IN THE PUBLIC PROCUREMENT APPEALS AUTHORITY

APPEAL CASE NO. 28 OF 2021-22

BETWEEN

M/S INNOXY TRADING COMPANY LTD..... APPELLANT

AND

INSTITUTE OF SOCIAL WORK ..... RESPONDENT

DECISION

CORAM

1. Adv. Rosan S. Mbwambo - Ag. Chairperson
2. Dr. William M. Kazungu - Member
3. Mr. Pius M. Mponzi - Member
4. Ms. Florida R. Mapunda - Ag. Secretary

SECRETARIAT

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

FOR THE APPELLANT

1. Mr. Sylivester A. Mlongamle - Procurement Officer
2. Ms. Magreth Kimani - Administration Officer

FOR THE RESPONDENT

1. Mr. Bigage Nkoranigwa - Head of Procurement Management Unit
2. Mr. Peter E. Mangala - Head of Legal Unit
3. Mr. Nicolaus Mayunga Sitta - Legal Officer
4. Mr. Sylivester Maganga - Supplies Officer

This Appeal was lodged by **M/s Innoxy Trading Company Limited** (hereinafter referred to as **"the Appellant"**) against the **Institute of Social Work** (hereinafter referred to as **"the Respondent"**). The Appeal is in respect of Tender No. AE/005/HQ/FA/2021/2022/NC/05 for Cleaning Services and Gardening (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 conducted using Mini-Competition arrangement through Tanzania National e-Procurement System (TANePS) as specified under the Public Procurement Act, No. 7 of 2011 as amended (hereinafter referred to as **"the Act"**) and the Public Procurement Regulations, GN. No. 446 of 2013 as amended by GN. No. 333 of 2016 (hereinafter referred to as **"the Regulations"**).

The Respondent floated an invitation to Tender on 16th November 2021. The deadline for submission of tenders was set for 22nd November 2021. On the deadline, forty two (42) tenderers, including the Appellant, submitted their respective tenders.

In this tender there was no preliminary evaluation since all tenderers were eligible and pre-qualified by Government Procurement Services Agency (GPSA). Evaluation was conducted in two stages namely; technical and financial evaluation. In the technical evaluation stage twelve (12) tenders were disqualified and the remaining thirty (30) tenders, including that of the Appellant were subjected to financial evaluation. After completion of financial evaluation tenders were ranked and M/s Dynamic Crowd Limited emerged to be the lowest evaluated tenderer. Thus, the evaluation committee recommended M/s Dynamic Crowd Limited for award of the Tender at a contract price of Tanzanian Shillings Five Million Three Hundred Ten Thousand (TZS 5,310,000.00) only VAT inclusive per month.

The Tender Board through Circular Resolution No. 51 of 2021/2022 dated 2nd March 2022 approved the award as recommended by the Evaluation Committee. On 15th March 2022, the Respondent issued a Notice of Intention to award the Tender to all tenderers who participated in the Tender. The Notice informed the tenderers that award has been proposed to M/s Dynamic Crowd Limited. The Notice also informed the Appellant that its tender was not successful for the reason that its bid price of TZS 6,254,540.00 VAT inclusive was higher compared to the price quoted by M/s Dynamic Crowd Limited.

Dissatisfied, on 17th March 2022, the Appellant applied for administrative review to the Respondent challenging its disqualification and the award proposed to M/s Dynamic Crowd Limited. On 29th March 2022, the Respondent issued a decision dismissing the Appellant's application for administrative review. Aggrieved further, on 5th April 2022, the Appellant filed this Appeal.

GROUNDS OF APPEAL

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

1. That, the Appellant ought to have been declared as the lowest evaluated bidder since the bid amount quoted included VAT. The proposed successful bidder, M/s Dynamic Crowd Limited is not the lowest evaluated bidder as its bid price was VAT exclusive. Further that M/s Dynamic Crowd Limited is not VAT registered. According to the Mini Competition Quotation Form, page 2, last paragraph, all service providers were to have Electronic Fiscal Devices (EFD). The Appellant doubts if M/s Dynamic Crowd Limited has an EFD. Thus, the Appellant requires an EFD receipts as evidence that M/s Dynamic Crowd Limited attached it to its bid when submitting the quotation.

2. That, the tender validity period was not specified in the Tender document contrary to the requirement of the law. The validity period for this Tender ought to have been 90 days. Counting from 22nd November 2021, the tender validity period ought to have lapsed on 22nd February 2022. Thus, the award is improper for being made outside the tender validity period.

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

    i. M/s Innoxy Trading Company Limited is the lowest bidder since its bid price included VAT which must be paid to the Government for all services rendered by a service provider;

ii. M/s Dynamic Crowd Limited is not the lowest evaluated bidder since is not VAT registered; and

iii. If M/s Dynamic Crowd Limited is VAT registered the Appellant requires evidence as per the tender requirements bidders were required to include VAT in their quoted prices.

REPLY BY THE RESPONDENT

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

1. That, according to TANePS, the bid price of M/s Dynamic Crowd Limited was TZS 5,310,000.00 and that of the Appellant was TZS 6,254,540.00. Both bid prices were VAT inclusive. However, between the two, M/s Dynamic Crowd Limited was evaluated as the lowest bidder, thus it was recommended for award. The Respondent added that, the Tender was open to all bidders who complied with specifications offered. The requirements provided did not exempt non-registered VAT bidders against registered ones.

   Regarding submission of EFD receipts as it appears in page 2 of the Mini Competition Quotation Form, the Respondent submitted that, the wording of the last paragraph in that page does not create or establish a new criterion for evaluation of the tender. The Respondent requested for EFD receipts so as to verify bidder's names with TIN numbers as well as proof of possessing an EFD

machine. The requirement was not for ascertaining bidders' registration with VAT as alleged by the Appellant.

2. That, bid validity period was not specified in the Mini Competition Quotation Form. Normally, it is the discretion of the procuring entity to specify the bid validity period for procurement of common use items. In this Tender, the validity period was not specified as the invited tenderers were those with GPSA's framework agreements.

   In addition, the Respondent submitted that, the Appellant ought to have sought for clarifications after realizing that the bid validity period was not specified in the Mini Competition Quotation Form.

3. Finally, the Respondent prayed for a declaration that:-

   i. The Appellant is not the lowest evaluated bidder according to the evaluation report dated 27th February 2022;

   ii. M/s Dynamic Crowd Limited is the lowest evaluated bidder according to the evaluation report;

   iii. VAT registration was not one of the criteria for selection of the successful bidder; and

   iv. EFD receipt was not one of the specifications that bidders were required to offer. This is the reason why TANePS did not require bidders to submit EFD receipts.

ANALYSIS BY THE APPEALS AUTHORITY

The Appeals Authority having gone through the appeal record and oral submissions by the parties, is of the view that the Appeal is centered on three main issues namely: -

1. **Whether there is a valid Tender for consideration;**
2. **Whether the disqualification of the Appellant's tender is justified; and**
3. **What reliefs, if any, are the parties entitled to.**

Having identified the issues, the Appeals Authority proceeded to resolve them as under: -

Whether there is a valid Tender for consideration.

The Mini Competition Quotation Form does not specify the tender validity period. This was confirmed during the hearing by both the Appellant and the Respondent. The Appellant contended that the tender validity period should have been ninety (90) days. On the other hand the Respondent contended that, since the Tender was for the procurement of common use items, the procuring entity has discretion to specify the tender validity period.

The Appeals Authority drew the attention of the Respondent on the requirement of Section 71 of the Act. This section reads: -

> *Sec.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."

(Emphasis added)

The above quoted section mandatorily requires procuring entities to specify in the tender documents the tender validity period. Following this attention, the Respondent readily conceded that failure to specify the tender validity period in the Mini Competition Quotation Form contravened the law.

In the circumstances the Appeals Authority finds that a tender that does not specify the tender validity period is invalid. Therefore, there is no valid Tender for consideration in this appeal. The first issue is concluded in the negative on this reason alone. Since determination of the first issue suffices to dispose this Appeal, the Appeals Authority shall not delve into the second issue.

What reliefs, if any, are the parties entitled to

Given the Appeals Authority's findings above, the Appeal is hereby allowed. The whole tendering proceedings and award made therefrom to M/s Dynamic Crowd Limited are nullified. The Appellant did not pray for costs, therefore the Appeals Authority makes 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 the Respondent this 18th day of May 2022.

ADV. ROSAN S. MBWAMBO

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Ag. CHAIRPERSON

MEMBERS:

1. **DR.WILLIAM M. KAZUNGU** .....
2. **MR. PIUS M. MPONZI**.....