IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY
AT DAR ES SALAAM

APPEAL CASE NO 06 OF 2016-17

BETWEEN

M/S PETROFUEL (T) LIMITED……APPELLANT

AND

STAMIGOLD COMPANY LIMITED ……RESPONDENT

DECISION

CORAM

1. **Hon. Vincent K.D Lyimo, J. (rtd) - Chairman**
2. **Mr. Louis P. Accaro - Member**
3. **Eng. Francis T. Marmo - Member**
4. **Mr. Ole-Mbille Kissioki - Secretary**

SECRETARIAT

1. **Ms. Florida Mapunda - Senior Legal Officer**
2. **Mr. Hamisi O. Tika - Legal Officer**
3. **Ms. Violet S. Limilabo - Legal Officer**

FOR THE APPELLANT

1. **Dr. Masumbuko Lamwai - Advocate, M.R.M Lamwai and Company**
2. **Mr. K.S Sudhi - Business Analyst**
3. **Ms. Mashamsham Mfaru- Vice President Operation**
4. **Ms. Mary M. Lamwai - Advocate, M.R.M Lamwai and Company**

FOR THE RESPONDENT

1. **Mr. Michael Mahende - Company Secretary**
2. **Mr. Sadick Kasuhya - Head of Procurement Management Unit**

This decision was set for delivery today 4th November 2016, and we proceed to deliver it.

The Appeal was lodged by M/s PETROFUEL (T) LIMITED (hereinafter referred to as "the Appellant") against STAMIGOLD COMPANY LIMITED (hereinafter referred to as "the Respondent").

The Appeal is in respect of Tender No. PA/125/SBM/2016-2017/G/01/LOT 1 for the supply of Sulphur Low Diesel (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 facts of the Appeal may be summarized as follows:

The Respondent invited bidders to participate in the above tender through an advertisement in the Daily News newspaper dated 30th May 2016. The deadline for submission of the tenders was on 24th June 2016 whereby five tenders were submitted from the following firms-

i) M/s State Oil (T) Ltd;

ii) M/s Camel Oil (T) Ltd;

iii) M/s Gulf Bulk Petroleum (T) Ltd (GBP);

iv) M/s Star Oil (T) Ltd; and

v) M/s Petro Fuel (T) Ltd.

The tenders were subjected for evaluation which was conducted in two stages namely; Preliminary Evaluation and Detailed Evaluation. Upon completion of the evaluation process, the Evaluation Committee recommended the award of contract to the Appellant *subject to successful negotiations.*

The Tender Board at its Meeting held on 23rd July 2016 deliberated on the recommendations in the Evaluation Report, directed the Respondent to conduct due diligence in respect to the Appellant's firm before award of the Tender in order to verify its capacity to perform the contract.

On 13th August 2016, the Respondent conducted negotiations with the Appellant. There was consensus between the two parties on most of the agenda items that had been tabled for discussion save for three issues namely; the credit facility, the payment schedule and the performance security. As a result, the Respondent terminated the negotiations with

the Appellant; vide its letter Ref No. SBM/GM/004/2016/87 dated 26th August 2016. On the next day, i.e. on 27th August 2016 the Respondent issued a Notice of Intention to Award the Tender to M/s GPB (T) Ltd.

On 31st August 2016, the Appellant by its letter Ref. No. PFTL/MD/2016/08/01-SCL lodged an application to the Respondent for Administrative Review challenging amongst others issues, termination of the negotiations and the award of the Contract to M/s GPB (T) Ltd. The Respondent did not react to the said application.

Having received no replies from the Respondent, on 13th September 2016 the Appellant wrote a reminder letter to the Respondent in which it challenged the termination of the negotiations.

On 28th September 2016, the Respondent in its letter Ref. No SBM/GM/004/2016/101 dismissed the Application for lack of merits and informed the Appellant that the award to the proposed successful bidder had been made pursuant to the Public Procurement Act No. 7 of 2011 as amended (hereinafter referred to as "the Act") read together with Public Procurement Regulations, GN No. 446 of 2013 (hereinafter referred to as "GN 446 of 2013").

Aggrieved, on 06th October 2016 the Appellant lodged this Appeal to the Appeals Authority.

SUBMISSIONS BY THE APPELLANT

The Appellant filed four (4) main grounds of Appeal as follows:-

a) **The Respondent erred in law for proposing credit period of ninety (90) days instead of thirty (30) days as indicated under Clause 18.2 (iii) of the Special Conditions of Contract (SCC);**

b) **The Respondent erred in law for rejecting the Appellant's proposal of issuing Tax Invoice per every delivery in accordance with EFD Regulations;**

c) **The Respondent erred in fact and law for concluding that the Appellant had rejected to comply with performance security requirements; and**

d) **The Respondent erred in law for terminating the negotiations prematurely.**

In support of the first ground, Dr. Lamwai learned counsel for the Appellant submitted that Clause 18.2(iii) of the SCC provides that the credit period should be thirty days. That means the payments are to be made within thirty (30) days from the receipt of goods and after submission of claim supported by the acceptance certificate issued by the procuring entity. He stated that the Respondent's proposal of 90 days' credit period was in contravention of the Respondent's own Tender Document. Thus, it was improper for the Respondent to terminate the negotiations on the ground that the non negotiable payment term mandated is 30 days and not 60 days. The learned counsel asserted that any deviation from it will be non compliance to the fundamental terms of the tender.

Addressing the Members of the Authority on the second ground, the learned counsel stated that Clause 12.3 of the SCC requires suppliers to

issue Tax Invoice for each delivery of goods. The said Clause is in compliance with the requirements of Regulation 10(2) of the Income Tax (Electronic Fiscal Devices) Regulations, GN 389 of 2012 (hereinafter referred to as "EFD Regulations"). The said Regulation requires the use of EFDs in the daily business transactions. Thus, the Respondent erred in law and fact to terminate the negotiations on the ground that the Appellant was required to raise and file invoices monthly and not on each delivery.

Next, the learned counsel addressed issues in ground three of the Appeal, wherein he submitted that the Respondent erred in fact and law for terminating negotiations on the ground that the former had refused to comply with performance security requirement as provided for in the Tender Document. He pointed out that during the negotiations the Appellant had rightly refused to provide credit period of 90 days in addition to the Performance Security of 10%. He stated that the Appellant was willing to provide performance security of 10% in addition to the credit period of 30 days only as per the Tender Document. Thus, termination of the negotiations based on that aspect was not proper at law.

On the fourth ground of Appeal, the learned counsel for the Appellant submitted that the Respondent erred in law for terminating the negotiations prematurely. The learned counsel pointed out that immediately after the first negotiation meeting in which there was consensus on most issues, the Appellant and the Respondent understood that all agenda items tabled were to be taken to their respective management for deliberations and guidance before

reconvening for the final stages of the negotiations. To the contrary, the Respondent did not convene the meeting as agreed; instead it unilaterally terminated the negotiations. The learned counsel submitted that since the negotiations were between two parties, it was improper for the Respondent to terminate negotiations unilaterally. The learned counsel insisted that while the letter of termination was issued on 26th August 2016, the Notice of Intention to award the contract to his competitor was issued immediately thereafter, i.e. on 27th August 2016. According to the learned counsel, that was a record short time since the Respondent had taken less than 24 hours to process and to award the same to M/s GBP (T) Ltd while it had taken the parties more than three months on the negotiations. He thus had suspected ill motive or foul play in the tender process.

Finally, the Appellant prayed that the Respondent be ordered to:

- **Re – start the negotiations**
- **Cancel the Notice of Intention to award the Tender.**

REPLIES BY THE RESPONDENT

In its replies to the Appellant's grounds of Appeal, the Respondent submitted as follows-

With regard to the first ground of Appeal, the Respondent submitted that Clause 18.2(iii) of the SCC requires payment to be made within sixty (60) days after receipt of the goods and upon submission of a claim supported by acceptance certificate issued by the procuring entity. The Respondent was however quick to admit that Clause 18.2(iii) of the

SCC as drafted contained errors because the credit period has been stated to be thirty days in words but has in brackets the numeral 60. Mr. Mahende the Company Secretary stated that by the said provisions in the SCC, the Respondent intended the credit period to be sixty days. He said that during the negotiations, the Appellant did not raise any issue in respect to that discrepancy but had come up with new proposals which were in effect counter offers, contrary to the requirements of the Tender Document. Accordingly, the Respondent rejected the Appellant's counter offer because accepting the same would make the performance of the contract impossible.

On the second ground of Appeal the Respondent disputed that the Appellant was restricted to comply with EFD Regulations. During negotiations the Respondent proposed payment method which could facilitate its business operations. He pointed out that in terms of the Tender Document, the monthly Tax Invoice would issue upon delivery of 750,000 liters of fuel in accordance with the Schedule of Requirements. He argued that the issuance of Tax Invoice as and when a consignment is receipted was unnecessary and insisted that one consolidated Tax Invoice after delivery of one monthly order could not be non-compliance with EFD Regulations as put by the Appellant.

Addressing the third ground of Appeal the Respondent stated that the submission of performance security is mandatory. It is a pre-condition as contained under Regulation 29 of GN. No 446 of 2013. The said Regulation requires successful tenderers to submit performance security in order to guarantee compliance in the performance of the contract. He submitted that as the Appellant had declined to comply fully with the

requirement of the law as amplified under Clause 9 of the General Condition of Contract (GCC) and Clause 7 of SCC there was no alternative but to terminate the negotiations.

Responding to the fourth ground of Appeal the Respondent disputed to have failed to reconvene the meeting as alleged. The Respondent drew the attention of the Members of the Appeals Authority to the proceedings of the negotiations, wherein he pointed out that after formal meetings, communication was through various emails in which the Appellant submitted responses regarding matters previously discussed. In those mails the Appellant submitted responses as directed by the management which indicated unwillingness to accept what was contained in the Tender Document such as performance security, payment schedule and credit period. Under the circumstances it was not possible for the Respondent to go on with the negotiations. The Respondent averred further that, there was no foul play and award made to the successful tenderer was in accordance with the Act and its Regulations.

Therefore, the Respondent prayed for the following reliefs:-

i) **Dismissal of the Appeal with costs**
ii) **Withdrawal of the decision the Appeals Authority requiring the Respondent to suspend the procurement process.**
iii) **Any other relief that the Appeals Authority shall deem fit to grant.**

ANALYSIS BY THE APPEALS AUTHORITY

In this Appeal there are two triable issues namely:-

- **Whether the termination of negotiations was proper at law**
- **To What reliefs, if any, are the parties entitled**

Having identified the issues, the Appeals Authority proceeded to determine them as hereunder-

1.0 Whether the termination of negotiations was proper at law

In determining this issue, the Appeals Authority revisited the documents submitted before it and observed that, both the Appellant and the Respondent had failed to reach consensus agreement on three items among ten that were tabled for discussion. Having so noted, the Appeals Authority deemed it proper to review the provisions of the law which guides negotiations as well as the respective Minutes of the negotiations in order to satisfy itself if the tabled issues were eligible for discussion. In the course of doing so, the Appeals Authority observed that negotiations are guided by Section 76 of the Act read together with Regulations 225 to 230 of GN No. 446 of 2013. According to Regulation 225(1)(a)-(h) negotiations may be undertaken in relation to;

a) **minor alteration to the technical details of the statement of requirements**
b) **reduction of quantities for budgetary reasons**
c) **Minor amendment to the special condition of the contract**

d) **Finalizing payment arrangement**

e) **Mobilization arrangement**

f) **Agreeing on final delivery or work schedule to accommodate any changes**

g) **The methodology or staffing, and**

h) **Clarifying details that were not apparent or could not be finalized at the time of bidding.**

The Appeals Authority observed further that, Regulation 225(1) of GN No 446 of 2013 is in *pari-materia* with Clause 37.1 of the Instructions To Bidders (ITB). The wording of both provisions clearly indicate that negotiations are not intended to materially change the terms and conditions of contract as provided for in the Tender Document.

The Appeals Authority reviewed the Minutes of the negotiations and observed that there were ten (10) issues that were listed for negotiation and these include; duration of supply, credit facility, change in price, delivery schedule, safety issues relating to mining industry, quality and standards of the items to be delivered, proper and effective communication between buyer and seller, transferring of ownership of products, inspection and acceptance of delivered goods and performance security.

The Appeals Authority observed that, the listed items are allowed for negotiations save for performance security. According to Section 58(2) of the Act read together with Regulation 29(1) of GN No.446 of 2013, a successful tenderer is mandatorily required to submit a performance security as specified in the Tender Document in order to guarantee

faithful performance of the contract. In this case Clause 7 of the SCC read together with Clause 24 of the Bid Data Sheet clearly specifies the required performance security in this tender. For purposes of clarity the Appeals Authority reproduces Clause 7 of the SCC as hereunder;

> **"The amount of performance security as a percentage of the contract price, shall be: 15% (fifteen percent) of the contract price in the form of an unconditional Bank Guarantee" (Emphasis added)**

From the above extract, it is crystal clear that the submission of the performance security is a mandatory requirement of the law and it has to be complied with by the successful tenderer as specified in the Tender Document. The issue of performance security is not a subject matter for negotiations.

Furthermore, in the course of reviewing the Minutes of the negotiations, the Appeals Authority noted that the Respondent insisted that performance security had to be complied with as provided in the Tender Document. However, the Appellant maintained his stance on submitting a performance security of 5% for the monthly volume. Incidentally, at the hearing of this Appeal, the learned counsel for the Appellant admitted that performance security cannot be negotiated and it has to be complied with as provided for in the Tender Document.

From the above facts, the Appeals Authority is of the view that, it was proper for the Respondent to terminate the negotiations as it had become apparent that the Appellant was unwilling to comply with

performance security requirement as provided for in the Tender Document. The Appeals Authority is of the further settled view that non compliance with performance security requirement is a sufficient ground for rejecting the Appellant's tender and for the dismissal of the Appeal. However, the Appeals Authority proceeds to determine the remaining grounds of Appeal as raised by the Appellant.

The Appeals Authority considered the Appellant's argument in relation to issuance of tax invoice per every delivery and observed that, according to the Schedule of Requirements the Appellant was required to supply 750,000 liters per month for a period of ten (10) months the equivalent of 7,500,000 liters. From the records submitted before the Appeals Authority there is nothing which shows that the Appellant and the Respondent had negotiated and agreed on part delivery of the monthly delivery quantity. In the absence of such an agreement, the Appeals Authority is of the firm view that, the Appellant was required to supply the required quantity of fuel as specified in the Schedule of Requirements.

The Appeals Authority considered Clause 12.3(i) of the SCC and Regulation 10(2) of the EFD Regulations relied upon by the Appellant and observed that the said provisions require invoices to be issued after delivery of the goods. Since there was no agreement on part delivery, it is expected that the goods are to be delivered in accordance with Schedule of Requirements. That means, tax invoices are to be raised after the supply of 750,000 liters per month. Alternatively and as submitted by the Respondent, the Appellant was at liberty to issue a

proforma invoice each time fuel was delivered until the monthly delivery amount was reached.

From the facts of this Appeal it is crystal clear that the Respondent had not prevented the Appellant from complying with EFD Regulations in issuing tax invoice. The Appeals Authority finds the Respondent's position of rejecting the Appellant's proposal of issuing tax invoice for every delivery (part delivery) to be proper and in accordance with the Tender Document. Thus, termination of negotiations based on this ground was also proper.

Furthermore, the Appeals Authority considered the Appellant's grounds of Appeal in relation to credit period. From oral as well as written submissions, it was observed that while the Appellant insisted that the required credit period was thirty days, the Respondent counter argued by indicating that it was sixty days. In order to substantiate the validity of the arguments by the parties, the Appeals Authority revisited the relevant provisions as contained in the SCC. It should be noted that under the relevant part of the SCC, there is Clause 18.1(i-iii) which relates to payments of goods supplied from abroad and which is not relevant to this particular Appeal. The same Clause 18.1(i-iii) has provisions for goods and services supplied from within the United Republic of Tanzania and sub clause (iii) thereof is relevant. There is no Clause 18.2(iii) as relied upon by the parties. The Appeals Authority revisited Clause 18.1(iii) which state as follows;

> **(iii) "On Acceptance: An amount of the Contract Price shall be paid to the Supplier within thirty (60) days after the date of the**

acceptance certificate for the respective delivery issued by the Procuring Entity".

The above quoted Clause is apparently the basis upon which the parties based their arguments. The said Clause provides credit period of thirty days in words and sixty days in numbers. As indicated earlier above, at the hearing of the Appeal, the Respondent admitted that there was typographical error but the intention of the Respondent was to have a credit period of sixty days. In addition, the Company Secretary stated that during the negotiations the Respondent had proposed the credit period to be extended from 60 to 90 days and the parties did not address the apparent discrepancy in the number of credit days. He said that the Appellant made proposals for advance payment of 100% before delivery and in the alternative, the proposed credit periods be based on the delivery date as per the Table drawn up by Appellant, reproduced herein below.

S.N	Delivery date/day	Payment
1	1-7	8-24
2	8-14	15-24
3	15-21	22-24
4	22-29	30-24 of the next month

In support of the different credit periods proposed, the Appellant categorically stated that it will not provide a credit period of 90 days since the same would put them to the exposure of TZS 4,200,000,000.00.

From the facts pointed out above the Appeals Authority is of the firm view that the parties were dead locked on the issue of credit payment system irrespective of whether or not the same should have been negotiated on the basis of thirty or sixty days.

Based on the above findings, the Appeals Authority is of the settled view that, since the Appellant and the Respondent failed to reach agreement on the suitable credit period, the Respondent as the procuring entity was entitled to terminate the negotiations.

Furthermore, the Appeals Authority considered the argument by the Appellant that the Respondent be required to re-open the negotiations and observes that the bidder was under no mandate continuing to require the Respondent to negotiate with them. And neither does the Respondent has room to reopen the negotiations. Regulation 230 of GN No 446 of 2013 states as follows:-

> **"Where negotiations are commenced with the next ranked tenderer or a new tenderer is invited, the procuring entity shall not reopen earlier negotiations; and the original tenderer shall be informed in writing of the reasons for termination of the negotiations". (Emphasis supplied)**

From the above findings it cannot be gainsaid that there was foul play or premature termination of negotiations as alleged by the Appellant.

Therefore, based on the findings made herein above the Appeals Authority's conclusion with regard to the first issue is that termination of negotiation was proper at law.

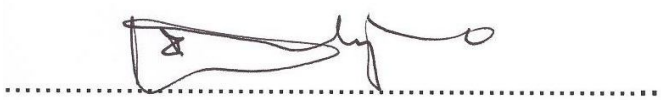
2.0 To what reliefs, if any, are the parties entitled

In determining the prayers, the Appeals Authority took cognizance of its findings made above, that is, the termination of negotiation with the Appellant was proper at law. The Appeals Authority rejects all the prayers by the Appellant and hereby upholds the Respondent's prayer that the Appeal be dismissed for lack of merits. The Appeal is hereby dismissed in its entirety and each Party to bear own costs.

This Decision is binding upon the parties and may be enforced in any court of competent jurisdiction 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.

This Decision is delivered in the presence of the Respondent and in the absence of the Appellant, this 04th November, 2016.



VINCENT K.D. LYIMO, J. (RTD)

CHAIRMAN

MEMBERS:

1. **ENG. FRANCIS T. MARMO** .....
2. **MR. LOUIS P. ACCARO** .....