

IN THE PUBLIC PROCUREMENT APPEALS AUTHORITY

APPEAL CASE NO. 11 OF 2020-21

BETWEEN

M/S RICK PLAN COMPANY LIMITED.....APPELLANT

AND

TEMEKE MUNICIPAL COUNCIL.....RESPONDENT

DECISION

CORAM

- | | |
|----------------------------|-----------------|
| 1. Adv. Rosan Mbwambo | - Ag. Chairman |
| 2. CPA. Fredrick Rumanyika | - Member |
| 3. Mr. Rhoben Nkori | - Member |
| 4. Ms. Florida Mapunda | - Ag. Secretary |

SECRETARIAT

- | | |
|------------------------|-----------------|
| 1. Ms. Violet Limilabo | - Legal Officer |
|------------------------|-----------------|

FOR THE APPELLANT

- | | |
|--------------------------|-------------------|
| 1. Mr. Kuzeny Msungu | - General Manager |
| 2. Mr. Bernard Mwakyembe | - Director |

FOR THE RESPONDENT

- | | |
|---------------------------|--|
| 1. Mr. Sostenes R. Chacha | - Head Procurement
Management Unit (HPMU) |
| 2. Ms. Martha Magaga | - Supplies Officer |

This Appeal is lodged by M/s Rick Plan Company Limited (hereinafter referred to as "**the Appellant**") against Temeke Municipal Council (hereinafter referred to as "**the Respondent**"). The Appeal is in respect of Tender No. LGA/016/2019/20/HQ/NC/1/2 for provision of Revenue Collection in Temeke Municipal Council Toilets at Temeke Sterio 1, Temeke Sterio 2, Temeke Sterio 3, Tandika, Mbagala, Kampochea, Tazara Veterinary, Mwembeyanga and Tuangoma (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 the Appeal may be summarized as follows: -

The Tender was conducted using National Competitive Tendering Method 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 and GN. No. 333 of 2016 (hereinafter referred to as "**the Regulations**").

Through TANePS the Respondent issued an Invitation to Tender on 10th June 2020. In this invitation qualified tenderers were invited to submit their tenders. Deadline for submission of tenders was set for 24th June 2020. The Tender had eight (8) Lots and the Appellant participated in Lots 1 and 3. On the deadline for submission of tenders, four (4) tenders were

A handwritten signature in black ink, consisting of a stylized 'R' followed by a series of loops and a final vertical stroke.

received in respect of Lot 1 and two (2) tenders were received in respect of Lot 3. This Appeal is in respect of Lot 1 for Temeke Sterio 1.

After opening, the Tenders were then subjected to evaluation, which was conducted in three stages namely, preliminary, detailed and post-qualification. During preliminary evaluation, three tenders including that of the Appellant were disqualified for failure to comply with the requirements of the Tender Document. Specifically, the Appellant was disqualified for submitting a Form of Bid which does not comply with the format provided in the Tender Document.

The remaining tender by M/s Workers General Supply Ltd was subjected to detailed evaluation and post-qualification. The evaluation committee recommended award of the contract to M/s Workers General Supply Ltd for Lot 1 at a contract price of Tanzania Shillings Six Million Four Hundred Thousand and Four Hundred (6,400,400.00) only. The Tender Board at its meeting held on 23rd July 2020 approved the award as recommended by the Evaluation Committee.

On 6th August, 2020 the Respondent issued the Notice of Intention to award the contract (hereinafter referred to as "**the Notice**") to all tenderers who participated in the Tender process. The Notice informed them that the Respondent intended to award the contract to M/s Workers General Supply Ltd. The Notice was received by the Appellant on 21st August 2020. Apparently, the Notice did not state reasons for disqualification of the Appellant.

Dissatisfied, the Appellant on 24th August 2020 applied for administrative review. The Appellant complained that the Respondent did not furnish in the Notice reasons for its disqualification. The Respondent did not respond to the Appellant's complaint and on 11th September 2020, the Appellant filed this Appeal.

SUBMISSIONS BY THE APPELLANT

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

1. That, the Respondent contravened the requirement of Regulation 231(4) (a), (b) and (c) of the Regulations for failure to state in the Notice reasons which led to the Appellant's disqualification. According to Regulation 231(4) (a), (b) and (c) of the Regulations procuring entities are mandatorily required to inform unsuccessful tenderers reasons for their disqualification. The Appellant submitted further that the Notice did not state how much would be remitted to the Respondent on monthly basis. Also that the percentage which would be retained by the tenderer was not stated. The Notice indicated only the awarded contract amount.

The Appellant went on to submit that the Notice issued with respect to Lot 3 did not state if all the submitted tenders were found to be non-responsive. The Appellant added that the Respondent's failure to respond to the Appellant's application for administrative review and



failure to avail it reasons for its disqualification indicates that the former deliberately contravened the law.

2. That, the Respondent also contravened the law for its failure to deliver the Notice within time. The Notice ought to have been delivered immediately after it was issued on 6th August 2020. To the contrary, the Notice was delivered on 21st August 2020. The Appellant challenged the Respondent's argument that there was unscheduled maintenance of the TANEPS as a result the Notice could not be uploaded to the system timely. It was submitted that; it is not true that there was unscheduled maintenance of the system as other procuring entities were using the same and it was working perfectly. For instance, on 7th August 2020 the University of Dar es Salaam advertised the Tender through TANEPS and the Appellant accessed the system. On 12th August, 2020 the National Environmental Management Council (NEMC) issued clarification through TANEPS and the same was received by the Appellant. Thus, it is not true that there was unscheduled maintenance rather the Respondent intended to deny the Appellant of its right of review as enshrined under the law.
3. That, the Appellant submitted a Form of Bid as per the requirement of the law. The Respondent required tenderers to submit Form of Bid but the provided sample in the Tender Document related to the Form of Qualification Information. Having noted the discrepancy, the Appellant opted to upload the Form of Bid as per the format provided in the Standard Bidding Document issued by the Public Procurement



Regulatory Authority (PPRA). Thus, the Appellant complied with Form of Bid requirement.

4. Finally, the Appellant prayed for the following orders: -
- i. The procurement process be suspended;
 - ii. Tenders be re-evaluated by an independent Evaluation Committee;
 - iii. After evaluation, the successful tenderer to be awarded the contract; and
 - iv. The procuring entity be given written warning.

REPLY BY THE RESPONDENT

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

1. The Respondent started its submission by indicating that, it is true that the Notice is dated 6th August 2020. However, the same was not sent to the Appellant immediately thereafter due to unscheduled maintenance of the TANePS. The said letter was sent manually and it was received by the Appellant on 21st August 2020.
2. Regarding reason for the Appellant's disqualification, the Respondent submitted that, the Appellant was disqualified from the Tender process for failure to attach a Form of Bid as per the format provided for in the Tender Document. In the slot where the Appellant was required to



upload the Form of Bid, it uploaded a mere letter which did not comply with the format of Form of Bid provided for in the Tender Document.

On the Appellant's proposition in relation to the format of Form of Bid provided in the Tender Document, the Respondent submitted that the same complied with the requirement of the law. The Respondent pointed out that it customized the Tender Document as per the needs of the services to be rendered. Thus, if the Appellant doubted the validity of the information provided in the Form of Tender, it ought to have sought for clarification before submission of its bid. The Appellant did not seek for clarification and proceeded to submit its tender as per the issued requirement. Thus, it ought to have complied with the requirement of the Tender Document as issued.

3. That, the evaluation process was conducted in compliance with the law using the criteria explicitly stated in the Tender Document. The Respondent submitted that Clause 1.8 of the Tender Document clearly states that the procuring entity is not obliged to award the tender to the highest or the lowest bidder without considering compliance with the criteria provided for in the Tender Document.
4. Finally, the Respondent prayed for dismissal of the Appeal for lack of merit.

Handwritten signature or initials in black ink, appearing to be a stylized 'N' followed by a flourish and a vertical line.

ANALYSIS BY THE APPEALS AUTHORITY

During the hearing the following issues were framed by the Appeals Authority namely: -

1.0 Whether the disqualification of the Appellant was justified; and

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

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

1.0 Whether the disqualification of the Appellant was justified.

In resolving this issue, the Appeals Authority considered the Appellant's contention that the Respondent's contravened Regulation 231 (4) (a), (b) and (c) of the Regulations by issuing a Notice which does not disclose reason that led to disqualification of the Appellant. Regulation 231(4) (a), (b) and (c) of the Regulations reads: -

Reg. 231 (4) "*The notice referred to in sub-regulation (2) shall contain-*

(a) Name of the successful tenderer;

(b) The contract sum and completion or delivery period; and

(c) Reasons as to why the tenderers were not successful."

(Emphasis supplied)

The above quoted provision clearly provides that the Notice should indicate the name of the proposed successful tenderer, contract sum and the reasons as to why other tenderers were unsuccessful.

The Notice dated 6th August 2020 states that award has been proposed to M/s Workers General Supplies Ltd at the contract amount of TZS 6,400,400.00 per month. The Notice did not disclose the reason which led to the disqualification of the Appellant. In that regard, the Appeals Authority finds that the Notice contravened the requirement of Regulation 231(4) (c) of the Regulations.

The Appeals Authority considered the Appellant's contention in relation to delay in communicating the Notice. The Appeals Authority observed from the records of Appeal that the Notice dated 6th August 2020 was delivered to the Appellant on 21st August 2020. The Appeals Authority while noting that there was delay in delivering the Notice it is of the opinion that the delay did not prejudice the Appellant in view of the provisions of Section 96(4) of the Act.

Section 96(4) of the Act allows tenderers to submit complaint if any to the Accounting Officer within seven working days of becoming aware of the circumstances giving rise to the complaint. The Appellant after receipt of the Notice on 21st August 2020 lodged an application for review to the Respondent on 24th August 2020. The Respondent did not respond to the application for review. On 11th September 2020 the Appellant filed this Appeal. The delay did not therefore; prejudice the Appellant from taking the above remedies.

Handwritten signature or initials in black ink, appearing to be a stylized 'R' followed by a star-like symbol and a '7'.

The Appeals Authority notes with concerns the Respondent's act of delay in serving the Notice, failure to state reason for disqualification of the Appellant and failure to respond to the Appellant's application for administrative review.

Regarding the Appellant's disqualification for failure to submit Form of Bid, the Appeals Authority revisited the Appeal record and observed that Clauses 1.2, 1.3 and 1.5 of the Tender Document require, amongst others, tenderers to submit Form of Bid as per the requirement provided. The said clauses read as follows: -

Clause 1.2 "KABRASHA LA ZABUNI

Kila kazi inayohitajika kufanywa na mwombaji wa zabuni imeelekezwa kwenye fomu ya maombi ya zabuni.

Kabrasha la zabuni limeambatanishwa na nyaraka zifuatazo

1. Maelezo kwa wazabuni
- 2. Fomu ya Maombi ya zabuni**
3. Masharti maalum ya zabuni
4. Masharti ya jumla ya wazabuni
5. Udhibiti wa mkataba
6. Kielelezo cha mkataba."

Clause 1.3 "MAANDALIZI YA ZABUNI

(a) ...

(b) Zabuni itakayowasilishwa na mzabuni iwe na nyaraka zifuatazo: -

(i) **Fomu ya maombi ya zabuni ikiwa imejazwa ipasavyo na kuwekwa mihuri husika;**

(ii)”

Clause 1.5 **“VIGEZO VYA UCHAMBUZI WA ZABUNI**

1.5.1 “Hatua ya kwanza

Katika hatua ya kwanza ya uchambuzi wa zabuni, vigezo vifuatavyo vitaangaliwa: -

(a) Fomu ya maombi ya zabuni ikiwa imesainiwa kikamilifu na muombaji.”

(Emphasis Supplied)

The above quoted clauses elucidate clearly that Form of Bid was amongst the crucial documents which were to be submitted by the tenderers when submitting their tenders. Further to that, the format of Form of Bid was provided for from pages 13 - 16 of the Tender Document.

The Appeals Authority reviewed the tender submitted by the Appellant and observed that it attached a Form of Bid titled “FOMU YA MAOMBI YA ZABUNI” which did not conform to the format provided in the Tender Document. During the hearing the Appellant was asked to clarify if it complied with the requirement of Form of Bid. In response thereof, the Appellant submitted that, the format of Form of Bid provided in the Tender

Document contravened the law as it is contrary to the standard bidding document issued by PPRA. The Respondent's Form of Bid contained information which were supposed to be in the Form of Qualification Information. The Appellant opted to submit the Form of Bid as contained in the Standard Bidding Document issued by PPRA.

From the Appellant's submission and the documents submitted in this Appeal, the Appeals Authority finds that a Form of Bid submitted by the Appellant contravened the requirement provided for in the Tender Document.

The Appeals Authority rejects the Appellant's argument that the format of Form of Bid provided in the Tender Document contravened the requirement of PPRA's Standard Bidding Document as well as the law. The Appeals Authority agrees with the Respondent's proposition that had the Appellant found the Tender Document to have any discrepancies it should have sought for clarification from the Respondent. This proposition is in line with the provision of Regulation 13 of the Regulations. The Appeals Authority therefore finds that, the Respondent's act of disqualifying the Appellant to be proper and in compliance with Regulation 206(2) of the Regulations which reads as follows: -

Reg. 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."

Given the circumstances above, the Appeals Authority concludes the first issue in the affirmative that the disqualification of the Appellant was justified.

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

Taking cognizance of the findings hereinabove, the Appeal is partly allowed to the extent of the Respondent's failure to state reasons for disqualification of the Appellant. The Appeal is otherwise dismissed as the Appellant's disqualification at the preliminary evaluation stage was justified.

No order as to costs.

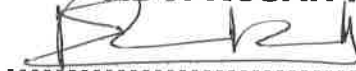
It is so ordered.

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 parties this 16th day of October 2020.

ADV. ROSAN MBWAMBO



AG. CHAIRMAN

MEMBERS: -

1. CPA. FREDRICK RUMANYIKA



2. MR. RHOBEN NKORI

