IN THE PUBLIC PROCUREMENT APPEALS AUTHORITY

APPEAL CASE NO. 36 OF 2021-22

BETWEEN

CHAMA CHA WASUKUMA MIKOKOTENI.....APPELLANT

AND

UBUNGO MUNICIPAL DIRECTOR.....RESPONDENT

DECISION

CORAM

1. Hon. Justice (Rtd) Sauda Mjasiri - Chairperson
2. Ms. Ndeonika Mwaikambo - Member
3. Mr. Pius Mponzi - Member
4. Ms. Florida Mapunda - Ag. Secretary

SECRETARIAT

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

FOR THE APPELLANT

1. Mr. Alvis Samuel - Legal Officer - BLM Advocates
2. Mr. Mrisho Salum Shaban - Member - CHAWAMI
3. Mr. Oscar Joseph Muba - Member - CHAWAMI
4. Mr. Abdu Shekatutu - Member - CHAWAMI

FOR THE RESPONDENT

1. Ms. Florida D. Kimambo - Municipal Solicitor
2. Ms. Azamah O. Ngwada - Head Procurement Management Unit (HPMU)

This Appeal was lodged by **Chama cha Wasukuma Mikokoteni** (hereinafter referred to as **"the Appellant"**) against Ubungo Municipal Director (hereinafter referred to as **"the Respondent"**). The Appeal is in respect of Tender No. LGA/180/2021-2022/NC/47 for Provision of Passenger Luggage Services at Magufuli Bus Terminal - Ubungo Municipal Council (Huduma ya Kubeba Mizigo ya Abiria katika Kituo cha Mabasi cha Magufuli katika Halmashauri ya Manispaa ya Ubungo (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: -

On 27th April 2022, the Respondent invited eligible tenderers to participate in the Tender. The deadline for submission of tenders was set for 5th May 2022 whereby ten tenders including that of the Appellant were received.

Tenders were then subjected to evaluation which was conducted into two stages namely; preliminary and technical evaluation. After completion of the evaluation process, the Evaluation Committee recommended award of the Contract to five tenderers namely; Kingereka Group, Wapagazi wa

Matoroli, M/S Jonick General Supply Company Ltd, Anna Nkingwa Legacy, and Chama cha Watafuta Maendeleo Dar es Salaam (CHAWAMADA).

The Tender Board at its meeting held on 21st May 2022, approved the award subject to successful negotiations. On 27th May 2022, negotiations took place and all proposed successful tenderers agreed to remit to the Respondent TZS. 2,250,000/= (Two Million Two Hundred and Fifty Thousand) only per month for a period of one year.

On 1st June 2022, the Respondent issued the Notice of Intention to award the contract to all tenderers who participated in the Tender. The Notice informed tenderers that the Respondent intends to award the contract to Kingereka Group, Wapagazi wa Matoroli, M/S Jonick General Supply Company Ltd, Anna Nkingwa Legacy and CHAWAMADA. The notice also informed the Appellant that its tender was disqualified for two reasons, namely:-

i. It is not registered by the Ubungo Municipal Council; and

ii. It is not recognized as a special group by the Public Procurement Regulatory Authority (PPRA).

Dissatisfied with the reasons given for its disqualification, on 13th June 2022 the Appellant applied for administrative review to the Respondent. On 15th June 2022, the Respondent issued its decision which dismissed the Appellant's application. Aggrieved further, on 23rd June 2022, the Appellant filed this Appeal.

When the matter was called on for hearing the following issues were framed by the parties and approved by the Appeals Authority:-

1.0 Whether the disqualification of the Appellant's tender was justified; and

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

SUBMISSIONS BY THE APPELLANT

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

1. With respect to the first issue the Appellant submitted that, the Respondent unfairly disqualified its group from the Tender process for non-registration as a special group. The Appellant submitted that, the group has been registered by the Ministry of Home Affairs with registration number S.A. 20702 under the name Chama Cha Wasukuma Mikokoteni/Toroli (Ubungo).

   The Appellant elaborated further that, it possesses a valid Business Licence, TIN Number and pays quarterly revenue to Tanzania Revenue Authority as required. The Appellant stated that, the Respondent was aware that it has been properly registered and for that reason it was issued with a business licence which is currently in use. Further to that, the Appellant stated that, initially it was offering passengers' luggage services at Ubungo bus terminal and later on moved to Magufuli Bus

Terminal. The Appellant notified the Respondent about its relocation to Magufuli bus terminal. The said notification was attached with all relevant documents which proved its legal registration. The Appellant added that, in July 2021 the Respondent issued an advert which required all groups that operate at Magufuli Bus Terminal to submit their legal documentation for purposes of verification. The Appellant submitted the documents as required. Thus, the Respondent was fully aware of its existence and registration.

2. The Appellant submitted further that, since the Respondent was aware of its existence, it ought to have informed PPRA about its registration for the sake of being recognized and being added in the roll of special groups. Thus, the Respondent could not have disqualified the Appellant for not being recognized by PPRA since such task is vested on it.

3. With regard to registration with Ubungo Municipal Council as a special group, the Appellant conceded that it was not registered in that category. However, according to the Appellant, its non-registration should not have led to its disqualification. The Appellant claimed to have been registered with the Ministry of Home Affairs and possess other documents which prove its legal existence.

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

    i. The whole Tender process be fully investigated to see the legality of the said Tender;

ii. The Tender be called off and nullified;

iii. The Respondent to refund the Appellant's Tender purchase fee;

iv. The Respondent to compensate the Appellant on the loss incurred; and

v. Any other relief the Appeals Authority may deem fit and just to grant.

REPLY BY THE RESPONDENT

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. With regard to the first issue the Respondent submitted that, the Appellant was disqualified from the Tender process for failure to comply with Clauses 2.11 and 2.13 of the Quotation Document. According to the Respondent the said clauses required tenderers to submit proof of registration with Ubungo Municipal Council and recognition as a special group by PPRA.

   The Respondent stated that, as a proof of its registration the Appellant attached to its tender other documents like a certificate of registration with the Ministry of Home Affairs, business licence, TIN number and a tax clearance certificate. There was no document attached which proves the Appellant's registration as a special group by Ubungo Municipal Council and being recognized by PPRA. For that reason its tender was disqualified.

2. The Respondent submitted further that, in order to be registered as a special group, the process has to commence from the Ward Office of the local vicinity within which the group originates. Then the application has to be submitted to the Department of Community Development within the Municipal Council. According to the Respondent a special group includes women, youth, elderly and persons with disability. Thus, before a group is registered, a review would be done so as to verify that there is compliance with the requirements of the law.

3. The Respondent stated that, the Appellant applied this Tender as a normal group and not a special group, thus it was disqualified for failure to comply with requirement of the Quotation Document.

4. Finally, on the second issue, the Respondent prayed that the Appellant's prayers should not be granted.

ANALYSIS BY THE APPEALS AUTHORITY

1.0 Whether the disqualification of the Appellant's tender was justified

In resolving this issue the Appeals Authority revisited the record of Appeal and observed that, the Appellant was disqualified at the preliminary evaluation stage for failure to be registered by Ubungo Municipal Council and recognized by PPRA as a special group.

In order to ascertain if the Appellant's disqualification was justified, the Appeals Authority revisited Clause 2.11 and 2.13 of the Quotation Document which provide as follows:-

> *"Clause 2.11 Kama ni kikundi lazima kiwe kimesajiliwa kuanzia ngazi ya Manispaa na kuendelea ngazi za juu;*
>
> *2.13 Mwombaji lazima awe* ***ametambuliwa na kusajiliwa kama kikundi maalum ndani ya Halmashauri ya Manispaa ya ubungo na Mamlaka ya Kudhibiti Ununuzi wa Umma*** *(PPRA)".*
>
> (Emphasis added)

The above quoted clauses clearly stipulate that in order for a group to be qualified for award of the Tender the same ought to have been registered by Ubungo Municipal Council and be recognized by PPRA as a special group.

The Appeals Authority revisited the Appellant's Tender and observed that it attached certificate of registration issued by the Ministry of Home Affairs which is valid from 13th September 2021 to 13th September 2026, Business licence which is valid until 19th October 2022, TIN number and Tax Clearance Certificate. There were no documents attached which proved the Appellant's registration as a special group by Ubungo Municipal Council and recognition by PPRA.

During the hearing Members of the Appeals Authority required the Respondent to clarify the reasons which led it to confine the Tender to special groups. In response thereof the Respondent clarified that, it is the requirement of the law that some of the tenders be exclusively reserved for special groups.

The Appeals Authority revisited Section 64(3)(c) of the Public Procurement Act, No. 7 of 2011 as amended (hereinafter referred to as "**the Act**") and Regulation 30C (1) of the Public Procurement Regulations, GN. No. 446 of 2013 and GN. No. 333 of 2016 (hereinafter referred to as "**the Regulations**") which provide as follows:-

> *"S.64(3)(c) Special groups includes women, youth, elderly and persons with disability*
>
> *Reg. 30C (1) A procuring entity shall grant an exclusive preference of thirty percent in its annual procurement to goods, works and services for special groups situates within its jurisdiction".*

The above quoted provisions clearly stipulate who would be qualified and accepted to form special groups. Further, each procuring entity is mandatorily required to set aside thirty percent of its annual budget for special groups.

The Appeals Authority further revisited Regulations 30A and 30B of the Regulations read together with the Item 7 of the Guidelines for

Participation of Special Groups in Public Procurement issued by PPRA on May 2020. The referred provisions read as follows:-

Reg. 30A (1) ***Without prejudice to Regulation 31 and subject to section 64 of the Act, the special group shall be eligible for preference scheme if it:***

(a) Is registered and recognized by relevant special groups supporting entities;

(b) Has been entered in the special register of the Authority and the Agency upon being submitted by the relevant special group supporting entity; *and*

(c) *Has at least seventy percent membership of the members forming such special group and headed one hundred percent by the relevant special group.*

(2) For the purpose of this regulation, special group supporting entities include ministries, agencies, government organizations, department responsible for development and empowerment of women, youth, elderly and persons with disabilities."

"Reg. 30B(1) ***A special group wishing to be granted exclusive preference under these regulations***

shall be registered by the relevant special group supporting entities in a manner to be determined by it before being forwarded by such entity to the Authority for the purpose of being recorded in the roll.

(4) ***A procuring entity shall not award a contract to a special group which is not recorded in the roll of the Authority."***

"Item 7.1 Pursuant to Regulation 30B of the PPR 2013 as amended a special group wishing to participate in public procurement shall apply for registration with the appropriate Special Group Supporting Entities (SGSE);

7.2 The registration shall be carried out by the relevant Special Group Supporting Entities (SGSE) after it has received application for registration from the beneficiaries of each group;

7. 3 After being registered, the SGSE shall forward the list of registered entity of special groups to the Authority for the purpose of being recorded in the roll of registered special groups;

7.4 PEs shall not award a contract to a special group that has not been recorded in the Authority's roll;

7.5 SGSE shall issue a registration certificate to a registered entity of special groups".

(Emphasis added)

The above quoted provisions provide a general guidance about special groups and their participation in public procurement. Further, the provision states categorically that Special Groups Supporting Entities (SGSE) after registering the special groups are required to forward the list to PPRA to be recorded in the roll of the registered special groups.

Having related the above quoted provisions and the requirement of the Quotation Document to the facts of this Appeal, the Appeals Authority is of the firm view that in order for tenderers to be eligible for award in this Tender, they ought to have been registered as a special group by the Respondent's office and be recognized by PPRA. The Appellant readily conceded during the hearing that it has not been registered as a special group by the Respondent's office. Thus, it was not eligible for award as it failed to comply with the requirements of the Quotation Document.

The Appeals Authority considered the Appellant's argument that the Respondent was duty bound to ensure that it is recognized by PPRA. The Appeals Authority is of the view that such a responsibility would arise if the Appellant was registered as a special group by the Respondent's office.

Given the above position, the Appeals Authority is of the settled view that, since the Appellant was not registered as a special group, the Respondent was not required to forward its particulars to PPRA for recognition and enrolment in the list of special groups.

The Appeals Authority wishes to enlighten the Appellant that being registered under the Societies Act, CAP 337 R.E. 2002, possessing a business licence and paying taxes does not impliedly qualify a tenderer to be registered and recognized as a special group under Section 64(2) and (3) (c) of the Act and Regulations 30A, 30B and 30C of the Regulations. The Appellant ought to have strictly adhered to the requirements of the Quotation Document and the law in relation to registration of special groups.

Given our findings hereinabove, the Appeals Authority is of the firm view that, the Respondent's act of disqualifying the Appellant to be proper and in accordance with Regulation 206 (2) of the Regulations. The provision reads as follows:-

> Regulation 206 (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 supplied)*

Under the circumstances the Appeals Authority concludes the first issue in the affirmative that, the disqualification of the Appellant's tender is justified.

2.0 What reliefs; if any; are the parties entitled to.

Taking cognizance of the findings on the first issue hereinabove, the Appeals Authority hereby dismiss the Appeal.

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 21st day of July 2022.

HON. JUSTICE (rtd) SAUDA MJASIRI

.....

CHAIRPERSON

MEMBERS:

1. **MS. NDEONIKA MWAIKAMBO**.....
2. **MR. PIUS M. MPONZI** .....