

IN THE PUBLIC PROCUREMENT APPEALS AUTHORITY

APPEAL CASE NO. 44 OF 2022-23

BETWEEN

M/S EXCEL ACCOUNTANCY SERVICES LTD.....APPELLANT

AND

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

M/S BMM SOLUTION (T) LTD.....2ND RESPONDENT

RULING

CORAM

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|-------------------------------------|---------------|
| 1. Hon. Justice (rtd) Sauda Mjasiri | - Chairperson |
| 2. Eng. Stephen Makigo | - Member |
| 3. Mr. Rhoben Nkori | - Member |
| 4. Mr. James Sando | - Secretary |

SECRETARIAT

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

FOR THE APPELLANT

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| 1. Mr. Elias Machibya | - Advocate - Machibya Professional Attorneys |
| 2. Ms. Loy Sehemba | - Advocate - Zeulmark Advocates |



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| 3. Mr. George Vedasto | - Advocate - Ve & Company
Advocates |
| 4. Mr. Longinus Bankyanule | - Managing Director |
| 5. Mr. Nicolaus Kula | - Personal Assistant - Machibya
Professional Attorneys |

FOR THE 1ST RESPONDENT

- | | |
|-----------------------|--|
| 1. Mr. Stephen Kimaro | - State Attorney - Office of Solicitor General |
| 2. Mr. Hussein Kambi | - State Attorney - Dar es Salaam City Council |
| 3. Mr. Francis Lemelo | - State Attorney- Dar es Salaam City Council |
| 4. Mr. Albert Kaguo | - Principal Supplies Officer - Dar es Salaam
City Council |

FOR THE 2ND RESPONDENT

- | | |
|-------------------------|---|
| 1. Ms. Kapwani Mbegalo | - Advocate - M/S BAMB Solution (T) Ltd |
| 2. Mr. Kuzeny Msungu | - Director of Operations |
| 3. Mr. Rashidi Kasisiko | - Advocate – M/S BAMB Solutions (T) Ltd |

This Appeal was lodged by M/S Excel Accountancy Services Ltd (hereinafter referred to as "**the Appellant**") against the Dar es Salaam City Council (hereinafter referred to as "**the 1st Respondent**"). The Appeal is in respect of Tender No. LGA/018/DCC/2022-2023/HQ/NCS/30 for Parking Revenue Collection at Dar es Salaam City Council (hereinafter referred to as "**the Tender**"). M/S BAMB Solution (T) Ltd applied to be joined in the proceedings and was accordingly joined as "**the 2nd Respondent**".



The background of this Appeal may be summarized from the documents submitted to the Public Procurement Appeals Authority (hereinafter referred to as "**the Appeals Authority**").

On 21st October 2022, the 1st Respondent through Tanzania National electronic Procurement System (TANePS) invited the tenderers to participate in the Tender. The deadline for submission of tenders was set on 22nd November 2022. On the deadline, eight (8) tenders were received including that of the Appellant.

The submitted tenders were evaluated by the Evaluation Committee that recommended an award of the tender to M/S Econex Company Ltd. The recommended contract price of monthly Revenue Collection was Tanzanian Shillings One Billion One Hundred Thirty Two Million Six Hundred Thousand only (TZS 1,132,600,000.00) VAT inclusive.

On 23rd December 2022, the 1st Respondent issued the Notice of Intention to award the Tender to all tenderers which participated in the Tender. M/S Web Corporation Ltd and M/S Ascerics Ltd lodged Appeal Case No. 24 and 27 of 2022-23 on 13th January 2023 and 16th January 2023 respectively to the Appeals Authority. Having considered the contentious arguments by the parties *vis-à-vis* the available documents and the applicable laws, the Appeals Authority found that the award to M/S Econex Company Limited was not proper. The Appeals Authority therefore nullified the proposed award and ordered the 1st Respondent to re-evaluate the remaining four tenders that reached the price comparison stage.



Following the Appeals Authority's order, the 1st Respondent re-evaluated the tenders and proposed award to the 2nd Respondent at a contract price of Tanzania Shillings One Billion Forty Four Million only (TZS 1,044,000,000.00) per Month. The recommendation of award was approved by the Tender Board at its meeting held on 12th April 2023.

On 27th April 2023, the 1st Respondent issued the Notice of Intention to award which informed the tenderers that it intends to award the Tender to the 2nd Respondent. Furthermore, the Notice informed the Appellant that its tender was not considered for award as it quoted a lower price to that of the 2nd Respondent.

Dissatisfied with the tender result, on 2nd May 2023, the Appellant applied for administrative review to the 1st Respondent. The Appellant claimed that the 1st Respondent did not issue its decision within the specified time limit and therefore it filed this Appeal on 19th May 2023.

When the matter was called on for hearing and at the time of framing up the issues, the Appeals Authority informed the parties that, having reviewed the record of Appeal, it observed that there is a need to determine if there is a valid Tender for consideration. Based on that observation, the following issues were framed:-

1.0 Whether there is a valid Tender for consideration by the Appeals Authority;

2.0 Whether the Respondent's decision was issued within time as required by the law;



3.0 Whether the proposed award of the Tender to the 2nd Respondent is proper in law; and

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

SUBMISSIONS BY THE APPELLANT

The Appellant was represented by three advocates, namely; Mr. Elias Machibya, Ms. Loy Sehemba and Mr. George Vedasto. Mr. Elias Machibya, the learned Advocate commenced the Appellant's submissions on the first issue by stating that, the bid validity period for this Tender was forty five (45) days from the deadline for submission of tenders that was 22nd November 2022. Counting from 22nd November 2022, the specified bid validity period ought to have expired on 5th January 2023. The learned counsel contended that prior to the expiry of the original specified validity period; the 1st Respondent sought several extensions.

According to the Appellant, the first extension was sought through a letter dated 2nd January 2023, for a period of thirty (30) days from 5th January 2023 to 4th February 2023. The Appellant contended to have received this request through email.

The Appellant submitted further that after 4th February 2023, there was no extension for the whole month of February 2023. The Appellant alleged to have received via email on 9th March 2023 the third request for extension of the bid validity period. The request was made through a letter dated 2nd March 2023 and it extended the bid validity period for sixty (60) days from 3rd March 2023 to 2nd May 2023. The fourth extension was requested

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through a letter dated 28th April 2023 which extended bid validity period for further sixty (60) days from 2nd May 2023 to 2nd July 2023. The Appellant contended to have accepted all the requests for extension of the bid validity period. The learned counsel therefore submitted that from the sequence of events there is a valid Tender for consideration as the bid validity period was extended in accordance with the requirement of the law.

On the second issue, the learned counsel submitted that after receipt of the Notice of Intention to award and being dissatisfied with the Tender results, on 2nd May 2023, the Appellant applied for administrative review to the 1st Respondent. According to Section 96(6) of the Public Procurement Act of 2011 as amended (hereinafter referred to as "**the Act**"), the 1st Respondent was required to issue its written decision within seven working days. Counting from 2nd May 2023 when the Appellant's application for administrative review was filed, the 1st Respondent ought to have issued its decision on or by 11th May 2023. Having not received the 1st Respondent's decision within the specified time limit, on 19th May 2023, the Appellant filed this Appeal.

The learned counsel contended further that on 22nd May 2023, the Appellant received the 1st Respondent's decision on its application for administrative review through a letter dated 9th May 2023. According to the learned counsel, the said decision was issued beyond the stipulated time limit.

On the third issue, Mr. George Vedasto, the learned advocate submitted that, the 2nd Respondent conspired with M/S Rick Plan Company Ltd to fix

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and arrange the contract price for the Tender under Appeal. The learned counsel elaborated that, the Form of Tender being a mandatory document for this Tender, prohibited tenderers from having an agreement on the Tender price with the intention of causing unfair competition.

The learned counsel submitted that according to the official search conducted on 29th March 2023 and 28th April 2023 to the Registrar's of Business Registration and Licensing Agency (BRELA), the 2nd Respondent and M/S Rick Plan Company Ltd have one common shareholder and director who has shares in both companies. The learned counsel contended that a quick review of the BRELA's official search indicated that the 2nd Respondent's company has a total of 500,000,000 shares and two shareholders who are also the directors. These are Mr. Brian Bryson Enas Kikoti who owns 5,000 shares and Mr. Emmanuel Michael Mshana who owns 100 shares. It was further observed that Mr. Kikoti is also a company secretary. On M/S Rick Plan Company Ltd, the BRELA's official search indicated that the company has a total of 1,000,000 shares whereby Mr. Kikoti and Jacqueline Benedict Chuwa both owns 300 shares respectively.

The learned counsel submitted that according to Section 181 of the Companies Act No 12 of 2002, the directors of the company have the powers of managing, directing and supervising the management and affairs of the company. Mr. Kikoti by virtue of being a director of the 2nd Respondent's company and M/S Rick Plan Company Ltd is involved in managing, supervising and directing all matters or affairs of the two companies. In that regard, Mr. Kikoti being a director of both companies was involved expressly or impliedly in preparation of the tenders by

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the 2nd Respondent and M/S Rick Plan Company Ltd. The fact that Mr. Kikoti is the shareholder and the director of both companies, it is obvious that the two companies have conspired on the quoted prices. Therefore, they have minimized fair and free competition for the Tender under Appeal.

The learned counsel expounded further that according to Section 86(1)(a) and (b) of the Act, the act of a director or its agent is the action of the company. Hence the fact that Mr. Kikoti is a director in both companies he is pre-supposed to have an implied or express knowledge of the quoted price by the 2nd Respondent and that of M/S Rick Plan Company Ltd. The fact that both companies participated in the same Tender, it is undisputed that the two colluded on the quoted price. Therefore, the 2nd Respondent's act in this regard contravenes the requirements of the Form of Tender that prohibits the tenderers from agreeing on the quoted price.

The learned counsel submitted that, Section 4A(2) of the Act and Section 9 of the Fair Competition Act No. 8 of 2003 require parties in the tender process to conduct themselves in a manner that maximizes competition, efficiency and transparency. That is to say, the tenderers are prohibited from colluding or conspiring when participating in a tender. The learned counsel urged the Appeals Authority to consider the 2nd Respondent's act on this Tender with a serious note. If such an act would be allowed it may set a precedent whereby a tenderer might register several companies. The registered companies can be used to participate in one Tender an act that would affect the principles of fair competition.

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The learned counsel elaborated further that the contracts attached to the 2nd Respondent's Statement of Reply were all signed by Mr. Kikoti as a managing director. This implies that even in this Tender if the same would be awarded to M/S Rick Plan Company Ltd, the same person would sign the contract. The Appellant's counsel finalized his submissions on this point by stating that the 1st Respondent ought to have disqualified the 2nd Respondent for having contravened the requirement of the Form of Tender.

Ms. Loy Sehemba, the learned advocate made her submissions in relation to the 2nd Respondent's failure to comply with the Form of Tender requirements. The learned counsel stated that the Tender Document under Section IX provided a sample format of the Form of Tender that was to be complied by all the tenderers. The first paragraph of the said Form required the tenderers to insert the amount of a quoted price in figures and in words. The 2nd Respondent inserted the said amount in words only and not in figures. The learned counsel expounded further that the 2nd Respondent modified the Form of Tender by inserting the words "*naomba Kuliwa kamisheni ya asilimia 13% ya Makusanyo kwa Mwezi*" at a place where it was required to state the quoted price in words and in figures.

The learned counsel contended further that the sample format of the Form of Tender required the tenderers to sign the same by indicating the name of the person signing, his position, date, the name of the tenderer and address. The 2nd Respondent's Form of Tender has been signed by one Kuzeny Ephasony Msungu, however his position was not stated.

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The learned counsel submitted further that, Item 2 of Section IV of the Tender Document requires the intended service to be rendered for a period of twenty four (24) months or two years. The said period ought to have been stated in the Form of Tender. To the contrary, the 2nd Respondent had indicated in its Form of Tender that it would render the said service for a period of twelve (12) months equivalent to one year. Thus, the 2nd Respondent also failed to comply with the requirements of the Form of Tender.

According to Clause 6.0 of the Instructions To Tenderers (ITT), the tenderers were required to fill the Form of Tender in the format provided for in the Tender Document without any alterations. To the contrary, the 2nd Respondent altered the Form of Tender by failing to fill in proper information or by including information that was not required. The learned counsel contended that, the anomalies noted on the 2nd Respondent's Form of Tender indicates that its tender was non-responsive. Therefore, the same ought to have been disqualified pursuant to Regulation 206(2) of the Public Procurement Regulations of 2013 as amended (hereinafter referred to as "**the Regulations**").

The Appellant submitted further that it doubts if the 2nd Respondent complied with the experience requirement by submitting at least three previous performed contracts with a value of not less than TZS 100,000,000.00 per month provided in the Tender Document. Three contracts ought to have been used to prove the 2nd Respondent's experience in parking revenue collection in municipalities and cities.

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Finally, the Appellant prayed for the following orders:-

- i. Disqualification of the 2nd Respondent and M/s Rick Plan Company Ltd;
- ii. The 1st Respondent be ordered to re-evaluate the remaining tenders;
- iii. The 1st Respondent be ordered to conduct due diligence before award of the Tender in accordance with the law;
- iv. The Respondents be ordered to pay Legal fees; and
- v. Any other remedy the Appeals Authority deems to be just and fit to grant.

SUBMISSIONS BY THE 1ST RESPONDENT

The 1st Respondent's submissions were led by Mr. Stephen Kimaro, State Attorney from the office of the Solicitor General. He commenced his submissions on the first issue by stating that there is a valid Tender for consideration by the Appeals Authority as stated by the Appellant. Had it been that the Tender was not valid, the same would have been objected by the Appellant.

The learned State Attorney submitted that according to Clause 8.0 of the ITT the specified bid validity period for this Tender was forty five (45) days from the deadline for submission of tenders. The deadline for submission of tenders was on 22nd November 2022 and the bid validity period ought to have expired on 5th January 2023. Prior to expiration of the original specified bid validity period, the 1st Respondent requested the extension of the bid validity period from the tenderers.



The learned State Attorney contended that the 1st Respondent issued the first request for extension of the bid validity period through a letter dated 2nd January 2023. The said letter requested the extension for a period of thirty (30) days from 5th January 2023 to 4th February 2023. The second request for extension of the bid validity period was made through a letter dated 3rd February 2023 which extended the bid validity period for thirty (30) days from 4th February 2023 to 3rd March 2023. The third request for extension was done through a letter dated 2nd March 2023 that extended the bid validity period for sixty (60) days from 3rd March 2023 to 2nd May 2023. The fourth request was issued through a letter dated 28th April 2023 which extended the bid validity period for 60 days from 2nd May 2023 to 2nd July 2023. The 1st Respondent contended to have notified all the tenderers regarding the requests for extension of the bid validity period through TANEPS. However, the 1st Respondent admitted to have no proper records of the tenderer's responses on the requested extension of the bid validity period. Nevertheless, he submitted that the Tender is valid for consideration by the Appeals Authority.

On the second issue, the learned State Attorney submitted that, it is an undisputed fact that the Appellant submitted its application for administrative review to the 1st Respondent. However, the said application did not comply with the requirements of Regulation 105(3) (c) of the Regulations as it did not state the provisions of the Act and Regulations that had been breached. Despite that anomaly the 1st Respondent determined the Appellant's application and issued its decision vide a letter dated 9th May 2023 within the time prescribed under the law. The 1st



Respondent's decision was communicated to the Appellant on the same date. Thus, the 1st Respondent's decision on the Appellant's application for administrative review was issued in accordance with the law.

In relation to the third issue, the learned State Attorney commenced his submissions by indicating that the Appellant has raised a serious allegation of conspiracy against the 2nd Respondent and has failed to substantiate the same. The learned State Attorney submitted that from the 1st Respondent's perspective the 2nd Respondent and M/S Rick Plan Company Ltd are two separate legal entities and each of them can sue or be sued separately as per Section 15 of the Companies Act, No. 12 of 2002.

The learned State Attorney submitted that the 2nd Respondent and M/S Rick Plan Company Ltd participated in the Tender under Appeal as separate legal entities. The 1st Respondent treated them as separate tenderers as well. There was no indication that the companies were related. The learned State Attorney submitted that according to the case of ***Salomon Vs Salomon*** [1897] AC 22; a corporation has separate legal personality, rights and obligation totally distinct from those of its shareholders. The learned State Attorney contended that since the 2nd Respondent and M/S Rick Plan Company Ltd have been properly incorporated under the laws of the country each one is a separate entity with a right to participate in the Tender.

The learned State Attorney submitted further that, much as the Appellant has alleged conspiracy, no evidence has been adduced to prove how the two companies colluded to fix and arrange the contract price. The

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Appellant has not attached a board resolution that proves the collusion and conspiracy of the two companies on this Tender. The learned State Attorney contended that in order for the allegations to be proved one has to lift the corporate veil. However, the circumstances for lifting the corporate veil have not been established in the present case.

The learned State Attorney contended that a conspiracy is a criminal offence and the same has to be proved in accordance with Section 386 of the Penal Code, Cap 16. According to the 1st Respondent, conspiracy has to be proved by documents and not mere words as alleged by the Appellant. The fact that Mr. Kikoti is the shareholder and the director in the 2nd Respondent's company and in the M/S Rick Plan Company Ltd does not connote conspiracy between the two companies. Thus, the Appellant's allegations in this regard are unfounded.

With regard to the Form of Tender, the learned State Attorney submitted that the Appellant has failed to indicate to what extent the anomalies in the 2nd Respondent's Form of Tender has affected fair competition. In addition to that, the Appellant has not indicated any provision of the law that has been breached. The Appellant's submissions on this point were merely accusations made at the bar and the same were not contained in the Statement of Appeal.

To support his submissions on this point, the learned State Attorney cited the case of ***Said Sultan Ngalema versus Isack Boaz Ng'iwanishi and 4 Others***, Civil Application No. 362/17 of 2021, Court of Appeal of Tanzania at Dar es Salaam (unreported) relying on the case of ***Trasafrika***

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Assurance Co. Ltd V. Cimbria (EA) Ltd (2002) E.A 627 where the Court of Appeal of Uganda held that "As is well known a statement of fact by counsel from the bar is not evidence and therefore the court cannot act on it".

In applying the principle of the cited case to this Appeal, the learned State Attorney stated that since the Appellant's argument in relation to the Form of Tender has been raised during the hearing, he urges the Appeals Authority not to consider the same.

The learned State Attorney submitted further that the 2nd Respondent and M/S Rick Plan Company Ltd were among the tenderers that participated in this Tender. The two tenderers were successful after the evaluation. The 2nd Respondent was recommended for an award after it was found to have a higher price to that of other tenderers. Therefore, the Tender was conducted in accordance with the law and the proposed award to the 2nd Respondent is justified.

In relation to experience, the 1st Respondent submitted that, the 2nd Respondent complied with the experience requirement as it attached to its tender three contracts with a value of at least TZS 100,000,000.00 as required by the Tender Document.

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

- i. Appeal be dismissed with costs; and
- ii. Any other relief the Appeals Authority may deem fit and fair to grant.



SUBMISSIONS BY THE 2ND RESPONDENT

The 2nd Respondent was represented by Ms. Kapwani Mbegalo learned advocate and Mr. Kuzeny Msungu, Director of Operations of the 2nd Respondent. Ms. Mbegalo began her submissions by adopting the submissions made by the 1st Respondent and the 2nd Respondent's written Statement of Reply. On the first issue, she submitted that the Tender is valid and therefore eligible for consideration by the Appeals Authority. She contended that the bid validity period for this Tender has not expired as the 1st Respondent had issued several requests for extension of the bid validity period. The requests were accepted by the 2nd Respondent through different letters that were submitted to the 1st Respondent. In addition to that, the 1st Respondent's requests for extension of the bid validity period were done in accordance with the Act and its Regulations.

On the second issue, the 2nd Respondent stated that the Appellant's application for administrative review did not comply with the requirements of Regulation 105(3) (a) - (f) of the Regulations as it failed to state which provisions of the Act and Regulations that were breached by the 1st Respondent. Thus, the Appellant's application for administrative review contravened the law.

Regarding the third issue, the 2nd Respondent submitted that, the Appellant has raised its suspicion that the 2nd Respondent and M/S Rick Plan Company Ltd have conspired and fixed the price for this Tender. It is the 2nd Respondent's submission that the Appellant's allegations are mere assumptions and therefore hearsay. The same have not been proven as to where, when and how the two companies colluded and conspired.

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The learned counsel elaborated that the Appellant has failed to submit the board resolution and the list of the management team to verify how the 2nd Respondent conspired with M/S Rick Plan Company Ltd to fix and arrange the contract price. The 2nd Respondent stated that, the two companies are separate legal entities and each company has its separate management and works separately. Therefore, the Appellant has failed to substantiate its conspiracy allegations against the 2nd Respondent.

In relation to experience, the 2nd Respondent submitted that its company has a vast experience in parking fee collection in more than three different cities. The 2nd Respondent elaborated that it had a contract with TARURA in Mwanza city with a value of TZS 140,000,000.00 per month. Also it had a contract with Kinondoni Municipal Council with a value of TZS 349,000,000.00 per month. Further to that the 2nd Respondent had a contract with TARURA in Arusha City with a value of TZS. 138,000,000.00 per month.

Apart from the above contracts which exceed TZS 100,000,000.00 required by the Tender Document, the 2nd Respondent has also executed other contracts with a value of TZS 38,444,000.00 per month with Dodoma City Council and Makambako Town Council with a contract value of TZS 21,840,000.00 per month.

Regarding the Form of Tender, the learned counsel submitted that, such argument is totally new and was not part of the grounds of Appeal contained in the Statement of Appeal. Therefore, the same should not be considered by the Appeals Authority.



The 2nd Respondent concluded its submissions by stating that the Tender under Appeal was conducted in accordance with the law and therefore the proposed award was proper and justified.

Finally, the 2nd Respondent prayed for the following orders:-

- i. The Appeals Authority to uphold the 1st Respondent's decision, since the Appellant is wasting time for the 1st Respondent to finalize the procurement process;
- ii. The Appeal be dismissed for lack of merit due to the Appellant's failure to indicate provisions of the Act and its Regulations that has been breached.
- iii. The Appellant to bear legal costs amounting to Tanzania Shillings Sixteen Million (TZS 16,000,000.00) incurred by the 1st and 2nd Respondents as a result of the Appellant's ignorance.
- iv. Any other relief the Appeals Authority may deem fit and just to grant.

On its brief rejoinder, the learned counsel for the Appellant submitted that, it had not received the second request for extension of the bid validity period and due to that it could not have extended the validity period on February 2023. The Appellant's counsel added that since the 2nd Respondent had indicated to have received all the four requests for extension of the bid validity period, such admission indicates that there was no equal treatment of tenderers in the disputed Tender. The 1st Respondent discriminated tenderers on the dissemination of the information which were to be equally received by all tenderers. The learned counsel concluded by indicating that in the absence of any other proof that



the second request for extension of the bid validity period was served to tenderers, there would be no valid tender for determination by the Appeals Authority.

ANALYSIS BY THE APPEALS AUTHORITY

1.0 Whether there is a valid Tender for consideration by the Appeals Authority

In resolving this issue the Appeals Authority revisited Section 71 of the Act read together with Regulation 191 of the Regulations which provide guidance on the validity period. Section 71 of the Act and Regulation 191(3), (4), (5) and (6) of the Regulations read as follows: -

"71. The procuring entity shall require tenderers to make their tenders and tender securities including tender securing declaration valid for periods specified in the tendering documents, sufficient to enable the procuring entity to complete the comparison and evaluation of the tenders and for the appropriate tender board to review the recommendations and approve the contract or contracts to be awarded whilst the tenders are still valid."

191(3) The period fixed by a procuring entity shall be sufficient to permit evaluation and comparison of tenders, for obtaining all necessary clearances and approvals, and for the notification of the award of contracts and finalise a contract but the period shall not exceed one hundred and twenty days from the final date fixed for submission of tenders.



- (4) In exceptional circumstances, prior to expiry of the original period of effectiveness of the tenders, a procuring entity may request tenderers to extend the period for an additional specified period of time.*
- (5) A tenderer may refuse the request under sub-regulation (3) without forfeiting its tender security and the effectiveness of its tender shall be terminated upon the expiry of the un-extended period of effectiveness.*
- (6) The request and the responses shall be made in writing or by any other means that provide a record of the information contained therein'.*

(Emphasis supplied)

The above quoted provisions state in clear terms that procuring entities are required to specify bid validity period for their tenders that would enable them to complete all the internal processes and finalise the contract. In exceptional circumstances, prior to the expiry of the original specified validity period, a procuring entity may request the tenderers to extend the validity period for the specified additional time. The request for extension and responses thereof should be made in writing or in any other means that provide a record.

The Appeals Authority revisited the Tender Document and observed that Clause 8.0 of the ITT (Sehemu ya Pili: Maelekezo kwa Wazabuni) specified the bid validity period for this Tender to be forty five (45) days from the deadline for submission of tenders. Clause 8.0 of the ITT reads as follows:-



***"8.0 Zabuni itabaki kuwa halali kwa kipindi cha siku 45
baada ya siku ya mwisho ya uwasilishaji wa zabuni".***

The Appeals Authority reviewed the record of Appeal and observed that the deadline for submission of tenders was on 22nd November 2022. Counting from 22nd November 2022, the forty five days ought to have lapsed on 5th January 2023. The record of Appeal indicates that prior to the expiry of the original specified bid validity period, the 1st Respondent through a letter dated 2nd January 2023 requested the tenderers to extend the validity period for thirty (30) days from 5th January 2023 to 04th February 2023. The said request was communicated to the tenderers through TANePS.

Having reviewed the record of Appeal and parties' submissions, the Appeals Authority observed that none of them disputes the issuance of the first request for extension of the bid validity period. The Appeals Authority revisited the audit trail of the disputed Tender on TANePS and observed that the first request for extension of the bid validity period was issued on 2nd January 2023 as indicated by the parties.

According to Regulation 191(6) of the Regulations, the request for extension of the bid validity period has to be followed by the responses from the tenderers. The 1st Respondent acknowledged to have received responses from the tenderers who accepted the request for an extension of the bid validity period although the proof thereof was not submitted before the Appeals Authority. The Appellant and the 2nd Respondent also claimed to have responded to the request for extension of the bid validity period.



The Appeals Authority considered the parties' rival arguments in relation to the issuance of the second request for extension of the bid validity period. On one hand the Appellant contended that there was no extension of the bid validity period after the expiry of the time specified on the first request for extension. On the other hand, the 1st Respondent contended to have issued the second request for an extension of the bid validity period through a letter dated 3rd February 2023 that was sent to the tenderers via TANePS. The 2nd Respondent contended to have received all four requests for an extension of the bid validity period. The 2nd Respondent also alleged to have accepted the said requests.

During the hearing the Appeals Authority required the 1st Respondent to specify the mode that was used to communicate the second request for an extension of the bid validity period. In response thereof, the 1st Respondent indicated that the request was communicated to the tenderers through Manual notification on TANePS. The 1st Respondent further contended to have received the 2nd Respondent's response on the said requests that was delivered physically to its office.

In ascertaining the validity of the parties' contentions in this regard, the Appeals Authority revisited the Tender's audit trail on TANePS. The Tender audit trail shows all the communications that were done in this Tender and observed that there was no communication from the 1st Respondent to the tenderers on 3rd February 2023 as contended. The audit trail indicates that from 2nd January 2023 when the first request for an extension of the bid validity period was communicated, the subsequent communication was



done on 9th January 2023 being followed with communication effected on 9th March 2023. There was no communication made in February 2023.

From the above facts, it is crystal clear that the 1st Respondent did not issue the second request for an extension of the bid validity period on 3rd February 2023 as contended. Since there was no request for extension of the bid validity period in February 2023, it follows that there was no response thereof. In view of this fact, the Appeals Authority is of the settled view that there was no extension of the bid validity period after expiry of the first request for extension which was effective from 5th January 2023 to 4th February 2023. That is to say, from 5th February 2023 there was no valid Tender.

In view of the above, the Appeals Authority is of the firm view that since the bid validity period expired from 5th February 2023, all the 1st Respondent's subsequent acts thereto which resulted to an award being proposed to the 2nd Respondent were null and void.

Given the above findings, the Appeals Authority hereby nullifies the Tender process for expiry of the bid validity period. Based on that, the Appeals Authority would not delve into the remaining issues relating to the merits of the Appeal.

The Appeals Authority partly allows the Appeal to the extent that the bid validity period had expired and therefore there is no valid Tender for consideration.

We make no order as to costs.



It is so ordered.

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

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

This Ruling is delivered in the presence of the Appellant and the 1st Respondent and in absence of the 2nd Respondent though duly notified this 22nd day of June 2023.

HON. JUSTICE (rtd) SAUDA MJASIRI



CHAIRPERSON

MEMBERS: -

1. ENG. STEPHEN MAKIGO.....



2. MR. RHOBEN NKORI.....

