IN THE PUBLIC PROCUREMENT APPEALS AUTHORITY

APPEAL CASE NO. 06 OF 2021-22

BETWEEN

M/S COSEKE (TANZANIA) LTD, IN JOINT VENTURE WITH COSEKE (KENYA) LTD AND COSEKE (RWANDA) LTD..... APPELLANT

AND

TANZANIA NATIONAL ROADS AGENCY (TANROADS) ..... RESPONDENT

DECISION

CORAM

1. Hon. Justice (rtd) Sauda Mjasiri - Chairperson
2. CPA. Fredrick Rumanyika - Member
3. Adv. Rosan Mbwambo - Member
4. Ms. Florida Mapunda - Ag. Executive Secretary

SECRETARIAT

1. Ms Agnes Sayi - Senior Legal Officer
2. Ms. Violet Limilabo - Senior Legal Officer

FOR THE APPELLANT

1. Mr. Deogratius Ngongoseke - Head of Business Development
2. Mr. Elieza Ngowi - Country Manager

FOR THE RESPONDENT

1. Mr. Saddy Rashid - Senior Legal Counsel
2. Prof. Mrawira D. Mrawira - Technical Adviser
3. Mr. Majaliwa Mkinga - ICT Manager
4. Mr. Malimi Masasila - Legal Counsel
5. Mr. Leonard Deusdedit - Ag. Head of Goods and Works
6. Mr. Linus S. Mhagama - ICT Officer
7. Mr. Boniface Kiondo - Legal Officer

The Appeal was lodged by **M/S Coseke (Tanzania) Ltd,** in Joint Venture with **Coseke (Kenya) Ltd and Coseke (Rwanda) Ltd** (hereinafter referred to as **"the Appellant"**) against the **Tanzania National Roads Agency** commonly known by its acronym as **TANROADS** (hereinafter referred to as **"the Respondent"**). The Appeal is in respect of Tender No. AE/001/2020-21/HQ/G/79 for Provision of Scanning Services, Indexing and uploading into Electronic Document Management System (EDMS) (hereinafter referred to as **"the Tender"**).

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

The Tender was re-advertised in the Daily News newspaper of 5th October 2020 and in the East African newspaper of 3rd-9th October 2020. The advertisements invited qualified bidders to submit their bids. The deadline for submission of bids was initially set for 17th November 2020 but was later on extended to 8th December 2020. By the deadline two (2) bidders submitted their bids.

Bids were then subjected to evaluation which was conducted into two stages namely; preliminary and detailed evaluation.

According to the evaluation report, preliminary evaluation assessed bidders on their commercial and technical responsiveness. The Appellant was disqualified at this stage for failure to comply with the technical requirements as provided for in the Tender Document. The remaining tender by M/S Datahouse (T) Ltd in JV with M/S Midata-Tech Ltd was subjected to detailed evaluation and found to have complied with all the requirements of the Tender Document. The Evaluation Committee recommended award of the Tender to M/S Datahouse (T) Ltd in JV with M/S Midata-Tech Ltd at a contract price of United States Dollars Nine Hundred Ninety Seven Thousand Six Hundred Ninety (USD 997,690.00) only, VAT inclusive.

The Tender Board at its meeting held on 15th March 2021, deliberated and approved the award as recommended by the Evaluation Committee.

On 12th August 2021, the Respondent issued the Notice of Intention to award the Tender which informed the Appellant that, it intends to award the Tender to M/S Datahouse (T) Ltd in JV with M/S Midata-Tech Ltd. The Notice also informed the Appellant that its tender was disqualified for failure to comply with requirements provided in the Tender Document.

Dissatisfied, on 18th August 2021, the Appellant applied for administrative review to the Respondent challenging the reason given for its disqualification. On 26th August 2021, the Respondent issued its decision which dismissed the Appellant's application for review. Aggrieved further, on 1st September 2021, the Appellant filed this Appeal to the Appeals Authority.

After the Appeal was lodged, the Appeals Authority notified the Respondent about the existence of the Appeal and required it to submit its reply. The Respondent's responses to the grounds of Appeal were preceded with a preliminary objection (PO) on a point of law to wit: -

> ***"The Appeal has been pre-maturely filed before the Appeals Authority contrary to Section 95 of the Public Procurement Act, No. 7 of 2011 as amended and Regulation 104 of the Public Procurement Regulations of 2013 prior to seeking administrative review to the accounting officer."***

During the hearing, the Appeals Authority directed the parties that it would hear both the PO and the merits of the Appeal. Therefore, parties were required to address it on both. In so doing the following issues were framed: -

1. **Whether the disqualification of the Appellant's tender was justified; and**
2. **What reliefs if any are the parties entitled to.**

Parties commenced their submissions by addressing the PO. The submissions are summarized as hereunder: -

SUBMISSIONS BY THE RESPONDENT ON THE PO

The Respondent submitted that the Appeal has been filed pre-maturely before the Appeals Authority as the Appellant failed to comply with the requirements of Section 95 of the Public Procurement Act, No. 7 of 2011 as amended in 2016 (hereinafter referred to as "**the Act**") and Regulation 104 of the Public Procurement Regulations, GN. No. 446 of 2013 as amended by GN. No. 333 of 2016 (hereinafter referred to as "**the Regulations**"). The said provisions clearly stipulate that any tenderer who claims to have suffered or who may suffer any loss or injury as a result of breach of a duty imposed on a procuring entity or an approving authority by this Act may seek a review in accordance with sections 96 and 97 of the Act.

The Respondent expounded its argument by stating that, the Appellant after being served with the Notice of Intention to award the Tender and being dissatisfied, it wrote a letter dated 18th August 2021 to the Respondent. According to the Respondent the said letter was not a formal application for administrative review. It was a mere letter intending to persuade the Respondent to award it the Tender based on the price it offered. A proper application for administrative review ought to have shown loss or injury suffered as a result of breach of duty by the procuring entity (Respondent). The Application also needed to indicate the reliefs sought. To the contrary, the Appellant's purported application for administrative review failed to comply with basic requirements.

Upon receipt of the Appellant's letter dated 18th August 2021, the Respondent replied vide its letter dated 26th August 2021. However, the Respondent's reply was made as a matter of courtesy and was not a decision on the Appellant's purported application for administrative review.

The Respondent submitted further that, following the sequence of events, it is obvious that after receipt of the Notice of Intention to award the Tender and being dissatisfied, the Appellant ought to have lodged a formal application for administrative review to the Respondent. However, it failed to do so. Thus, due to such an anomaly, the Appellant's Appeal is improperly before the Appeals Authority as it omitted the first step of review. The Respondent therefore, prayed that the Appeal be dismissed with costs.

REPLY BY THE APPELLANT ON THE PO

In response to the PO, the Appellant submitted that it did not skip any stage of the review process. It lodged its application for administrative review to the Respondent after receipt of the Notice of Intention to award the Tender. The Respondent responded accordingly. Having been dissatisfied with the Respondent's decision issued on its application for administrative review, the Appellant filed this Appeal. The Appeal followed the review procedures as required. The Appellant prayed that the Appeal be heard on merits as it is properly before the Appeals Authority.

ANALYSIS OF THE APPEALS AUTHORITY ON THE PO

In determining the PO raised, the main issue for consideration is ***whether there is a competent Appeal before the Appeals Authority***.

In resolving this issue, the Appeals Authority revisited Sections 95 (1), 96 (1) and 97 (1) and (2) of the Act and Regulations 104, 105 (1) and (3) of the Regulations as amended. The provisions read as follows:-

> *Section 95 (1) "Any tenderer who claims to have suffered or who may suffer any loss or injury as a result of breach of a duty imposed on a procuring entity or an approving authority by this Act may seek a review in accordance with sections 96 and 97."*

> *Section 96 (1) "Any complaints or dispute between procuring entities and tenderers which arise in respect of procurement proceedings, disposal of public assets*

by tender and awards of contracts shall be reviewed and ***decided upon a written decision of the accounting officer of a procuring entity and give reasons for his decision."***

Section 97 (1) "A tenderer who is aggrieved by the decision of the accounting officer may refer the matter to the Appeals Authority for review and administrative decision.

(2) where-

(a) the accounting officer does not make a decision within the period specified under this Act; or

(b) the tenderer is not satisfied with the decision of the accounting officer,

the tenderer may make a complaint to the Appeals Authority within seven working days from the date of communication of the decision by the accounting officer or upon the expiry of the period within which the accounting officer ought to have made a decision"

Regulation 104 "A tenderer who claims to have suffered or who may suffer any loss or injury as a result of breach of a duty imposed on a procuring entity or an approving authority by the Act or these Regulations may apply for a review in accordance with section 95 of the Act."

Regulation 105 (1) "Any application for administrative review ***shall be submitted in writing or electronically to the accounting officer of a procuring entity and a copy shall be served to the Authority within seven working days of the tenderer becoming or should have become aware of the circumstances giving rise to the complaint or dispute".***

(3) "The application for administrative review shall contain-

(a) details of the procurement or disposal requirements to which the complaint relates;

(b) details of the provisions of the Act, Regulations or provisions that have been breached or omitted;

(c) an explanation of how the provisions of the Act, Regulations or provisions have been breached or omitted, including the dates and name of the responsible public officer, where known;

(d) documentary or other evidence supporting the complaint where available;

(e) remedies sought; and

(f) any other information relevant to the complaint.

(Emphasis provided)

The above quoted provisions entail that a tenderer who claims to have suffered or that may suffer any loss or injury as a result of breach of duty imposed to a procuring entity may submit a complaint in writing or electronically to the accounting officer within seven (7) working days of becoming aware of the circumstances giving rise to a complaint. Where the accounting officer issues its decision and a tenderer is still dissatisfied or the accounting officer fails to issue its decision within the stipulated time limit, a tenderer may submit an appeal to the Appeals Authority pursuant to Section 97 of the Act read together with Regulation 107 of the Regulations.

It is evident from the record of Appeal that on 12th August 2021, the Respondent issued the Notice of Intention to award the Tender to all tenderers who participated in the Tender process. Dissatisfied, on 18th August 2021, the Appellant filed an application for administrative review to the Respondent challenging the reason given for its disqualification. On 26th August 2021, the Respondent issued its decision which dismissed the Appellant's application for administrative review.

Having reviewed the Appellant's letter dated 18th August 2021 addressed to the Respondent, the Appeals Authority observed as follows:-

1. The application for review was made in writing in compliance with Regulation 105 (1) of the Regulations;

2. Details of the procurement requirements were provided as per Regulation 105 (3) (a) of the Regulations;

3. Remedies were sought as per the requirement of Regulation 105 (3) (e) of the Regulations.

The Appeals Authority observed further that the Appellant's application for administrative review did not contain specific provisions of the Act, Regulations and Tender Document which were breached and how they were breached as per Regulation 105 (3) (b) and (c) of the Regulations.

The Appeals Authority is of the view that much as the provisions of the law were not mentioned in the Appellant's application, its wording indicated clearly that the Appellant was challenging its disqualification from the Tender process. The Respondent on its part after receipt of the Appellant's application for administrative review entertained it and issued its decision on 26th August 2021. In the said decision the Respondent had a sub heading titled "Response to your complaint". On the second paragraph of the said decision (letter) the Respondent acknowledged that the Appellant was challenging its disqualification from the Tender process. The third paragraph indicated that review of the tender process was carried out after receipt of the Appellant's complaint and it was found that the Appellant's disqualification was justified. This indicates that the Respondent was not prejudiced by the Appellant's omission to cite the provisions.

In view of the above, the Appeals Authority is of the settled view that, the Appellant made an application for administrative review before lodging an Appeal to this Appeals Authority.

Under the circumstances, the Appeals Authority hereby dismiss the Respondent's PO and proceeds to determine the Appeal on merits.

SUBMISSIONS BY THE APPELLANT ON THE MERITS OF THE APPEAL

The Appellant's grounds of Appeal stated in the Statement of Appeal as well as oral submissions during the hearing may be summarized as follows:-

1. That, the Appellant was among the tenderers who participated in the Tender. According to the Notice of Intention to award the Tender its tender was disqualified for failure to pass the documents scanning test. The Appellant disputes the reason given for its disqualification on the ground that according to Clause 11.1 (j) of the Bid Data Sheet (BDS) there was no criteria of *"Test scanning and uploading the outputs into TANROADS's EDMS"*. Therefore, its disqualification was unfair as it is based on the criterion which was not explicitly stated in the Tender Document.

   The Appellant added that, the Respondent's act in this regard contravened Regulation 203 (1) of the Regulations which requires evaluation to be consistent with terms and conditions provided for in the Tender Document.

2. That, according to the Tender Document, a mandatory document scanning test was to be carried out at the Respondent's headquarters

and support was to be provided by its IT officers. During the testing exercise the required support was not provided for by the Respondent. Thus, hindering the Appellant's testing exercise.

3. That, the Respondent intends to award the Tender to a tenderer whose price is USD 700,000 more than the Appellant's quoted price. The Respondent ought to have considered the amount of the public funds which would be wasted instead of it being used for other projects.

4. Finally, the Appellant prayed for the following orders:-

    i. The Appellant be considered to have complied with the Tender requirements and therefore eligible for the next steps of evaluation; and

    ii. Compensation costs which amounts to TZS 5,800,000.00 being Appeal fees amounting to TZS 300,000.00; legal fees amounting to TZS 3,000,000.00 and general damages amounting to TZS 2,500,000.00.

REPLY BY THE RESPONDENT ON THE MERITS OF THE APPEAL

The Respondent's reply to the Appellant's grounds of Appeal as well as oral submissions during the hearing may be summarized as follows: -

1. That, the criteria of *"Test scanning and uploading the outputs into TANROADS's EDMS"* were explicitly stated under Clause 11.1 (j) (1)

and (2) of the BDS. The said provision states clearly the criteria for evaluation of a tenderer to be (a) customization of bulk scanning software to automate generate hyperlinks (shortcuts) for each user department to facilitate access of such records; and (b) each bidder to carry out a testing of their customized scanning software and generate a screen capture of the outputs of the test scanning.

The Respondent submitted further that Clause 11.1 (j) (3) of the BDS stipulates that the objective of the testing requirement is to ensure that each bidder has completed customization of their bulk scanning software to the extent that it can automatically index the scanned documents, classify them properly, upload and place them in records folder following specific TANROADS' repository structure of Electronic Document Management System (EDMS).

2. That, Clause 11.1 (j) (4) of the BDS requires two copies of testing results (screenshots & checklists) to be signed by the Purchaser's designated IT staff; and one copy to be kept by the Respondent and the remaining copy to be issued to the bidder for inclusion in the tender submission. The Appellant was fully aware of the checklist criterion as stipulated under Clause 11.1 (j) (4) of the BDS. The checklist indicated that, the representative of the Appellant one Mr. Jossiah Kibona participated in the testing assessment and signed the checklist report on 4th December 2020.

3. That, Clause 5.4 of Section VI - Purchasers Requirements provides clear guidance on steps and procedures which were to be followed

during mandatory testing. The Respondent added that, the mandatory testing was carried out at the Respondent's premises with the assistance of IT officers. Tenderers were provided with all the technical assistance which was required during the testing. However, after completion of that process the Appellant's checklist report was found to have not complied with testing requirement.

4. That, the Respondent conducted the evaluation process in accordance with the terms and conditions prescribed in the Tender Document. The Appellant being one of the tenderers was issued with the Tender Document which contained all the requirements of the Tender. Further to that, the Appellant attended the pre bid meeting whereby several issues were clarified. Thus, if some of the criteria were not clear it should have sought for clarification.

5. That, the Respondent challenged the Appellant's argument that it quoted the lowest price and thus it ought to have been awarded the Tender. The argument should not be entertained since it was not one of the grounds of the Appeal.

6. Finally, the Respondent prayed for the following orders:-

   i. That, the Appellant's remedies sought are baseless and unfounded in law and the same ought to be dismissed in its entirety with costs; and

ii. The Appellant does not deserve the purported filing fees for Appeal, legal fees and general damages since the Appeal has no merits.

ANALYSIS OF THE APPEALS AUTHORITY ON THE MERITS OF THE APPEAL

1. Whether the disqualification of the Appellant's tender was justified.

In resolving this issue, the Appeals Authority revisited the Appeal record and observed that, the Appellant's tender was disqualified for failure to comply with the requirements of Clause 11.1 (j) of the BDS.

To ascertain the validity of the Appellant's disqualification in this regard, the Appeals Authority revisited Clause 11.1 (j) of the BDS which provides as follows:-

Clause 11.1 (j) "*The Bidder shall submit with its bid the following additional documents:*

1) The bidder shall customize their bulk scanning software to automate the placement of each record in the appropriate Record Folder, but also generate the hyperlinks (shortcuts) for each user department to facilitate the access of such records. Figures 1 and 2 below shows the Repository Structure (Record folders) and

user departments structure (where hyperlinks shortcuts will be placed).

2) *Each bidder **MUST** carry out a testing of their customized scanning software and, generate a screen capture of the outputs of the test scanning that shall be included in the bid submission.*

3) *This testing requirement is to ensure that each bidder has completed customization of their bulk-scanning software to the extent that it can automatically index the scanned documents, classify them properly, upload and place them in records folders following specific TANROADS' repository structure.*

4) *Two copies of testing results (screenshots & checklist) must be signed by Purchaser's designated IT staff; one copy shall be kept in file by TANROADS and the copy issued to the Bidder for inclusion in the tender submission."*

(Emphasis provided)

The above quoted provision read together with Item 5.4 of Section VI of the Purchaser's Requirement clearly indicate that Bidders were required to carry out testing of their customized bulk scanning software. The testing

outcome was to be signed by the Respondent's staff and bidders' representatives. One copy of the testing outcome was to be kept by the Respondent and the other copy was to be issued to bidders for inclusion in their tenders.

The record of Appeal indicates that during the documents testing exercise the Appellant was represented by Mr. Jossiah Kibona who signed the outcome of the testing exercise on 4th December 2021. During the hearing the Appellant was required to clarify if Mr. Jossiah Kibona was one of its employees. In response thereof, the Appellant conceded that Mr. Jossiah Kibona was one of its employees and represented it during the testing exercise. The Appellant stated that the said employee was not given technical support as was required. The Respondent on its part contended that all tenderers were given the required technical support during the mandatory testing exercise.

The Appeals Authority revisited the checklists sheets which provided the results of the mandatory scanning test and observed that both bidders were supervised by one Mr. Linus S. Mhagama (Respondent's Examiner) and the checklists were signed by bidders' representatives on 4th December 2020. The Appeals Authority further revisited the requirement description under the checklist sheet and observed that the same were provided for in the Tender Document under Clause 11.1 (j) of the BDS read together with Section VI – Purchaser's Requirements, Part 3 – Technical Specifications. Thus, the Appellant was aware of the mandatory testing requirements.

The Appeals Authority considered the Appellant's allegation that it was not given the required support during the mandatory testing exercise and observed that if the said anomaly existed the same ought to have been reported or challenged. In the absence of such a report or challenge and the Appellant's representative's act of signing the checklist sheet which had the outcome of the mandatory testing, implies that the testing was conducted as per the requirements provided for in the Tender Document.

Furthermore, the Appeals Authority rejects the Appellant's argument that test scanning and uploading the outputs into TANROAD'S EDMS was not indicated in the Tender Document. The said requirements were clearly provided for in the Tender Document as pointed out hereinabove.

Section 72 (1) of the Act and Regulations 203 (1), 206 (1) and (2) of the Regulations provide as follows:-

Sec. 72(1) "*The basis for the tender evaluation and selection of the successful tenderer* ***shall be clearly specified in the tender document.***"

Reg. 203 (1) "***The tender evaluation shall be consistent with terms and conditions prescribed in the tender documents and such evaluation shall be carried out using the criteria explicitly stated in the tender documents".***

Reg. 206 (1) "***The procuring entity's determination of a tender's responsiveness shall be based on***

the contents of the tender itself *without recourse to extrinsic evidence".*

(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."***

(Emphasis added).

Therefore, in view of the above quoted provisions the Appeals Authority finds that the Respondent's act of disqualifying the Appellant to be in accordance with the law.

In relation to the Appellant's argument on the lowest price offered, the Appeals Authority agrees with the Respondent that this was a new ground raised during the hearing of the Appeal. Thus, it would not be entertained.

Given the above findings the Appeals Authority's concludes issue No. 1 in the affirmative.

2. What reliefs if any are the parties entitled to.

Taking cognizance of the findings hereinabove that, the Appellant's disqualification is justified, the Appeals Authority hereby dismiss the Appeal. The Respondent is allowed to proceed with the Tender process. Each party is to bear its own costs.

It is so ordered.

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

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

The Decision is delivered in the presence of the parties this 23rd day of September 2021.

HON. JUSTICE (rtd) SAUDA MJASIRI

.....

CHAIRPERSON

MEMBERS:

1. **CPA. FREDRICK RUMANYIKA**.....
2. **ADV. ROSAN MBWAMBO**.....