be suspended paving way to this Appeal.
- ii) The Notice of Intention to award which indicates the Respondent's intention to award the tender to the proposed successful tenderers be quashed.
- iii) Re-evaluation of the Tender.
- iv) Payment of TZS 18,540,000.00 being costs of this Appeal as per the following breakdown: -
 - a) Appeal fee TZS 300,000.00.
 - b) Legal representation USD 6,000 (TZS 14,400,000.00).
 - c) Transportation costs for two persons return ticket from Kenya to Dodoma via Dar es salaam TZS 3,240,000.00.
 - d) Accommodation for two persons for one day at Dodoma TZS 600,000.00.
- v) Any other relief this Appeals Authority may deem just to grant.

REPLY SUBMISSIONS BY THE RESPONDENT

The Respondent was represented by Mr. Ayoub Sanga, assisted by Ms. Jacqueline Kinyasi, State Attorneys, both from the Office of the Solicitor General. Mr. Leopold Kaswezi, Corporate Counsel, Mr. George Magambo, State Attorney, Mr. Michael Kanyela, State Attorney and Mr. William Masanja, Head of Procurement Management Unit were from the Respondent's office. Mr. Ayoub Sanga, the learned State Attorney led the Respondent's team in addressing the Appeals Authority. He commenced the submissions by adopting the Respondent's written Statement of Reply.

According to the learned State Attorney the evaluation process for the Tender was conducted in adherence to the requirements of Sections 40(7) and 72(1) of the Act read together with Regulations 203(1), 204(2)(k) and 206(2) of the Regulations. Further that the Tender and its evaluation was guided by the Tender Document. The Tender Document comprised of several sections which were all to be read together and not in isolation.

He submitted that Clause 11.1(h) of the ITT allowed the Respondent to specify other requirements that were relevant for the Tender. In complying with Clause 11.1(h) of the ITT, the Respondent specified, among others, a requirement that tenderers should submit sample pages of textbooks published, printed, and supplied by them. This requirement was specified under Clause 15(ix) of the TDS. Section IV-Qualification and Evaluation Criteria contained evaluation criteria for this Tender. Item 2.1 (h) and 2.2(h) of Section IV-Qualification and Evaluation Criteria allowed criteria specified in the TDS to be also considered during evaluation. Therefore, the Respondent conducted the evaluation process in accordance with the

requirements provided for in the Tender Document, particularly Section IV- Qualification and Evaluation Criteria.

Regarding the Appellant's argument on unfair disqualification, the learned State Attorney submitted that the Appellant was fairly disqualified from the Tender process. The reason for its disqualification was a failure to comply with the requirement of Clause 15(ix) of the TDS which required tenderers to submit sample pages of ten titles of textbooks published, printed, and supplied by the respective tenderer in the United Republic of Tanzania and approved by the Ministry of Education within the last ten years. The Appellant did not submit sample pages of ten (10) titles of textbooks published by it and printed in the United Republic of Tanzania. Instead, the Appellant attached to its tender a list of sample pages of ten (10) titles of textbooks published by the Respondent without the latter's consent or approval. Consequently, the sample pages of textbooks attached to the Appellant's bid contravened the requirements of Clause 15(ix) of the TDS, hence the bid became non-responsive.

In relation to the Appellant's assertion that the evaluation process was conducted based on the alien criteria, the learned State Attorney submitted that the Respondent conducted the evaluation process based on the criteria specified in the Tender Document. He added that, all tenderers were treated equally. The Appellant's tender was disqualified at the technical evaluation stage for failure to comply with the requirement of Clause 15(ix) of the TDS. The learned State Attorney elaborated that the Respondent did not introduce new criterion during evaluation as alleged by the Appellant.

The criteria used to evaluate the tenders were as provided for in the TDS and Section IV-Qualification and Evaluation Criteria.

The learned State Attorney submitted that the Respondent never changed the evaluation criteria as alleged by the Appellant. The evaluation criteria used to evaluate the tenders were those provided in the Tender Document. He added that, clarifications provided prior to the deadline for submission of tenders required tenderers to submit a list of published and supplied books in the United Republic of Tanzania. The clarifications did not change the requirements of the Tender Document. In addition to that, the clarifications were clear and tenderers, the Appellant inclusive were required to comply with them as they were.

Regarding contradicting reasons for the Appellant's disqualification, the learned State Attorney submitted that, the reason for the Appellant's disqualification contained in the Notice of Intention to award is the same as the one contained in the Respondent's decision on the Appellant's application for administrative review. According to the Respondent the reason given in both letters is the same though writing style may look different.

The learned State Attorney submitted further that, if the Appellant interpreted that the Notice of intention to award and the Respondent's decision on the application for administrative review contained different reasons for its disqualification, the alleged discrepancy, if at all existed, never prejudiced the Appellant because the reason given for disqualification in both letters is the same as the reason stated in the evaluation report.

Regarding the Appellant's contention that Clarifications No. 5 amended the requirement of Clause 15(ix) of the TDS, the learned State Attorney submitted that prior to the deadline for submission of tenders the Respondent issued several clarifications. Among the clarifications issued were in relation to Clause 15(ix) of the TDS and Item 4.1 - Eligibility and Qualification Criteria under Section IV-Qualification and Evaluation Criteria. Clause 15(ix) of the TDS was clarified through Clarifications No. 4 whereby tenderers were required to demonstrate their experience in publishing books and supplying textbooks in the United Republic of Tanzania. Item 4.1 - Eligibility and Qualification Criteria which is under Section IV-Qualification and Evaluation Criteria was clarified through Clarifications No. 5. In the said clarifications tenderers were required to demonstrate their experience in printing and supplying textbooks to the Respondent. None of the issued clarifications omitted the criterion relating to publishing, the learned State Attorney contended.

It was the learned State Attorney's submissions that the Respondent's act of issuing clarifications was in accordance with Regulation 13 of the Regulations. If the Appellant was not certain of the issued clarifications it should have sought for further clarifications. Otherwise, if the Appellant was aggrieved by the contents of the Tender Document, it should have exercised its rights of challenging it according to the law. By submitting its bid, the Appellant demonstrated that it understood the requirements of the Tender and the clarifications supplied. Raising these complaints after submitting and losing the bid is an afterthought. The Appeals Authority should not consider such complaints at this juncture.

In relation to the Appellant's proposition that the Tender was for printing and supply only and therefore a requirement relating to publishing was irrelevant, the learned State Attorney stated that the said requirement is one of the key requirements for the Tender. According to the Respondent since these were new books, they wanted a tenderer who is also a publisher so that it would be able to correct the publishing shortfalls that may be discovered during the printing process. The learned State Attorney stated further that it is the Respondent that knows the importance of each, and every criterion provided for in the Tender Document. Thus, if the Appellant was of the view that publishing criterion was not relevant for the Tender, it should have sought for clarifications in accordance with Regulation 13 of the Regulations and or should have complained as required by law.

Regarding the complaint that the Appellant was pre-qualified for the Tender relating to only printing and supplying textbooks, the learned State Attorney submitted that pre-qualification and tendering are two different processes. A tenderer may be pre-qualified, however, that cannot guarantee that the same tenderer would qualify during tendering. A pre-qualified tenderer must comply with all the requirements issued during tendering process; the learned State Attorney contended. He also submitted that if the Appellant was pre-qualified for participating in tenders relating to printing and supply of textbooks, it should not have participated in the Tender. In the alternative, the Appellant should have sought for clarifications. Or else the Appellant should have challenged the

Respondent's act of floating a tender containing requirements different from the one for which tenderers were pre-qualified.

In relation to the Appellant's argument that it previously worked with the Respondent the learned State Attorney submitted that previous award does not guarantee award in the future tenders. It is an undisputed fact that the Appellant was previously awarded the contract on merits after it had complied with the requirements set forth in the Tender Document. Had the Appellant been compliant in this Tender, the Respondent would not have hesitated to award it.

To buttress his contention that the Appellant's disqualification is justified, the learned State Attorney referred the Appeals Authority to its decision issued in the case of ***M/S SGS Tanzania Superintendence Company Limited versus Tanzania Bureau of Standards***, Appeal Case No. 25 of 2021-22. In the said Appeal, the Appeals Authority upheld the procuring entity's decision of disqualifying a bidder for failure to comply with the requirements of the Tender Document. The learned State Attorney implored the Appeals Authority to apply the same position in this Appeal.

The learned State Attorney further cited the case of ***Ally Linus and Eleven Others versus Tanzania Harbours Authority and Another***, [1998] T.L.R 5. In the referred case it was stated that courts are to be bound by their own decisions and if there is a departure from the position already made, there must be a justification to so depart. According to the learned State Attorney there is no justification for the Appeals Authority to depart from its previous decision on this point.

The learned State Attorney concluded his submissions by stating that the Appellant's complaint that it deserved to be awarded the Tender for it quoted a lower price than the intended awardees should not be considered as it is not among the grounds set out in the Statement of Appeal. In the alternative, the learned State Attorney submitted that having the lowest quoted price is not the basis for award of the Tender. According to Regulation 212(a) of the Regulations the tender is awarded to the lowest evaluated tender and not the lowest quoted price.

On the reliefs the Respondent prayed that since the Appeal is devoid of merits all the prayers should be rejected and that the Appeal should be dismissed. Costs should follow the event.

ANALYSIS BY THE APPEALS AUTHORITY

1.0 Whether the Appellant's disqualification was justified.

In determining this issue, the Appeals Authority commenced by considering the Appellant's complaints that the Notice of Intention to award and the Respondent's decision on the application for administrative review contained different reasons as for its disqualification.

The Notice of Intention to award informed the Appellant that its tender was disqualified as it did not submit scanned copies of the cover page, Title page, Copyright page, and Acknowledgement page showing the ISBN of sample Books.

The Appellant complained in the application for administrative review that the reason given for its disqualification is not true because it submitted the

sample books as required in the Tender Document. When the Respondent issued its decision and while dismissing the Appellant's application for administrative review stated that the sample books were submitted but the Appellant was disqualified because the sample books submitted were not published by the Appellant as required on the TANEPS and the Tender Document.

The Appeals Authority agrees with the Appellant that these are two different reasons. However, the system evaluation report as observed on TANEPS indicates that the Appellant was disqualified for failure to comply with the requirement of Clause 15(ix) of the TDS. This reason was clearly stated in the Respondent's decision on the application for administrative review. Hence, the Appeals Authority is of the firm view that the Appellant has not been prejudiced by this omission.

The Appellant also argued that the Tender relates to printing and supplying of textbooks. Qualification requirement relating to publishing should not have been made part of the requirement of the Tender. The Respondent on its part insisted that the publishing qualification was deliberately included as one of the requirements to enable the Respondent to secure a tenderer that can check any errors that might have been overlooked by a publisher.

The Appeals Authority agrees with the Respondent that had the Appellant found that the said requirement is irrelevant, it should have sought for clarifications pursuant to Regulation 13 of the Regulations or challenge its existence by way of administrative review in accordance with Section 96 of

the Act. Since the Appellant opted not to challenge the existence of such requirement and or to seek clarifications prior to the deadline for submission of tenders, it implies that the Appellant was ready to be bound by such a requirement as it was.

The above finding also applies to the Appellant's complaint that it was pre-qualified for the Respondent's tenders relating to printing and supply only. The Appellant should have challenged the existence the requirement relating to publication in the Tender.

Coming to the reasons for the Appellant's disqualification, the record of appeal indicates that the Appellant was disqualified for failure to comply with requirements of Clause 11.1(h) of the ITT as modified by Clause 15(ix) of the TDS.

Clauses 11.1(h) of the ITT and 15(ix) of the TDS read as follows:-

"Clause 11.1 The tender prepared by the Tenderer shall constitute the following components: -

*(h) any other documents other than the documents under ITT 11.1(a) – (g) above, required to be completed and submitted by Tenderers **as specified in the TDS.**"*

*"Clause 15(ix) **All bidders MUST submit sample pages of ten (10) titles of textbooks published and supplied by the respective bidder in the United Republic of Tanzania approved by the respective Ministry of***

Education within the last ten (10) years from 2012 to 2022.

Bidder will attach scanned copies of the Cover page, Title Page, Copyright Page and Acknowledgement Page showing ISBN of the sample books online through TANEPS'.

(Emphasis supplied)

The learned counsel for the Appellant strenuously argued that the above quoted requirement was amended through Clarification No.5. According to the learned counsel Clarifications No. 5 amended Clause 15(ix) of the TDS in that the only qualification requirement was experience in printing and supplying of textbooks. Question and answer on Clarifications No.5 read as follows: -

"Question

Tender document has clearly stated that experience in supply of textbooks: The bidder shall furnish documentary evidence to demonstrate that it meets the following requirements: Attach documentary evidence to show experience of at least two (2) performed contracts in the last three years in printing and supplying TIE textbooks, each contract not less than TZS 2.5 Billion. Are the tenderers allowed to submit performed contract of similar nature between 2020-2022 in other countries/institutions?"

Answer

"The bidder must have experience in printing and supplying textbooks in Tanzania Institute of Education. Firms that have

worked with TIE before already known the high standard/quality of the books required."

We have carefully considered the above quoted question. It appears to us that the question originates from the requirement in Item 4.1 - Eligibility and Qualification Criteria which is under Section IV-Qualification and Evaluation Criteria and not Clause 15(ix) of the TDS as contended by the Appellant. Looking into the answer provided thereto it is our settled view that the answer given clarified on the importance of tenderers having experience in printing and supplying textbooks.

The Appeals Authority also revisited Clarifications No. 4, particularly question two (2) and the Respondent's answer thereto. Question 2 and its response read as follows: -

Question

"2. As per the TDS Clause 11.1(h) – point number ix – All bidders must submit the sample pages of 10 titles of textbooks published and printed, since we are not performing any publishing tasks for Tanzania shall we be able to submit the book samples which is printed by us without publishing."

Answer

*"2. Since this tender involved secondary school books that are newly published, the PE requires the prospective tenderer to have experience in publishing books in the United Republic of Tanzania. Therefore, **the bidders must submit book samples***

published and printed by the respective bidders to assure the PE of their experience in printing and publishing Tanzania textbooks'.

From the contents of the above quoted question, it is apparent that tenderers requested for clarifications on the requirements in Clause 11.1(h) of the ITT. Requirements of Clause 11.1(h) of the ITT are read together with Clause 15(ix) of the TDS. The tenderers sought clarifications whether they were required to submit book samples published and printed by themselves. The quoted part of Clarification No. 4 answered the question in the affirmative clearly clarifying that tenderers were required to submit textbook samples that they published and printed.

The Appeals Authority carefully reviewed the Appellant's tender on TANePS. It transpired that the Appellant attached 13 sample pages of textbooks which were printed by the Appellant. However, the attached sample pages of textbooks were published by the Respondent and not by the Appellant. This in the Appeals Authority's considered view, is, contrary to the requirement of Clause 15 (ix) of the TDS.

The Appeals Authority also looked into the system's evaluation report on TANePS. This system evaluation report indicates, amongst others, that the Appellant was disqualified for failure to comply with the requirement of Clause 15(ix) of the TDS.

The Appeals Authority considered the Appellant's contention that Clause 15(ix) of the TDS that has been used to disqualify the Appellant was not among the evaluation criteria provided under Section IV-Qualification and

Evaluation Criteria. In response thereto the Respondent submitted that Item 2.1 (h) and 2.2(h) of Section IV-Qualification and Evaluation Criteria allowed criteria specified in the TDS to be also considered during evaluation. In view of Item 2.1 (h) and 2.2(h) of Section IV-Qualification and Evaluation Criteria, the Appeals Authority agrees with the Respondent that the requirement provided under the TDS were also to be considered during evaluation.

The Appellant also complained that the Tender was for printing and supplying textbooks. There was no requirement for publishing. Therefore, its tender was disqualified based on a non-existing evaluation criterion. From the above exposition, the Appeals Authority finds that Clause 11.1(h) of the ITT as modified by Clause 15(ix) of the TDS which has been the basis for the Appellant's disqualification in the Tender, was one the evaluation criteria provided for in the Tender Document. This ground, therefore, fails.

In view of the above findings, the Appeals Authority is of the settled view that the Appellant failed to comply with the requirement of Clause 15(ix) of the TDS. Therefore, the Respondent's act of disqualifying the Appellant is justified as is in accordance with Regulation 206(2) of the Regulations which reads as follows:-

"Reg. 206(2) Where a tender is not responsive to the tender document, it shall be rejected by the procuring entity, and may not subsequently be made responsive by correction or withdrawal of the deviation or reservation."

The Appellant also complained that it should have been considered for award as it has quoted the lowest price. The Respondent contended that this point should not be considered as was not one of the grounds of appeal. Apparently, the Appellant's Statement of Appeal contain this ground. Therefore, the Appeals Authority proceeds to determine it.

According to Regulation 212 of the Regulations a successful tender 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: -

"Reg. 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."* (Emphasis supplied)

Therefore, the Appeals Authority is of the settled view that the Appellant's tender did not reach the financial evaluation stage, hence, its price could not have been compared with those of the proposed successful tenderers. Consequently, its price could not have been considered for award because it was not the lowest evaluated tender.

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?

Having found that the Appellant's disqualification is justified, the Appeals Authority hereby dismiss the Appeal and orders the Respondent to proceed with the Tender process.

The Respondent asked that the costs should follow the event. We have found that the reason given in the Notice of intention to award was not correct. Respondent had to change the reason in its decision on the Appellant's application for administrative review. The Appeals Authority is of the considered view that had the Respondent gave the correct reason for the Appellant's disqualification in the first place the Appellant might have been satisfied. The wrong reason given certainly prompted the Appellant to complain hence this appeal. In any case the Respondent did not advance any evidence for the costs incurred. In view of the above, the Appeals Authority declines to award costs to the Respondent.

It is so ordered.

This decision is binding and can be enforced in accordance with Section 97(8) of the Act.

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

This Decision is delivered in the presence of the parties, this 22nd day of May 2023.

ADV. ROSAN MBWAMBO



AG: CHAIRPERSON

MEMBERS: -

1. MS. NDEONIKA MWAIKAMBO

2. DR. WILLIAM KAZUNGU