

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 |
| 3. Ms. Violet Limilabo | - Senior Legal Officer |
| 4. Mr. Venance Mkonongo | - Legal Officer |

FOR THE APPELLANT

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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 |
| 7. Mr. Denis Cleophace | - Procurement Officer - DAWASA |

The Appeal was lodged by **M/S Ismani Company Limited** (hereinafter referred to as "**the Appellant**") against the **Dar es Salaam Water Supply and Sanitation Authority** commonly known by its acronym as "**DAWASA**" (hereinafter referred to as "**the Respondent**"). The Appeal is in respect of Tender No. TR158/2023/2024/G/136 for Supply of Calcium Hypochlorite (hereinafter referred to as "**the Tender**").

The background of this Appeal may be summarized from the documents submitted to the Public Procurement Appeals Authority (hereinafter referred to as "**the Appeals Authority**") as follows: -

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 No. 446 of 2013 as amended (hereinafter referred to as "**the Regulations**") as repealed and replaced by Act No. 10 of 2023 and Regulations, GN.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 Tender to M/S Junaco (T) Limited. The proposed contract price was Tanzania Shillings Two Billion Four Hundred Forty-Four Million only (TZS 2,444,000,000.00) VAT exclusive. The Tender Board approved the award of the Tender on 19th July 2024 as recommended by the Evaluation Committee.

On 2nd September 2024, the Respondent issued the Notice of Intention to award the Tender. The Notice informed the Appellant that the Respondent intended to award the Tender to M/S Junaco (T) Ltd. In addition, the Notice stated that the Appellant's tender was disqualified for not being the lowest evaluated tenderer in terms of the financial evaluation stage.

Dissatisfied with the reason given for its disqualification, on 5th September 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



disqualified for submitting a Bank Guarantee which was less than 148 days as specified in the Tender Document.

Upon receipt of the Respondent's decision, on 10th September 2024, the Appellant wrote another letter to the Respondent challenging the new reason for its disqualification. On 19th September 2024, the Respondent replied to the Appellant's raised concern by reiterating its position as stated in the letter dated 10th September 2024. Aggrieved further, on 20th September 2024, the Appellant filed this Appeal to the Appeals Authority.

When the matter was called on for hearing, the following issues were framed, namely: -

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 submissions were made by Mr. Kizito Shirima, Operation Officer. He commenced on the first issue by stating that the Appellant was among the eight tenderers which participated in the Tender. During the Tender opening, the Appellant's quoted price was lower than that of the proposed successful tenderer, M/S Junaco (T) Ltd. However, the Appellant was surprised that the Notice of Intention to award indicated that the Respondent intended to award the Tender to M/S Junaco (T) Ltd which had a higher price.



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.

Mr. Shirima submitted further that the Respondent has erred in law for issuing two different reasons for the Appellant's disqualification. He stated that the first reason is as contained in the Notice of Intention to award. The said reason stated that the Appellant's tender was disqualified for not being the lowest evaluated tenderer in terms of financial evaluation. The second reason is encompassed in a response to the Appellant's application for administrative review by the Respondent which stated that the Appellant's tender was disqualified for submitting the Bank Guarantee which was less than 148 days as specified in the Tender Document.



Mr. Shirima conceded that the Appellant did not submit the Bank Guarantee which met the provided requirements in the Tender Document. However, the Appellant challenges the Respondent's act of introducing a new reason for its disqualification when handling the application for administrative review. Mr. Shirima contended that the Respondent was required to issue an appropriate reason for the Appellant's disqualification in the Notice of Intention to award. Thus, the Respondent's act of introducing a new reason for the Appellant's disqualification when entertaining its complaint raises doubt as to the authenticity of the whole Tender process.

Mr. Shirima elaborated that, if the Respondent was aware of the appropriate reason which disqualified the Appellant's Tender, the same was to be included in the Notice of Intention to award. The Respondent's act of stating that the Appellant's Tender was disqualified for not being the lowest evaluated tenderer at the financial evaluation stage implied that the Appellant qualified in all stages save the price requirement. Thus, the Appellant challenged the proposed award believing that it had the lowest price to the proposed successful tenderer. Therefore, the Respondent's conduct in this regard contravened the law, Mr. Shirima contended.

Mr. Shirima added that even if the new reason for the Appellant's disqualification 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



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.



The learned State Attorney stated that when communicating the Notice of Intention to award, NeST picked the default reason which the Respondent was unable to edit. The learned State Attorney contended that, having realized such a challenge, the Respondent consulted the Public Procurement Regulatory Authority (PPRA) on the matter and awaits for the PPRA's guidance.

The learned State Attorney submitted that since NeST picked the default reason when issuing the Notice of Intention to award, the Respondent argued that the reason given for the Appellant's disqualification in the Notice of Intention to award differed with the reason issued in the Respondent's decision on the Appellant's application for administrative review. This is because it did not contain a detailed explanation on the Appellant's disqualification as was the case in the decision for the Application for administrative Review. The Notice of Intention to award indicates that the Appellant's tender was found non-responsive for not being the lowest evaluated tenderer at the financial comparison stage. On the contrary, the Respondent's decision on the Appellant's application for administrative review stated categorically that the Appellant's Tender was disqualified for submitting the Bank Guarantee which had less than 148 days as specified in the Tender Document.

The learned State Attorney submitted that the appropriate reason for the 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 to material deviation which justified the rejection of the tender in compliance with Regulations 204(2)(c) and 206(2) of the Regulations.

In support of her submissions, the learned State Attorney cited PPAA Appeal Case No. 25 of 2021-22 between ***M/S SGS Tanzania Superintendence Company Limited and Tanzania Bureau of Standards*** and PPAA Appeal Case No. 35 of 2021-22 between ***M/S Aroche Systecs & Investico Ltd and Tanzania Airports Authority***. In the referred cases, the Appeals Authority dismissed the Appeals for having found that the Appellants' disqualifications in both Appeals were justified for failure to comply with the mandatory tender requirements. For instance, in the case of ***M/S SGS Tanzania Superintendence Company Limited*** (supra) the Appellant was disqualified for failure to 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 clarification is vested in the Appellant in terms of Regulation 13(1)(a) of the Regulations. Thus, the Appellant should have sought for clarification if it was of the view that some of the Tender requirements were unclear.

The learned State Attorney stated further that, the Respondent proposed award of the Tender to M/S Junaco (T) Ltd who was found to be the lowest evaluated tenderer pursuant to Clause 33(1) of the ITT. She stated that the Appellant was not proposed for award of the Tender as it did not comply with the criterion provided in the Tender Document. Thus, award of the Tender could have not been made to the Appellant regardless of quoting the lower price.

The learned State Attorney concluded her submissions by praying that the Appeal be dismissed for lack of merits and each party to bear its own costs.

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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. According to the Respondent such omission was caused by the NeST which picked the default reason when issuing the Notice of Intention to award that was not detailed and the Respondent failed to edit it. The Respondent asserted that, much as the Notice of Intention to award did not contain a clear reason for the Appellant's disqualification, the same does not negate the fact that the Appellant was fairly disqualified for failure to comply with Bank Guarantee requirements as provided in the Tender Document.

In ascertaining if the disqualification of the Appellant's tender was justified, the Appeals Authority revisited Clauses 18.1 and 18.3 of the ITT. It observed that the referred provisions required tenderers to submit Tender security in a form of Bank guarantee, an irrevocable letter of credit issued 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



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 the format provided in Section V [Tendering Forms].

18.3 The Tender Security shall be denominated in the local currency or in another freely convertible currency, and it shall be in the form specified in the TDS which shall be in any of the following: -

- a) **a Bank guarantee**, an irrevocable letter of credit issued by a reputable bank, or an insurance bond issued by a reputable insurance firm located in the United Republic of Tanzania or abroad **valid for twenty- eight (28) days beyond the end of the validity of the Tender. This shall also apply if the period for Tender validity is extended.** In either case, the form must include the complete name of the Tenderer.*
- b) certified banker's cheque.*
- c) Another security if indicated in the TDS.*



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 slot the Appellant attached a Bank Guarantee from the CRDB Bank dated 31st May 2024. The



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 valid for 28 days beyond the specified validity period. After adding the 28 days to the specified validity period, it was observed that the Bank Guarantee was to be valid until 30th October 2024.

Having reviewed the Appellant's Bank Guarantee, it is crystal clear that if there would be a demand for payment, the same was to be made on or before that date, that is 1st July 2024. This implies that any demand beyond the specified date would not be acceptable. In view of this fact, the Appeals Authority finds the Appellant's Bank Guarantee to be valid until 1st July 2024 while the same was required to be valid until 30th October 2024.

The Appeals Authority reviewed the evaluation report in NeST and observed that the Appellant's tender was disqualified at the commercial evaluation stage for submitting the Bank Guarantee which was valid for a 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



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 were clearly provided in the Tender Document. Thus, seeking clarification under the circumstances would have rendered a non-responsive tender responsive. Therefore, the Appeals Authority rejects the Appellant's assertion in this regard.



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 of Appeal. It observed that the Notice of Intention to award states that the Appellant's tender was disqualified for not being the lowest evaluated tenderer in terms of financial evaluation. Additionally, the Respondent's decision on the application for administrative review pointed out that the Appellant was disqualified for submitting a Bank Guarantee which was not in compliance with the requirements of the Tender Document.

Regulation 231(4) of the Regulations requires a procuring entity when issuing the Notice of Intention to award to state the name of the successful tenderer, contract sum and completion period and the reasons as to why other tenderers were not successful. Regulation 231(4) of the Regulations reads as follows: -

"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;

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

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



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 faced a challenge in communicating the actual reason for the Appellant's disqualification, it should have contacted PPRA for the guidance. Thus, the Appeals Authority finds the Respondent's act of not issuing the actual reason for the disqualification of the Appellant in the Notice of Intention to award to have contravened Regulation 231(4) of the Regulations.

Despite the Respondent's anomaly in communicating the Notice of Intention to award, the Appeals Authority is of the settled view that the same does not change the position that the Appellant was fairly disqualified for submitting the Bank Guarantee which contravened the requirements of the Tender Document. The Appeals Authority is also of the considered view that the Respondent's failure to issue the actual reason for the Appellant's disqualification has not prejudiced the Appellant's rights in the circumstances of this Appeal. Thus, the Appellant's contention on this point is rejected.

On the Appellant's contention that the Respondent should have awarded the Tender to it as it had a lower price compared to the proposed successful tenderer, the Appeals Authority observed that the Appellant was 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



to be the lowest evaluated tenderer as required under Regulation 212(a) of the Regulations which reads as follows: -

"212. The successful tender shall be-

(a) The tender with the lowest tender price in case of goods, works or services, or the highest evaluated tender price in case of revenue collection, but not necessarily the lowest or highest submitted price, subject to any margin of preference applied."

[Emphasis Supplied]

From the above observations, the Appeals Authority is of the settled view that the disqualification of the Appellant's tender was justified as it failed to comply with the requirements of the Tender Document.

Consequently, the Appeals Authority concludes the first issue in the affirmative that the disqualification of the Appellant's tender was justified.

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

Taking cognizance of the above findings, the Appeals Authority hereby dismiss the Appeal for lack of merit. The Respondent is ordered to proceed with the Tender process in observance of the law. We make 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 absence of both parties though duly notified this 24th day of October 2024.

HON. JUSTICE (rtd) SAUDA MJASIRI



CHAIRPERSON

MEMBERS: -

1. ENG. STEPHEN MAKIGO



2. DR. WILLIAM KAZUNGU

