

IN THE PUBLIC PROCUREMENT APPEALS AUTHORITY

APPEAL CASE NO. 09 OF 2024-2025

BETWEEN

M/S ISMANI COMPANY LIMITEDAPPELLANT

AND

DAR ES SALAAM WATER SUPPLY AND

SANITATION AUTHORITY.....RESPONDENT

DECISION

CORAM

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|-------------------------------------|---------------|
| 1. Hon. Justice (rtd) Sauda Mjasiri | - Chairperson |
| 2. Eng. Stephen Makigo | - Member |
| 3. Dr. William Kazungu | - Member |
| 4. Mr. James Sando | - Secretary |

SECRETARIAT

- | | |
|------------------------|------------------------------|
| 1. Ms. Florida Mapunda | - Deputy Executive Secretary |
| 2. Ms. Agnes Sayi | - Senior Legal Officer |

- | | |
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| 1. Mr. Kizito Shirima | - Operation Officer |
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FOR THE RESPONDENT

- | | |
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| 1. Ms. Lilian Machage | - Senior State Attorney - Office of
Solicitor General - (OSG) |
| 2. Mr. Boaz Msoffe | - State Attorney - OSG |
| 3. Mr. Emil Ntangwa | - Director of Procurement Management
Unit (DPMU) - DAWASA |
| 4. Ms. Hellen Lubogo | - Head of Procurement Management
Unit (HPMU) - OSG |
| 5. Ms. Neema Mugassa | - Senior Legal Officer - DAWASA |
| 6. Mr. Shiyenze Bunyese | - Engineer - DAWASA |

The Tender was conducted using the International Competitive Tendering method as specified in the Public Procurement Act of 2011 as amended (hereinafter referred to as "**the Act**") and the Public Procurement



Regulations, GN. No. 446 of 2013 as amended (hereinafter referred to as "**the Regulations**") as repealed and replaced by Act No. 10 of 2023 and Regulations, GN. No. 518 of 2024, respectively.

On 15th May 2024, the Respondent through National e-Procurement System of Tanzania (NeST) invited tenderers to submit their tenders. The deadline for submission of tenders was set on 4th June 2024. On the deadline, the Respondent received eight tenders including the Appellant's.

The received tenders were subjected to evaluation. After completion of the evaluation process, the Evaluation Committee recommended award of the

2024, the Appellant applied for administrative review to the Respondent. On 10th September 2024, the Respondent issued its decision which rejected the Appellant's application for administrative review. Furthermore, the Respondent's decision pointed out that the Appellant's tender was



Mr. Shirima submitted that the Appellant was dissatisfied with the Respondent's proposed award and the reason given for its disqualification. Thus, it applied for administrative review to the Respondent. Mr. Shirima elaborated further that, upon review of the Appellant's complaint, the Respondent maintained its decision of intending to award the Tender to M/S Junaco (T) Ltd. According to the Appellant, the Respondent indicated that its tender was found to be non-responsive for submitting the Bank Guarantee which was less than 148 days as specified in the Tender Document.

Mr. Shirima stated that the Appellant was dissatisfied with the Respondent's decision, thus it filed this Appeal. Therefore, the Appellant challenges, among other grounds, the Respondent's act of intending to award the Tender to M/S Junaco (T) Ltd as it has a higher price and therefore not qualifying for award.

Appellant's tender was disqualified for submitting the Bank Guarantee which was less than 148 days as specified in the Tender Document.

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ma conceded that the Appellant did not submit the Bank e which met the provided requirements in the Tender Document. the Appellant challenges the Respondent's act of introducing a on for its disqualification when handling the application for ative review. Mr. Shirima contended that the Respondent was to issue an appropriate reason for the Appellant's disqualification otice of Intention to award. Thus, the Respondent's act of g a new reason for the Appellant's disqualification when ng its complaint raises doubt as to the authenticity of the whole ocess.

ma elaborated that, if the Respondent was aware of the te reason which disqualified the Appellant's Tender, the same was uded in the Notice of Intention to award. The Respondent's act that the Appellant's Tender was disqualified for not being the aluated tenderer at the financial evaluation stage implied that the qualifed in all stages save the price requirement. Thus, the challenged the proposed award believing that it had the lowest he proposed successful tenderer. Therefore, the Respondent's n this regard contravened the law, Mr. Shirima contended.

ma added that even if the new reason for the Appellant's ation was valid, before concluding that the Appellant's tender was

non-responsive, the Respondent was required to seek clarification from the CRDB Bank or from the Appellant on the noted discrepancy. To the contrary, the Respondent did not do so. Instead, it disqualified the

Mr. Shirima
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However,
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Mr. Shirima
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price to the
conduct in

Mr. Shirima
disqualification

Appellant's tender and proceeded to recommend award of the Tender to the proposed successful tenderer who had a higher price to the Appellant's for almost ten million Tanzania shillings. Had the Respondent sought for clarification, it would have cleared the ambiguity on the Appellant's Bank Guarantee, an act which would have led the Respondent to award the Tender to the Appellant who had a competitive price to the proposed successful tenderer.

In concluding his submissions, Mr. Shirima prayed for the following reliefs: -

- i) The Appeals Authority order the Respondent to withdraw the Notice of intention to award the Tender to the proposed successful tenderer;
- ii) The Respondent be ordered to award the Tender to the Appellant; and
- iii) Each party should bear its own costs.

REPLY BY THE RESPONDENT

The Respondent's submissions were made by Ms. Lilian Machage, Senior State Attorney from the Office of the Solicitor General. Ms. Machage commenced on the first issue by adopting the Respondent's Statement of Reply. She stated that the Appellant was among the tenderers which submitted their tenders for the Tender. After completion of the evaluation process, the Appellant's tender was found non-responsive for submitting the Bank Guarantee which had less than 148 days as specified in the Tender Document.

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Appellant's disqualification is the one contained in the Respondent's decision on the application for administrative review. The Appellant submitted the Bank Guarantee which had less than 148 days specified

under Clause 18.3(a) of the Instructions To Tenderers (ITT). The learned State Attorney pointed out that the last paragraph on the Appellant's Bank guarantee states that *"any demand for payment under this guarantee must be received by the Bank on or before 1st July 2024."* According to Clause 18.3(a) of the ITT, the Bank Guarantee was to be valid for a period of 148 days which will end on 29th October 2024. Thus, the Appellant's Bank Guarantee was found to have contravened Clause 18.3(a) of the ITT. The learned State Attorney stated that the Appellant's failure to comply with the Bank Guarantee requirements provided in the Tender Document amounted

attach audited financial statements for the past three years and a bank statement for the past six months an act that amounted to a material deviation which justified its rejection in the tender process. The learned



State Attorney urged the Appeals Authority to adopt the same principle in this Appeal.

Regarding the Appellant's argument that before considering its tender as non-responsive the Respondent was required to seek clarification. According to the learned State Attorney, the Respondent is not bound to seek clarification as contended by the Appellant. The duty of seeking

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ANALYSIS BY THE APPEALS AUTHORITY

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

In resolving this issue, the Appeals Authority took cognizance of the fact that the Appellant conceded to have not submitted the Bank Guarantee which complied with the requirements of the Tender Document. However, it challenged the Respondent's act of issuing two different reasons for its disqualification in the Notice of Intention to award and the decision on the application for administrative review. The Respondent on its part claimed to have not issued two different reasons as contended by the Appellant.

By a reputable bank or an insurance bond issued by a reputable insurance firm and such a security must be valid for twenty-eight days beyond the bid validity period. Clauses 18.1 and 18.3 of the ITT were modified by Clause 26 of the Tender Data Sheet (TDS) which provide that the required

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Tender security should be in the form of a Bank Guarantee. Clauses 18.1, 18.3 of the ITT and Clause 26 of the TDS read as follows: -

"18.1 Pursuant to ITT 11[Documents and Sample(s) Constituting the Tender], the Tenderer shall furnish as part of its tender, a Tender Security in the amount and currency specified in the TDS or Tender Securing Declaration as specified in the TDS in

c) Another security if indicated in the TDS.

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26. ***The required tender security is Tender Security – Bank Guarantee. The amount of the Tender security shall be the Tanzanian Shillings 80,000,000.00.***

[Emphasis supplied]

The Appeals Authority observed further that the Respondent provided for a specific format of the required Bank Guarantee in NeST which reads as follows: -

"This guarantee will expire: (a) if the tenderer is a successful Tenderer, upon our receipt of copies of the contract signed by the Tenderer and the performance security issued to you upon instructions of the Tenderer; and (b) if the Tenderer is not the successful Tenderer, upon the earlier of (i) our receipt of a copy of your notification to the tenderer of the name of the successful tenderer; or (ii) twenty - eight days after the expiry date of the Tender validity.

Consequently, any demand for payment under this guarantee must be received by us at the office on or before that date."

According to the format provided in NeST, tenderers were required to make their Bank Guarantee valid for twenty-eight days beyond the bid validity period which was 120 days as indicated under Clause 25 of the TDS.

The Appeals Authority reviewed the tender submitted by the Appellant in NeST. It observed that on the Bank Guarantee, the Appellant had stated

guarantee was addressed to the Respondent and on the last paragraph it reads as follows "*Consequently, any demand for payment under this guarantee must be received by us at the office on or before the date. i.e 1st July 2024*".

The Appeals Authority reviewed the record of Appeal and observed that the Tender opening took place on 4th June 2024. The validity period specified for the Tender was 120 days which was to end on 2nd October 2024. Clause 18.3 of the ITT required the tender security for the Tender to be

shorter period than the period specified in the Tender Document. That is, the Appellant's Bank Guarantee was valid for less than 148 days. In view of this finding the Appeals Authority is of the firm view that the Respondent's

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act of disqualifying the Appellant's tender complied with Regulations 204(2)(c) and 206(2) of the Regulations which read as follows: -

"204(2) Material deviation to commercial terms and conditions which justify rejection of a tender shall include the following: -

(c) failure to submit a tender security as specified in the tendering documents.

*"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]

The Appeals Authority considered the Appellant's argument that before the Respondent rejected its tender it should have sought for clarification from it or the CRDB Bank. The Appeals Authority observed that Regulation 207 of the Regulations gives discretion to procuring entities of seeking clarification or not from tenderers on their submitted tenders. In the event the procuring entity decides to seek clarification, the same should not change the substance of the Tender. In the Tender under Appeal, the Appellant failed to comply with the Bank Guarantee requirements which

responsive. Therefore, the Appeals Authority rejects the Appellant's assertion in this regard.

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The Appeals Authority further considered the Appellant's contention that the Respondent had issued two different reasons for the Appellant's disqualification in the Notice of Intention to award and in the decision on the application for administrative review. The Respondent claimed to have not issued two different reasons as contended by the Appellant. For the sake of enlightening the parties, the Appeals Authority reviewed the record

In view of the requirement of the above quoted provision, the Respondent was required to communicate the actual reason that led to the Appellant's disqualification from the Tender process in the Notice of Intention to

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award. The Appeals Authority considered the Respondent's argument on this point that when issuing the Notice of Intention to award, NeST picked a default reason from the system. Hence, the Respondent was unable to edit the same. The Appeals Authority observes that if the Respondent

disqualified at the commercial evaluation stage. Hence, it could not have been considered for award of the Tender. The Appeals Authority wishes to enlighten the Appellant that in order for it to be awarded the Tender it had

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to be the lowest evaluated tenderer as required under Regulation 212(a) of

This decision is binding and can be enforced in accordance with Section 97(8) of the Act.

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

This decision is delivered in the absence of both parties though duly notified this 24th day of October 2024.

HON. JUSTICE (ret.) SAUDA MIASTRI