

IN THE PUBLIC PROCUREMENT APPEALS AUTHORITY

APPEAL CASE NO. 45 OF 2022-23

BETWEEN

M/S ASCERICS LIMITED.....APPELLANT

AND

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

M/S BMM SOLUTIONS (T) LIMITED.....2ND RESPONDENT

DECISION

CORAM

- | | |
|-------------------------------------|---------------|
| 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. Ms. Violet Limilabo | - Senior Legal Officer |

FOR THE APPELLANT

- | | |
|--------------------|---------------------------------|
| 1. Mr. Seif Kasori | - Procurement Officer |
| 2. Ms. Mary Mwasi | - Assistant Operational Manager |

FOR THE 1ST RESPONDENT

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

FOR THE 2ND RESPONDENT

1. Ms. Kapwani Mbegalo - Advocate
2. Mr. Kuzeny Msungu - Director of Operation

This 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**"). The Appeal is between **M/S Ascerics Limited** (hereinafter referred to as "**the Appellant**") and **Dar es Salaam City Council** (hereinafter referred to as "**the 1st Respondent**"). M/S BAMB Solutions (T) Limited applied to be joined in the proceedings and was accordingly joined as "**the 2nd Respondent**".

The background of this Appeal is summarized from the documents submitted to the Public Procurement Appeals Authority (hereinafter referred to as "**the Appeals Authority**") as follows:-

On 21st October 2022, the 1st Respondent through Tanzania National electronic Procurement System (TANePS) invited 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 received tenders were evaluated by the Evaluation Committee that recommended an award of the Tender to M/S Econex Company Limited. The recommended contract price of a monthly Revenue Collection was Tanzanian Shillings One Billion One Hundred Thirty Two Million Six Hundred Thousand only (TZS 1,132,600,000.00). The said recommendations were approved by the Tender Board at its meeting held on 21st December 2022.

The proposed award to M/S Econex Company Limited was challenged by M/S Web Corporation Ltd and M/S Ascerics Ltd through Appeals No. 24 and 27 of 2022/2023 lodged before this Appeals Authority on 13th January 2023 and 16th January 2023 respectively. 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. Therefore, the Appeals Authority nullified the proposed award and ordered the 1st Respondent to re-evaluate the remaining four tenders that reached the price comparison stage.

Following the order by the Appeals Authority, the 1st Respondent re-evaluated the tenders and recommended an award to the 2nd Respondent at the contract price of a monthly revenue collection of Tanzanian Shillings One Billion Forty Four Million only (TZS 1,044,000,000.00). The recommendations of the evaluation committee were 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 tenderers that it intends to award the Tender to the



2nd Respondent. In addition, 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 results, on 5th May 2023, the Appellant applied for administrative review to the 1st Respondent challenging the proposed award for being made after expiry of the bid validity period. The Appellant claimed that when the 1st Respondent failed to issue its decision within the specified time limit, it filed this Appeal on 23rd May 2023.

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

1.0 Whether the proposed award of the Tender to the 2nd Respondent was made within the bid validity period; 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. Seif Kaisori, Procurement Officer and Ms. Mary Mwasi, Assistant Operations Manager. On the first issue, the Appellant commenced by stating that Section 71 of the Public Procurement Act of 2011 as amended (hereinafter referred to as "**the Act**") read together with Regulation 191 of the Public Procurement Regulations, GN. No. 446 of 2013 as amended (hereinafter referred as "**the Regulations**") require procuring entities to specify a bid validity period for each tender. The specified bid validity period for the Tender under Appeal was forty five (45) days from 22nd November 2022 to 5th January 2023.



The Appellant submitted that Regulation 191(4) of the Regulations allows the extension of the bid validity period provided that the request for extension is made prior to the expiry of the initial specified period. The Appellant claimed that prior to the expiry of the specified bid validity period, the 1st Respondent through a letter dated 2nd January 2023 requested for extension of the bid validity period for thirty (30) days from 2nd January 2023 to 31st January 2023.

The Appellant stated that after expiry of the extended validity period, there was no further extension on February 2023. The Appellant claimed that on 9th March 2023, it received through TANePS the request for extension of the bid validity period dated 2nd March 2023. The said request intended to extend the bid validity period for thirty (30) days from 3rd March 2023.

The Appellant contended that, since there was no request for extension of the bid validity period after expiry of the initial extended period, there was no valid Tender from 1st February 2023 that would warrant a request for extension of the bid validity period to be issued. The Appellant added that, the request for extension of the bid validity period though dated 2nd March 2023, it was received by the Appellant through TANePS on 9th March 2023. The request for extension intended to extend the bid validity period from 3rd March 2023 to 2nd April 2023. The Appellant stated that even if it could be assumed that the Tender was still valid by the time such a request was made, the said request was served to the tenderers beyond the period within which the bid validity ought to have been extended.

A handwritten signature in dark ink, appearing to be 'J. S. Ar.', is located at the bottom center of the page.

The Appellant submitted further that, even if it could have been assumed that the request for extension of the bid validity period issued on 9th March 2023 was valid, there was no extension of the bid validity period for the whole month of April 2023. Thus, when tender results were issued, there was no valid Tender.

The Appellant submitted that the 1st Respondent's act of intending to award the Tender to the 2nd Respondent contravened Regulation 191(3) of the Regulations which requires an award to be made within the bid validity period. The Appellant added that since the Tender was yet to be completed, the 1st Respondent ought to have extended the bid validity period prior to the expiration of the original specified period in accordance with Regulation 191(4) of the Regulations. According to the Appellant, the bid validity period expired on 1st February 2023. Therefore, the third and fourth requests for extension of the bid validity period issued by the 1st Respondent were invalid.

The Appellant stated further that the 1st Respondent's act of proceeding with evaluation of tenders after the expiry of the bid validity period contravened Clause 8 of the Instruction to Tenderers (ITT) which specified the bid validity period to be forty five (45) days. In addition, the 1st Respondent's act also contravened Clause 13.1 and Schedule Three (Table 3-3.5(b)) of the Evaluation Guidelines issued by the Public Procurement Regulatory Authority (PPRA) in May 2020.

The Appellant submitted further that, Regulation 204(1) and (2)(d) of the Regulations states clearly that lack of the bid validity period is one of the

A handwritten signature in dark ink, appearing to be 'J. S. - S. S.', is located at the bottom center of the page.

material deviation which may render the Tender to be rejected. The Appellant contended that since the bid validity period for this Tender had expired from 1st February 2023, the Tender ought to have been rejected pursuant to Regulation 206(2) of the Regulations. Therefore, there was no valid Tender for the 1st Respondent to issue an award to the 2nd Respondent.

The Appellant stated that, on 27th April 2023 the 1st Respondent issued the Notice of Intention to award. Upon receipt and being dissatisfied with the Tender results thereof, on 5th May 2023 the Appellant applied for administrative review. The Appellant claimed that the 1st Respondent did not issue its decision within the specified time limit and therefore the Appellant filed this Appeal on 23rd May 2023.

Finally, the Appellant prayed for the following reliefs: -

1. Cancellation of the Tender process and the same be re-advertised as the second and third request for extension of the bid validity period was made in contravention of the law and therefore there is no valid Tender;
2. The Respondent be prohibited from acting unlawfully; and
3. Any other relief the Appeals Authority may deem just to grant.

REPLY BY THE 1ST RESPONDENT

The 1st Respondent's submissions were made by Mr. Stephen Kimaro, State Attorney from the Office of the Solicitor General. He commenced his submissions by stating that, the Appellant was among the tenderers that responded to the invitation to Tender by submitting their bids on the



deadline for submission of tenders. The submitted bids were subjected to evaluation and during the financial evaluation stage the Appellant's bid price was found to be lower compared to that of the 2nd Respondent. Thus, the Appellant's tender was not considered for award.

In relation to the expiry of the bid validity period, the learned State Attorney submitted that Section 71 of the Act and Regulation 191 of the Regulations require procuring entities to specify the bid validity period for each tender. The provisions also allow procuring entities to extend the bid validity period in exceptional circumstances, prior to the expiry of the original specified validity period. The learned State Attorney submitted that, the bid validity period for this Tender was forty five (45) days from 22nd November 2022 to 5th January 2023. Due to the prevailing circumstances the 1st Respondent was compelled to extend the bid validity period for four times.

The learned State Attorney contended that the first request for extension was done through a letter dated 2nd January 2023 which extended the bid validity period for a period of thirty (30) days from 5th January 2023 to 4th February 2023. The second request for extension was done 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 which extended the bid validity period for sixty (60) days from 3rd March 2023 to 2nd May 2023. The fourth request for extension was done 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, it admitted having no proper records of the tenderers' responses on the requested extension of the bid validity period.

The learned State Attorney submitted further that the 1st Respondent received the Appellant's application for administrative review dated 5th May 2023. Having considered the raised contentions, the 1st Respondent issued its decision thereof through a letter dated 9th May 2023. Thus, the Appellant's application for administrative review was determined as per the requirements of the law.

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

- i) Dismissal of the Appeal with costs; and
- ii) Any other relief that the Appeals Authority may deem fit and fair to grant.

REPLY BY THE 2ND RESPONDENT

The 2nd Respondent's submissions were made by Mr. Kuzeny Msungu, Director of Operations from the 2nd Respondent's office. He commenced his submissions by stating that, according to Regulations 191 and 192 of the Regulations procuring entities are allowed to extend the bid validity period prior to the expiry of the original specified period. In the Tender under Appeal, the 1st Respondent extended the bid validity period in accordance with the requirements of the law.

The 2nd Respondent contended that the requests for extensions of the bid validity period were made through letters with Ref. Nos DCC/RI.10/IX/121

dated 28th April 2023, DCC/RW.4/2/94 dated 2nd March 2023, DCC/RE.7/11/97 dated 3rd February 2023 and DCC/RW.4/2/93 dated 2nd January 2023. The 2nd Respondent contended to have received all the requests for extension of the bid validity period.

The 2nd Respondent elaborated that the requests for extensions of the bid validity period were communicated to the tenderers through TANEPS save for the second request that was physically collected from the 1st Respondent's office. The 2nd Respondent added that the third request for extension of the bid validity period was received on 9th March 2023 while it was dated 3rd March 2023. The 2nd Respondent alleged to have been asked by the 1st Respondent to accept the third request for extension of the bid validity period effectively from 3rd March 2023 to 2nd May 2023 despite having received the said request on 9th March 2023.

The 2nd Respondent contended further that the Tender is still valid as the requests for extension of the bid validity period were done in accordance with the law and therefore the proposed award to it is proper in law.

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

- i) The 1st Respondent be allowed to proceed with the Tender process as at the time this Appeal was lodged the Tender was still valid as extensions of the bid validity period were done in accordance with the law;
- ii) The Appellant be ordered to pay costs of this Appeal including legal fees for the 1st and 2nd Respondents to the tune of TZS 16,000,000.00; and



iii) The Appellant's Appeal be dismissed in its entirety.

On its brief rejoinder the Appellant submitted that, the two Respondents failed to ascertain if there was a request for extension of the bid validity period in February 2023. In addition to that, the Respondents were unable to substantiate the validity of the third and fourth requests for extension of the bid validity period. In that regard, the Appellant contended that the proposal to award the 2nd Respondent was made after the expiry of the bid validity period and therefore, a nullity.

ANALYSIS BY THE APPEALS AUTHORITY

1.0 Whether the proposed award of the Tender to the 2nd Respondent was made within the bid validity period

In resolving this issue, the Appeals Authority considered the contentious arguments by the parties whereby on one hand the Appellant alleged that there is no valid tender due to the expiry of the bid validity period and therefore the proposed award to the 2nd Respondent is not proper in the eyes of the law. On the other hand, the Respondents contended that the Tender under Appeal is still valid as the bid validity period has not expired as alleged by the Appellant. The 1st Respondent claimed to have issued four requests for extension of the bid validity period prior to the expiry of the original specified period, therefore the Tender is valid.

In ascertaining the validity of the parties' contentious arguments, 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 a 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 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 22nd November 2022. Counting from 22nd November 2022, the forty five days ought to have lapsed on or by 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 tenderers through TANEPS.

Having reviewed the record of Appeal and parties' submissions in this Appeal, 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 asserted 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 that they accepted the request for extension of the bid validity period although the proof thereof was not submitted before the Appeals Authority. The Appellant and the 2nd Respondent also contended to have responded to the first 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 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 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 the second request for

A handwritten signature in black ink, appearing to be a stylized 'J' followed by a flourish and a small 'g'.

extension of the bid validity period by collecting it physically from the 1st Respondent's office. The 2nd Respondent also alleged to have accepted the said request.

During the hearing the Appeals Authority required the 1st Respondent to specify the mode that was used to communicate the second request for extension of the bid validity period taking into consideration that the 2nd Respondent alleged to have collected the letter physically from its office. In response thereof, the 1st Respondent asserted that the request was communicated to the tenderers through Manual Notification on TANePS only. The 1st Respondent further contended to have received the 2nd Respondent's response 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 which shows all the communications that were done in this Tender. The Appeals Authority observed that there was no communication from the 1st Respondent to tenderers on 3rd February 2023 as contended. The audit trail indicates that from 2nd January 2023 when the first request for extension of the bid validity period was communicated, the subsequent communication was done on 9th January 2023 being followed with the communication effected on 9th March 2023. Therefore, 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 extension of the bid validity period on 3rd February 2023 as contended, consequently, 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 the 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.

The Appeals Authority considered the 2nd Respondent's contention that it received the second request for extension of the bid validity period by collecting it physically from the 1st Respondent's office and its response thereof was also delivered through the same mode. The Appeals Authority rejects the 2nd Respondent's proposition in this regard for the reason that the same was not substantiated. The 1st Respondent in its submissions indicated to have communicated the said request through Manual Notification on TANEPS. The 2nd Respondent did not submit before the Appeals Authority any document that proves that the said letter was physically collected from the 1st Respondent's office. Furthermore, no proof was submitted which indicates that the 2nd Respondent physically delivered its response to the 1st Respondent's office.

The Appeals Authority also considered parties' proposition in relation to the third and fourth requests for extension of the bid validity period. It observed that having already been established hereinabove that there was no valid Tender after expiry of the bid validity period on 4th February 2023, there is no need of assessing the validity of the 1st Respondent's act in that regard. Since after expiry of the bid validity period all acts subsequent thereto are a nullity in the eyes of the law.

The Appeals Authority reviewed the record of Appeal and observed that by the time the bid validity period expired, the award to the 2nd Respondent was yet to be proposed. Thus, the recommendation of awarding the Tender to the 2nd Respondent was approved by the Tender Board on 12th April 2023. That is to say, the approval of the award was made after expiry of the Tender.

According to Section 71 of the Act quoted herein above, approval of award by the Tender Board has to be done prior to the expiry of the bid validity period. Since it has already been pointed out that the Tender expired on 4th February 2023, it goes without saying that the award to the 2nd Respondent was made in the absence of a valid Tender.

In view of the above findings, the Appeals Authority is of the firm view that the 1st Respondent's act of intending to award the Tender to the 2nd Respondent while there is no valid Tender in place contravened the law.

Under the circumstances, the Appeals Authority concludes the first issue in the negative that the proposed award of the tender to the 2nd Respondent was made after expiry of the bid validity period.

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

Taking cognizance of the above findings that there is no valid Tender after the expiry of the bid validity period, the Appeals Authority hereby allows the Appeal and nullifies the Tender process as well as the proposed award to the 2nd Respondent. The 1st Respondent is ordered to re-start the Tender process in accordance with the law. We make no order as to costs.



It is so ordered.

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

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

This decision is delivered in the presence of the Appellant and 1st Respondent and in the absence of the 2nd Respondent though duly notified this 23rd day of June 2023.

HON. JUSTICE (rtd) SAUDA MJASIRI



CHAIRPERSON

MEMBERS: -

1. ENG. STEPHEN MAKIGO.....

2. MR. RHOBEN NKORI.....