

**IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY
AT DAR ES SALAAM
APPEAL CASE No. 29 OF 2016-17**

BETWEEN

M/S MNTAMBO CONSTRUCTION COMPANY LTD..... APPELLANT

AND

KILINDI DISTRICT COUNCIL.....RESPONDENT

DECISION

CORAM

- | | |
|------------------------------|-------------------|
| 1. Mrs. Rosemary A. Lulabuka | - Ag. Chairperson |
| 2. Eng. Aloys J. Mwamanga | - Member |
| 3. Mr. Louis P. Accaro | - Member |
| 4. Mr. Ole-Mbille Kissioki | - Secretary |

SECRETARIAT

- | | |
|---------------------------|------------------------|
| 1. Ms. Florida Mapunda | - Senior Legal Officer |
| 2. Ms. Violet S. Limilabo | - Legal Officer |
| 3. Mr. Hamis O. Tika | - Legal Officer |

FOR THE APPELLANT

- | | |
|----------------------|------------|
| 1. Mr. Issa Abdallah | - Advocate |
|----------------------|------------|

2. Mr.Mndaila M. Geni - Director
3. Mr. Ismail S. Mntambo - Director

FOR THE RESPONDENT

1. Mr. Clemence A. Mwakasendo - District Executive Director
2. Mr. Edward Reuben Mahwa - Head of Legal Section
3. Mr. Peter M. Luhanda - Head Procurement Management Unit (PMU)
4. Ms. Aziza Mwanamadibu - Kilindi Postal Master Register (PMR)

This decision was scheduled for delivery today, 10th May 2017 and we proceed to deliver it.

The Appeal was lodged by M/S MNTAMBO CONSTRUCTION COMPANY LTD (hereinafter referred to as "the Appellant") against the KILINDI DISTRICT COUNCIL (hereinafter referred to as "the Respondent").

The Appeal is in respect of Tender No. LGA/127/2016/2017/W/01 for Periodic Maintenance of Kibirashi Gitu Road 14 KM (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 facts of the Appeal May be summarized as follows:-

The Respondent invited tenderers to participate in the tender through the Nipashe Newspaper dated 1st October 2016; the deadline for submission of the tender was set for 21st October 2016, whereby six firms submitted their tenders.

Tenders were subjected to evaluation which was conducted into three stages namely; preliminary, detailed and post qualification evaluation. At the preliminary evaluation stage the tender submitted by the Appellant was disqualified on two reasons emanating from non adherence to Clause 20 of Instruction to Tenders (ITT) that;

- 1) Declaration on litigation history was signed by unauthorized person; and
- 2) A form of Tender was signed by unauthorized person.

The remaining five tenders were subjected to detailed evaluation that included price comparison and ranking of tenders. In that process the tender by M/s Elandy Construction Company Ltd was ranked the first thus subjected to post qualification whereby he was found to be non responsive for failure to comply with requirements of the Tender Document. Then the second ranked tenderer M/s Zamros Business Company Ltd was post qualified and after completion of the exercise, the Evaluation Committee recommended award of the Tender to them at a contract price of TZS. 132,763,275.00 VAT inclusive. The Tender Board meeting held on 17th November 2016 approved award of the tender as recommended.

On 14th December 2016, the Respondent issued a Notice of Intention to Award the Tender to all tenderers. It was alleged by the Appellant that the said Notice was not received, and on 10th January 2017 the Appellant wrote a letter to the Respondent requesting for the tender results. On 26th January 2017 the Respondent replied to the Appellant's request through a letter which was sent by registered mail. On 6th March 2017, the Appellant received a Notice of Intention to Award the Tender which did not disclose reasons for his disqualification. The Appellant on the same day wrote to the Respondent requesting to be given reasons for their disqualification. On 23rd March 2017, the Respondent responded to the Appellant's letter which informed him that, the Notice of Intention to award the Tender was sent to all tenderers who participated in the tender on 21st December 2016 through their postal addresses and a registered mail that was sent to the Appellant on 26th January 2017. Furthermore, the Appellant was informed that the contract had entered into force hence the Respondent becomes *functus officio* to any complaints lodged to him pursuant to Section 96(5) of the Public Procurement Act of 2011 as amended (hereinafter referred to as "the Act").

Aggrieved by the Respondent's decision, on 31st March 2017, the Appellant lodged this Appeal to the Appeals Authority.

Upon receiving notification of the Appeal and as the Respondent was required to file replies, he raised a Preliminary Objection(PO) that the Appeal is time barred for being filed out of time. In that regard the Appeals

Authority was obliged to resolve the PO raised before embarking to the substantive Appeal.

RESPONDENT'S SUBMISSION ON THE PO

The Respondent submitted that the Appeal has been filed out of time and should not be entertained by the Appeals Authority.

In support of his submission, the Respondent argued that the Notice of Intention to award dated 14th December 2016 was dispatched on 21st December 2016 to all tenderers who participated in this Tender through their respective Postal address, the Appellant inclusive. Despite issuance of the above mentioned letter, on 18th January 2017 the Respondent received a letter dated 10th January 2017 from the Appellant requesting to be informed of the tender results. The Respondent on 26th January 2017 responded to the Appellant's concern through a letter which was sent to the Appellant via registered mail and attached a Notice of Intention to Award. By this letter the Appellant ought to have lodged his complaint to the Respondent within seven working days if he was dissatisfied with the proposed award of the Tender pursuant to Section 60(3) of the Act as Amended. The Appellant did not do so, instead, he wrote another letter dated 6th March 2017 complaining that the letter to notify them about the proposed award of the Tender was sent late and did not contain reasons for their disqualification.

Furthermore, the Respondent submitted that, he did not use the Appellant e-mail address since the law requires that communication between

procuring entity and bidders to be in written or electronic form that provides a record and that is why they decided to use registered mail that provide record of the communication. Due to that the Respondent replied to the Appellant's complaint that the time to entertain complaints had expired and the contract had already entered into force hence the Respondent could not entertain the complaint pursuant to Section 96(4) and (5) of the Act.

RESPONSES BY THE APPELLANT ON THE PO

In response to the Respondent's submissions, the Appellant argued as follows;

That, the Appeal is not time barred, since time starts to accrue when the Appellant becomes aware of circumstances giving rise to the complaint pursuant to Rule 12 of the Public Procurement Appeals Rules. The Appellant in this Appeal became aware on the circumstances giving rise to the complaint on 24th March 2017 after receiving the Respondent letter which informed them that their complaints could not be entertained by the Respondent since the contract had already entered into force. The Appellant submitted further that, the letter dated 26th January 2017, was received by them on 6th March 2017. The said letter was attached with other two letters that is; a letter dated 14th December 2016 and that of 6th February 2017. Basing on that letter, the Appellant could not lodge complaint since the said Notice did not contain reasons for the Appellant's disqualification contrary to Regulation 231(4)(c) of the Public Procurement Regulation of 2013 (GN. No. 446/2013). The Appellant on the same date

wrote to the Respondent requesting him to be given reasons for their disqualifications.

Finally the Appellant submitted that, the Appeal was submitted within time since it was triggered by the letter dated 23rd March 2017, received via e-mail address to them on 24th March 2017. The Appeal was filed to the Appeals Authority on 31st March 2017 well within seven working days in compliance with the law.

ANALYSIS BY THE APPEALS AUTHORITY ON THE PO

Having gone through to the filed documents together with the oral submissions by the parties, the Appeals Authority is of the firm view that the main issue calls for determination is *whether the Appeal is proper before it.*

In resolving the above issue, the Appeals Authority observed that, the Respondent relied on Section 60(3) of the Act which requires tenderers to lodge complaint within seven working days upon receipt of the Notice of Intention to Award the Tender. During the hearing the Respondent submitted that the Appellant was required to submit complaint within seven working days after receiving the Notice of Intention to Award the Tender. To wit; 26th January 2017. The Appellant on his side contended that, the letter relied upon by the Respondent was received by them on 6th March 2017 without reasons for their disqualification hence it was not a proper notice capable to be relied upon.

To substantiate the parties contention, the Appeals Authority revisited the Envelope of an ordinary mail which was received by the Appellant 6th March 2017 and observed that the envelope was stamped at the Postal Office Kibaya- Kiteto Manyara on 6th March 2017. When the Respondent was shown the said Envelope his witness one Aziza Mwanamadibu a Kilindi Postal Master Register, confirmed that the said envelope was the ordinary mail that contained the Notice of Intention to Award the Tender she sent to the Appellant on 21st December 2016. It is the Appeals Authority's view that if the letter sent on 21st December 2016 was received on 6th March 2017; presumably the alleged registered mail sent to the Appellant is yet to reach him. It is so believed because when asked by the Members of the Appeals Authority on the mode of transportation of ordinary and registered mails, the witness submitted that the Postal Office has no vehicles of it's own, hence they use public transport for both ordinary and registered mail. She further submitted that Mails from Kilindi to Manyara will have to go through Handeni, Korogwe, Arusha then Manyara. The only difference between the two modes of serving letters is that a registered mail keeps record. Thus, the Respondent's contention regarding the postal rule as well as his contention that the proper Notice of Intention to Award was that sent on 26th January 2017 is negated.

The Appeals Authority also considered the Appellant's contention that the Notice of Intention to Award the Tender did not mention the reasons for their disqualification and that's why on 6th march 2017 the Appellant wrote to the Respondent requesting amongst others, reasons for their

disqualification. The Appeals Authority observed that the said Notice of Intention to Award contained the name of the proposed tenderer and the awarded contract price that is; M/s Zamros Business Co. Ltd at a contract price of TZS. 132,763,275.00 without giving reasons for the Appellant's disqualification. The Appeals Authority concurs with the Appellant that there was no way he could have lodged complaint without knowing reasons for their disqualification which was sent to them on 23rd March 2017 and at that time the contract had already been signed on 16th February, 2017. Thus the Appellant was left with no option than submitting Appeal to the Appeals Authority which he did on 31st March 2017 (within five days from the date of receiving Respondent's reply).

From the above findings, the Appeals Authority is of the firm view that the Appeal is proper before it. The PO is hereby rejected and the Appeals Authority proceeded to hear the merits of the Appeal.

SUBMISSION BY THE APPELLANT ON MERITS OF THE APPEAL

The Appellant's grounds of Appeal may be summarized as follows:-

- i. That, they are disputing the reasons that the person who signed the Tender form and the form of litigation history was not authorized by the Power of Attorney.

In expanding the ground Mr. Mndaila M. Mgeni submitted that he was the one who prepared the Appellant's tender and he was sure that their tender complied with all the requirements of the Tender Document including attachment of the Power of Attorney which

authorized three persons namely; Seif O. Mntambo, Ismail O. Mntambo and Mndaila O. Mgeni. According to the Power of Attorney any of the named persons could sign their tender document.

- ii. That, the Appellant had the lowest quoted price compared to other tenderers hence they were entitled for the award of the tender.

Finally the Appellant prayed for the following orders;

- i. Compensation for the costs used in this tender amounting to TZS. 10 million which includes transport costs incurred in making follow up to know the tender results and legal fees; and
- ii. Appeal filing fees TZS. 200,000.

REPLIES BY THE RESPONDENT ON MERITS OF THE APPEAL

In response to the Appellant's ground of Appeal the Respondent submitted that, the Appellant was disqualified for submitting forms of tender and litigation history forms that were signed by unauthorized person contrary to the requirements of the Tender Document.

Finally the Respondent prayed for the following orders:-

- i. To dismiss the Appeal for lack of merits; and
- ii. That the Respondent has neither moral nor legal duty to compensate the Appellant.

ANALYSIS BY THE APPEALS AUTHORITY

The Appeals Authority is of the view that there are two issues calling for determination namely;

- 1) Whether the Appellant was fairly disqualified; and
- 2) What reliefs, if any, are the parties entitled to.

Having framed the above issues, the Appeals Authority proceeded to resolve them as herein below;

1. Whether the Appellant was fairly disqualified

In resolving this issue the Appeals Authority revisited the Evaluation Report and observed that the Appellant was disqualified at the preliminary evaluation stage for submitting the Tender Form and Litigation History Form which were signed by unauthorized person contrary to the requirements of Clause 20.2 of the Instruction To Tenderers (ITT) and Clause 22 of the Bid Data Sheet (BDS).

To ascertain the justification of the Appellant's disqualification on the above ground; the Appeals Authority revisited the Tender Document and observed that Clause 20.2 of the ITT which was modified by Clause 22 of the BDS requires original and copies of the tender to be signed by person(s) duly authorized to sign on behalf of the tenderer and such authorization must consist written confirmation as specified in the BDS. The Clauses reads as follows;

ITT 20.2" The original and all copies of the Tender shall be typed or written in indelible ink and shall be signed by a person or persons duly authorized to sign on behalf of the tenderer. This authorization shall consist of a written confirmation as specified in the Tender Data Sheet and shall be attached to the tender. The name and position held by each person signing the authorization must be typed or printed below the signature. All pages of the Tender, except for un-amended printed literature, shall be initialed by the person or persons signing the Tender." (Emphasis Added)

BDS 22 "Written confirmation of authorization is a Power of Attorney."

The Appeals Authority revisited the Appellant's tender and observed that, the Power of Attorney attached to his tender authorized three persons namely; Seif O. Mntambo, Ismail O. Mntambo and Mndaila O. Mgeni. The Appeals Authority observed that the names and signature appeared on the Form of Tender and Litigation history form differs as it contains the name of Seif O. Mtambo with a signature of another *donee*. When asked by Members of the Appeals Authority about such glaring anomaly, the Appellant's Counsel responded that the names appearing in the Tender Forms and Litigation History forms are the same as in the Power of Attorney. When further asked if corresponding signatures appearing in the Power of Attorney, Form of Tender and Litigation History are the same, he admitted to be slightly different. One Mndaila O. Mgeni admitted to have signed on behalf of Seif O. Mntambo who was sick. The Appeals Authority observe that the Appellant's representatives act were not proper. The

Appeals Authority agrees with the Respondent that the Appellant was fairly disqualified.

With regard to the Appellant's contention that his tender was the lowest, the Appeals Authority is of the firm view that much as the Appellant was disqualified at the Preliminary Evaluation stage, his bid price could not have been compared with other tenderers. Comparison of tenders is a final stage to determine the lowest tender price from bidders who have been found to be substantially responsive to the Tender Document in preceding stages. Therefore, his assertions that he had the lowest price compared to the successful tenderer and that he was entitled for the Award of the contract are baseless.

In view of the above findings, the Appeals Authority concludes the first issue in the affirmative.

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

In resolving this issue, we took cognizance of the Appeals Authority's findings and conclusion on the first issue above and prayers by the parties. In doing so, the Appeals Authority observes that since the Appellant was fairly disqualified, his prayers cannot be granted.

With regard to the prayers by the Respondent, the Appeals Authority upholds them. The Appeal is hereby dismissed in its entirety for lack of merits.

It is so ordered.

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

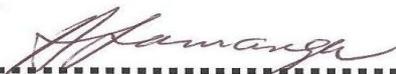
The Right of Judicial Review as per Section 101 of the Act is explained to the parties.

This Decision is delivered in the presence of the Appellant and in absence of the Respondent this 10th May, 2017.



MRS. ROSEMARY A. LULABUKA
Ag. CHAIRPERSON

MEMBERS:

1. ENG. A. J. MWAMANGA 
2. MR. L. P. ACCARO 