

IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY
AT DAR ES SALAAM
APPEAL CASE NO. 27 OF 2018-19

BETWEEN

M/S MM ATTORNEYS IN ASSOCIATION WITH
BOAS AND ASSOCIATES.....APPELLANT

AND

MINISTRY OF MINERALS.....RESPONDENT

RULING

CORAM

- | | |
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| 1. Hon. Justice (rtd) Sauda Mjasiri | - Chairperson |
| 2. CPA. Fredrick Rumanyika | - Member |
| 3. Dr. Leonada Mwangike | - Member |
| 4. Mr. Ole-Mbille Kissioki | - Secretary |

SECRETARIAT

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

FOR THE APPELLANT

- | | |
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| 1. Mr. Makaki Masatu | - Managing Partner |
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2. Mr. Symphorian Malingumu

- Accountant

FOR THE RESPONDENT

1. Mr. Edwin S. Igenge

-Director of Legal Service

2. Ms. Ashura U. Kassim

-Ag. Director-Procurement
Management Unit (PMU)

3. Ms. Mariam S. Mgaya

-Ag. Executive Secretary
TEITI

This appeal was lodged by M/s MM Attorneys in association with Boas and Associates (hereinafter referred to as "the Appellant") against the Ministry of Minerals (hereinafter referred to as "the Respondent"). The Appeal is in respect of Tender No. ME/008/2016-17/TEITI/C/04 for Provision of Consultancy Services for carrying out Scoping of Tanzania Extractive Industries Performance and Production of TEITI Report for the Year 2016/17 (hereinafter referred to as "the Tender").

The Tender was conducted using the Consultant Qualification Selection procedures specified in the World Bank Guidelines as well as the Public Procurement Act No. 7 of 2011, as amended (hereinafter referred to as "the Act").

After going through the records submitted by the parties to the Public Procurement Appeals Authority (hereinafter referred to as "the Appeals Authority"), the background to the Appeal can be summarized as follows:-

The Respondent invited three firms to submit their expression of interest. After the evaluation only the Appellant's firm was shortlisted. On 8th June 2018 it was invited to submit its proposal. The deadline for submission was set for 29th June 2018. The Appellant submitted its proposals as required.

The Appellant's Technical Proposal was subjected to the evaluation process and was found to be responsive to the requirements of the Request For Proposal (RFP), by scoring 82.40% above the required points of 80%. Thereafter, its Financial Proposal was opened and evaluated. Ultimately, the evaluation Committee recommended award of the Tender to the Appellant at a contract price of TZS. 356,420,980.65 subject to successful negotiation.

The Tender Board at its meeting held on 21st August 2018 approved the award recommendations, subject to successful negotiation which aimed at reducing the Appellant's contract price to fit the estimated budget of the Respondent. On 10th October 2018, negotiations were successfully conducted between the parties reducing the awarded price to TZS. 328,213,455.6 VAT inclusive.

On 19th October 2018 the Respondent issued an award letter to the Appellant. On 23rd October 2018 the Respondent's head of PMU sent a scanned award letter to the Appellant via an email. Upon receiving the letter, the Appellant observed some anomalies and informed the Respondent accordingly. The Respondent promised to send an amended letter. However the said letter was not sent as promised. On 5th December 2018, the Appellant reminded the Respondent about the delay. On 8th

December 2018, the Respondent sent another email to the Appellant informing it that the Tender had been cancelled since October 2018, although, the said cancellation letter was not attached to the email. Thus, on 11th December 2018, the Appellant requested the Respondent to email the said letter. Consequently, on 17th December 2018, the Appellant received an email from the Respondent with two attachments namely; the letter dated 13th November 2018 which revoked the award made to the Appellant and a letter dated 13th December 2018 informing the Appellant that the Tender has been cancelled. The ground for revoking the Appellant's award was that, it had performed below the required standard in two previous assignments of a similar nature as complained by the user department.

Dissatisfied, the Appellant applied for administrative review to the Respondent's Accounting Officer on 26th December 2018. The Respondent failed to issue a decision within time. Consequently, on 7th January 2018, the Appellant lodged this Appeal.

SUBMISSIONS BY THE APPELLANT

The Appellant's submissions may be summarized as follows:-

1. That, the purported cancellation or revocation of the award made by the Respondent contravened the Public Procurement Act of 2011 as amended together with the Public Procurement Regulations of 2013 as amended (hereinafter referred to as "GN. No. 446 of 2013").

2. That, the provision cited in the cancellation or revocation letter did not give authority to the Accounting Officer to do so.
3. That, there are no justifiable and probable reasons for the purported cancellation or revocation of the award.
4. Finally the Appellant prayed for the following orders:-
 - a. The withdrawal of the letter purporting to cancel or revoke the award of the Tender;
 - b. The issuance of an amended letter of award; and
 - c. The signing of the contract in terms of what was agreed in the negotiation meeting held on 10th October 2018.

REPLY BY THE RESPONDENT

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

1. That, the cancellation or revocation of the award did not contravene the Act and its Regulations.
2. That, the provisions cited in the cancellation or revocation letter grants power to the Respondent's Accounting Officer.
3. That, there are legally justifiable and probable reasons for the cancellation or revocation of the award.
4. Finally the Respondent prayed for the following orders:-
 - a. That the revocation and / or cancellation letter is valid and cannot be withdrawn;

- b. The Respondent cannot issue a rectified letter of award while the Tender has been cancelled or revoked;
- c. The Respondent cannot proceed to sign a contract since the Tender has already been cancelled; and
- d. The Appellant to bear the costs of the Appeal.

At the hearing of this Appeal and during the framing up of issues, the Appeals Authority was of the considered view that, there was a point of law to be determined before hearing the appeal on merits. This is in relation to the legal status of the Tender. The Appeals Authority noted that the Bid Validity Period had expired and no extension of time was sought. In that respect, the Appeals Authority called the parties to address it as to whether or not there exists a valid tender for consideration after the lapse of the stated Bid Validity Period.

SUBMISSIONS BY THE APPELLANT

The Counsel for the Appellant conceded that the Bid Validity Period had expired, given that the Tender Validity Period for this Tender was ninety days (90) from the date of tender opening which took place on 29th June 2018. He submitted further that the letter of award was issued to the Appellant on 19th October 2018 after the expiry of the Bid Validity Period contrary to the requirement under the law, which provides that the tender has to be awarded within the Bid Validity Period. However, the learned Advocate for the Appellant argued that the Respondent did not take any steps to extend the Bid Validity Period. According to him the Appellant

cannot be penalized for the expiry of the Bid Validity Period. He relied on Appeal Case No. 8 of 2017-18 between *Nyalinga Investment Company Ltd and Mpanda Urban Water Supply and Sanitation Authority*, whereby this Appeals Authority was of the view that the expiry of the Bid Validity Period was caused by the deliberate delay and negligence of the Respondent. The Appellant prayed for the Appeals Authority to adopt the above decision since the Respondent was duty bound to extend the bid validity before its expiry. It was wrong for the Respondent to continue negotiations with the Appellant and to issue an acceptance letter while knowing that the bid validity had expired. The Appellant prayed to the Appeals Authority to proceed with the appeal on merit.

SUBMISSIONS BY THE RESPONDENT

The Respondent submitted that, there is no valid Tender for consideration since the Bid Validity Period expired on 27th September 2018, and there was no extension or any move to extend the same. He argued further that since there was no extension, the award letter issued on 19th October 2018, contravened the requirement of Regulation 62 of the GN. No. 446 of 2013 as amended.

With regards to the case cited by the Appellant, the Respondent argued that, as the Appeals Authority is not bound by its own decision and can depart from it when it considers it proper to do so. He prayed for the dismissal of the Appeal.

ANALYSIS BY THE APPEALS AUTHORITY

Having heard the parties, the Appeals Authority is of the view that, the main issue for determination is *whether or not there exists a valid tender for consideration after expiry of the Bid Validity Period.*

It is undisputed that the Bid Validity Period of this Tender was ninety days (90) pursuant to Clause 1.12 of the Instructions To Consultants(ITC) from the date of Proposal opening held on the 29th June 2018. Counting from the date of the Proposal opening, the validity period of the Proposal expired on 27th September 2018 and no extension was made.

According to Section 71 of the Act as amended, read together with Regulation 191(3) and (4) of the GN. No. 446 of 2013 as amended; a procuring entity is required to finalize all procurement processes within the validity period stated in the Tender Document. Further to that, extension of the Bid Validity Period may be sought under exceptional circumstances. The provisions reads;

"Sec 71: The procuring entity shall require tenderers to make their tenders and tender securities including tender securing declaration valid for the periods specified in the tendering documents, sufficient to enable the procuring entity to complete the comparison and evaluation of the tenders and for the appropriate tender board to review the recommendations and to approve the contract or contracts to be awarded whilst the tenders are still valid".

“Reg. 191(3): The period fixed by a procuring entity shall be sufficient to permit evaluation and comparison of tenders, for obtaining all necessary clearances and approvals, and for the notification of the award of contracts and finalise a contract but the period shall not exceed one hundred and twenty days from the final date fixed for submission of tenders.

(4) In exceptional circumstances, prior to expiry of the original period of effectiveness of the tenders, a procuring entity may request tenderers to extend the period for an additional specified period of time.”

The above quoted provisions clearly indicate that the Respondent was duty bound to finalize all procurement processes within the period of ninety (90) days that is, from 29th June 2018 to 27th September 2018. However, this was not the case. There was no extension of the Bid Validity Period in accordance with Reg. 191(4) supra. Instead, the tender process proceeded, for example; negotiations took place on 10th October 2018 followed by issuance of the award letter on 19th October 2018 contrary to the law. The Appeals Authority finds the process took place outside the Bid Validity Period and therefore there was no valid tender.

The Appeals Authority is of the considered view that the circumstances in *Nyalinga Investment Company Ltd* (supra) are different and distinguishable from this appeal. In Nyalinga’s case the Appeals Authority ordered the Respondent to proceed with the evaluation by post qualifying the Appellant after it had been satisfied that it was unfairly disqualified.

Instead of doing so, the Respondent proceeded to recommence the evaluation process, which led to delays, and later on claimed that the bid validity of the tender had lapsed, and consequently rejected the Tender with intention to retender. It was established that there was negligence on the part of the Respondent in the timely implementation of the order made by the Appeals Authority. In this Appeal the circumstances are different. The parties acted when the Bid Validity Period had expired.

When asked by the Members of the Appeals Authority, whether the Appellant raised the issue of the Bid Validity Period or extension of time, with the Respondent, the Appellant conceded that this was never done. This means that both the Appellant and the Respondent continued to make correspondences including negotiations when the Bid Validity Period had already expired.

In view of what is stated hereinabove, the Appeals Authority is of the considered view that there exists no valid Tender for consideration after the expiry of the Bid Validity Period. Thus, the lapse of the Bid Validity Period invalidates the Tender. It follows therefore as night follows day that all the subsequent actions had no legal force.

What reliefs, if any, are the parties entitled to

In view of the Appeals Authority's findings on the point of law, that there is no valid tender for consideration after the expiry of the bid validity period, the Appeal has no basis and is hereby dismissed. As the point of law was raised *suo motu* by the Appeals Authority, each party is to bear its own costs.

Order accordingly.

This Ruling 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 Ruling is delivered in the presence of the parties this 4th February 2019.



HON. JUSTICE (RTD) SAUDA MJASIRI
CHAIRPERSON

MEMBERS:

1. CPA. FREDRICK RUMANYIKA 
2. DR. LEONADA MWAGIKE 