

IN THE  
PUBLIC PROCUREMENT APPEALS AUTHORITY

APPEAL CASE NO. 12 OF 2016-17

BETWEEN

M/S BONIFACE SILIWAN SANG

GENERAL TRADERS.....APPELLANT

AND

MUHEZA DISTRICT COUNCIL.....RESPONDENT

DECISION

CORAM

- |                                       |   |               |
|---------------------------------------|---|---------------|
| 1. Hon. Vincent, K. D. Lyimo, J.(rtd) | - | Chairman      |
| 2. Eng. Aloys J. Mwamanga             | - | Member        |
| 3. Ms. Monica P. Otaru                | - | Member        |
| 4. Ms. Florida R. Mapunda             | - | Ag. Secretary |

SECRETARIAT

- |                           |   |               |
|---------------------------|---|---------------|
| 1. Mr. Hamisi O. Tika     | - | Legal Officer |
| 2. Ms. Violet S. Limilabo | - | Legal Officer |

FOR THE APPELLANT

- |                                    |   |                   |
|------------------------------------|---|-------------------|
| 1. Mr. Boniface Siliwan Sang       | - | Managing Director |
| 2. Mr. Alhabib Swaleh M. Mwarwanda | - | Companies Manager |

## FOR THE RESPONDENT

1. Ms. Luiza O. Mlewa - District Executive Director
2. Ms. Aisha Mhando - Head Legal Section
3. Mr. Rogers G. Challenge -Head Procurement  
Management Unit
4. Mr. Sigisbert Akwilini - District Solicitor

This decision was scheduled for delivery today 27<sup>th</sup> January 2017, and we proceed to do so.

The Appeal at hand was lodged by M/s BONIFACE SILIWANI SANG GENERAL TRADERS (hereinafter referred to as “the Appellant”) against MUHEZA DISTRICT COUNCIL (hereinafter referred to as “the Respondent”).

The said Appeal is in respect of Tender No. LGA/132/HQ/2016/2017/NC/03 for the Revenue Collection of Agricultural Products including Cereals, Fruit, and others save for Forest Products (hereinafter referred to as “the Tender”).

According to the documents submitted to the Public Procurement Appeals Authority (hereinafter referred to as “the Appeals Authority”), as well as oral submissions by the parties during the hearing, the facts of the Appeal may be summarized as follows:-

The Respondent advertised the Tender on 30<sup>th</sup> September 2016 and the deadline for the submission was 10<sup>th</sup> October 2016 whereby three tenders were received from the following firms-

1. M/s Okoamuda Ltd.
2. M/s Proper Services (T) Ltd.
3. M/s Boniface Siliwan Sang General Traders

After the evaluation process, the Respondent by his letter dated 19<sup>th</sup> November 2016, issued the relevant notice of intention to award the Tender to the Appellant. Upon receiving the said letter, the Appellant wrote to the Respondent on 24<sup>th</sup> November 2016, requesting for extension of time to submit the Performance Security since the signatory of the company intended to travel to India for treatment. On that same date the Respondent informed the Appellant that, they are required to comply with the requirements of the Tender Document. Meanwhile, the Respondent sought for clarification from the Public Procurement Regulatory Authority (PPRA) in a letter dated 28<sup>th</sup> November 2016, on whether the Appellant could be granted extension of time to submit Performance Security as requested. In the same letter, the Respondent informed PPRA that it had required the Appellant to comply with the requirement of the Tender Document and that no extension had been granted.

In response to the advice sought, the PPRA advised the Respondent that if a tenderer fails to sign a contract or to submit the requisite Performance Security, the bid should be disqualified and procuring entity, through its Tender Board, may select the next lowest evaluated tenderer among the

remaining tenderers as per Regulation 233(4) of the Public Procurement Regulation (hereinafter referred to as "GN. No. 446/2013"). PPRA also advised the Respondent that a procuring entity may reject all tenders as per Section 59 of the Public Procurement Act of 2011 (hereinafter referred to as "the Act").

On 30<sup>th</sup> November 2016, the Respondent issued the acceptance letter to the Appellant. In the said letter, the Appellant was informed that the contract will be signed within three days and called upon the Appellant to submit the performance security of 10% of the total contract sum before signing of the contract.

On 1<sup>st</sup> December 2016, the Appellant informed the Respondent that its Managing Director one Boniface Sang who was among the signatories had travelled to India for treatment and was expected back on 17<sup>th</sup> December 2016. The Appellant showed that it could not submit the Performance Security within the period stated in the acceptance letter and requested for extension of time up to 22<sup>nd</sup> December 2016. The Appellant showed that it was relying on Regulations 24 and 26 of GN. No. 446/2013. As at 22<sup>nd</sup> December 2016, the Appellant had not submitted the relevant Performance Security.

On 28<sup>th</sup> December 2016, the Respondent by its letter Ref. No. LGA/132/HQ/2016/2017/NC/03/05 nullified the award made to the Appellant on the ground that he failed to submit the relevant Performance Security in terms of Regulation 233(1) of GN. No. 446/2013. And on the next following day, the Respondent issued the acceptance letter to the

second lowest evaluated tenderer M/s Proper Service (T) Ltd. at a contract price of TZS.52,620,000/- and commission of 25% per month. The said letter also required him to submit Performance Security within three days from the date of receiving that letter. Following negotiations conducted between M/s Proper Service (T) Ltd and the Respondent, the contract was signed between the parties. The Appellant through its letter dated 2<sup>nd</sup> January 2017, wrote to the Respondent challenging the nullification of the award earlier made to them.

On 4<sup>th</sup> January 2017 the Respondent by its letter Ref. No. HW/MUH.S.85/71/7 dismissed the complaint and informed the Appellant that the decision to nullify the award made to him was properly made pursuant to Regulation 233(1) and (4) of GN. No. 446/2013.

Aggrieved by the Respondent's decision, on 5<sup>th</sup> January 2017, the Appellant lodged this Appeal to this Appeals Authority.

#### SUBMISSIONS BY THE APPELLANT

The Appellant filed two (2) main grounds of Appeal as follows:-

- i. That, nullification of the award for failure to submit the Performance Security within the prescribed time was not proper.

The Appellant argued that Clause 1.20 of the Tender Document provided clearly that the Performance Security shall be paid within three days before contract signing and this requirement has been supported by Regulation 29(3) of the GN. No.446/2013. The Appellant asserted that it could not

understand the Respondent's motive since under the Regulations the Performance Security had to be submitted within twenty eight days and not within the three (3) days relied upon by the Respondent.

In explaining this apparent conflict, the Appellant argued that as per Regulation 233(1) of GN. No. 446/2013, Performance Security has to be submitted within twenty eight days, it had requested for extension of time up to 22<sup>nd</sup> December 2016 to sign the contract. The Respondent never replied to such request. And that, the Appellant in compliance with Regulation 233(1) of the GN. No. 446/2013 deposited the Performance Security on 28<sup>th</sup> December, 2016. Thus it was unfair to nullify the award.

- ii. That, the Respondent erred in law for awarding the Tender to M/s Proper Services (T) Ltd. without issuing the notice of intention to award. Elaborating, the Appellant submitted that immediately after the award was nullified, the Respondent awarded the Tender to M/s Proper Services (T) Ltd. without issuing a notice of intention to other tenderers who participated in the Tender contrary to Section 60(3) of the Act.

Finally the Appellant prayed for the following reliefs;

- i) Nullify the award made to the second lowest evaluated tenderer and ensure justice is done in the Tender proceedings;
- ii) Mobilization costs of the Tender amounting to TZS. 2,000,000/=;

iii) Costs for preparation of the Tender, and Appeal filing fees  
TZS. 1,500,000/=.

#### REPLIES BY THE RESPONDENT

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

First, that the Appellant failed to comply with the requirement of Clause 1.20 of the Tender Document which required payment of the Performance Security within three days before signing the contract.

The Respondent submitted that after the Appellant had been issued with the acceptance letter on 30<sup>th</sup> November 2016, he requested for extension of time for signing the contract up to 22<sup>nd</sup> December 2016 and submit the Performance Security. Due to the Appellant's failure to submit the Performance Security on time, the Respondent's Tender Board on 28<sup>th</sup> December 2016 nullified the award so made and awarded the Tender to the second lowest evaluated tenderer M/s Proper Services (T) Ltd.

The Respondent submitted further that, the Appellant's default to remit the Performance Security within the prescribed period was against the tender proceedings and the nullification of the award was in compliance with the law.

Second, there was no need of issuing another notice of intention to award since the selection of M/s Proper Services (T) Ltd. was within the ongoing procurement proceedings. The issuing of a new notice of intention to

award would have delayed the government activities as it would have needed at least another month to complete the procurement process and it was not the Parliament's intention to prolong the procurement proceedings, rather to cut it short as it emanates from the same tender award which resulted from the Appellant's failure to submit the Performance Security on time.

Finally the Respondent prayed for the dismissal of the Appeal for lack of merits.

#### ANALYSIS BY THE APPEALS AUTHORITY

In dealing with this appeal, the Appeals Authority is of the view that, there are three triable issues namely:-

1. Whether nullification of the award made to the Appellant was justifiable;
2. Whether the procedure for award of Tender to the second lowest evaluated tenderer complied with; and
3. What reliefs, if any, are the parties entitled to.

Having framed the issues in dispute the Appeals Authority proceeded to determine them as follows;

1. Whether nullification of the award made to the Appellant was justifiable;

In determining this issue the Appeals Authority considered the Appellant's contention that nullification of the award made to him on ground that he failed to deposit the Performance Security within prescribed time was not proper.

To ascertain the Appellant's contention, the Appeals Authority revisited the Tender Document issued by the Respondent and observed that Clause 1.20 of the said document requires a successful tenderer to deposit the Performance Security within three days before the signing of the contract. The said provision is quoted hereinunder and reads as follows;

“Iwapo mzabuni atachaguliwa atatakiwa kuwasilisha fedha ya dhamana ya utendaji [Performance Security] sawa na asilimia 10% ya marejesho ya miezi ya mkataba kulingana na makadirio ya makusanyo yake. Fedha hizo ziwekwe katika kipindi cha siku tatu kabla ya kusaini mkataba na fedha hizi zitarejeshwa siku 14 baada ya mkataba kuisha.”

During the hearing, upon being asked by the Members of the Appeals Authority regarding compliance with the above clause, the Appellant admitted not to have complied. He merely stated that it had requested for extension of time to deposit the same. The Appellant stated that he nevertheless complied with Regulation 233(1) of GN. No. 446/2013 because it had deposited the Performance Security on 28<sup>th</sup> December 2016.

Furthermore, the Appeals Authority revisited Regulation 29 (3) of GN. No. 446/2016 which requires a successful tenderer after receiving the

acceptance letter to furnish the Performance Security within the time prescribed in the Tender Document. For purpose of clarity the said provision is reproduced hereunder and reads as follows:-

Reg. 29(3) "within a period prescribed in the tender documents, the successful tenderer shall, after receipt of the notice of acceptance, furnish the procuring entity with the performance security in accordance with conditions of the contract and form prescribed in the tender documents."

From the above quoted provision, the Appeals Authority is of the firm view that the Appellant did not comply with the requirement of the Tender Document which required him to submit the Performance Security within three days before signing the contract. The Appellant's assertion that it had requested for extension of time to submit the Performance Security up to 22<sup>nd</sup> December 2016 cannot be valid, since such request contravened the requirement of the Tender Document.

Furthermore, the Appeals Authority revisited Regulation 233(1) of GN. No. 446/2013 also relied upon by the Appellant that it allows Performance Security to be submitted within twenty eight days. For ease of reference, the said Regulation is reproduced as follows-

Reg. 233(1) where a tender is accepted by the accounting officer, the procuring entity and the person whose tender is accepted shall enter into a formal contract for supply of goods, provision of services or undertaking of works within twenty eight calendar days after

fulfilling all conditions prior to the signing of contract.”  
(emphasis added)

From the above quoted provision, the Appeals Authority is of the view that, the said Regulation does not support the Appellant’s assertion pointed out above. Rather, it requires all conditions that are to be complied with prior to the signing of the contract to be finalized and the contract signing has to be completed within twenty eight days. That means submission of the Performance Security and signing of the contract has to be in accordance with provisions of the Tender Document and the same should not exceed 28 days. Therefore, the nullification of the Appellant’s award was proper since it had failed to comply with requirement of the Tender Document in relation to submission of the Performance Security.

The Appeals Authority concludes the first issue in the affirmative that nullification of the award made to the Appellant was justified and proper.

2. Whether the procedure for award of Tender to the second lowest evaluated tenderer complied with;

The Appeals Authority revisited Section 60(3) of the Act and observed that, the Accounting Officer is mandatorily required to issue the notice of intention to award to the tenderers who participated in the tender process giving them seven days to submit complaints, if any. The Appeals Authority is of the view that the Respondent was required to comply with such requirement, because in the first notice of intention to award the proposed tenderer was the Appellant who failed to comply with the requirement of

the Tender Document. Thus, the selection of the second evaluated tenderer M/s Proper Service (T) Ltd. though within the same tender process dictated that the Respondent was required to issue the second notice of intention to award allowing tenderers to submit complaints, bearing in mind that tenderers may not be aware of the award made to the second evaluated tenderer M/s Proper Services (T) Ltd.

Going by the facts of the case and bearing in mind that there were only three participating bidders, once the Appellant was eliminated for his own failure to comply with the Tender there remained two others, the second lowest evaluated bidder being one of them and the last one being M/s Okoa Muda Ltd. If anything, failure to issue the notice would have prejudiced either the second lowest evaluated bidder or M/s Okoa Muda Ltd. whose commission was pegged at 40% of the total contract sum and thereby viewed as not eligible for the purpose of revenue collection. The Appellant has not been able to show how he was prejudiced under the circumstances. In the opinion of the Appeals Authority, failure to issue the notice was an irregularity which did not occasion failure of justice under the circumstances.

From the above finding the Appeals Authority concludes the second issue that, although the procedure for awarding tender to the second tenderer M/s Proper Services (T) Ltd. did not strictly adhere to procedure on issue of notice, there was no prejudice whatsoever to the Appellant.

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

In determining the prayers, the Appeals Authority took cognizance of its findings in respect to the two issues above. In the main, the nullification of the award earlier made to the Appellant was justified in law and the award to the second successful bidder was also proper. The Appeals Authority rejects all the prayers by the Appellant and hereby upholds the Respondent's prayer that the Appeal be dismissed for lack of merits.

The Appeal is hereby dismissed for lack of merits. Each party is to bear own costs. It is so ordered.

This Decision is binding upon the parties and may be enforceable in the same manner as a Decree or Order of a court of law in terms of Section 97(8) of the Act.

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

This Decision is delivered in the presence of the parties this, 27<sup>th</sup> day of January 2017.



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JUDGE (Rtd) V.K.D. LYIMO

CHAIRMAN

MEMBERS:

1. ENG. ALOYS J. MWAMANGA



2. MS. MONICA P. OTARU

