

IN THE  
PUBLIC PROCUREMENT APPEALS AUTHORITY

AT DAR ES SALAAM

APPEAL No. 34 OF 2017-18

BETWEEN

M/S UTALII FOOD CATERERS.....APPELLANT

AND

THE UNIVERSITY OF DAR ES SALAAM.....RESPONDENT

DECISION

CORAM

1. Ms. Monica P. Otaru - Ag. Chairperson
2. Eng. Francis T. Marmo - Member
3. Mr. Louis P. Accaro - Member
4. Mr. Ole-Mbille Kissioki - Secretary

SECRETARIAT

1. Ms. Florida Mapunda - Senior Legal Officer
2. Ms. Violet Limilabo - Legal Officer

FOR THE APPELLANT

1. Mr. Henry Mrema - Managing Director
2. Mr. Ian Almachius - Advocate, Sub-Sahara law Chambers
3. Mr. Joseph Dominic - Karishoi Business Advisory Services
4. Ms. Margareth Katanga - Finance Department

FOR THE RESPONDENT

1. Prof. William Alanangisye - Vice Chancellor
2. Dr. Saudin J. Mwakaje - Ag. Corporate Counsel
3. Ms. Prisca Kuhanga - Assistant PMU Manager
4. Ms. Alice Hossea - Finance Officer
5. Ms. Edina Mpakama - Secretary, PMU

The Appeal was lodged by M/s Utalii Food Caterers (hereinafter referred to as "the Appellant") against the University of Dar es Salaam (hereinafter referred to as "the Respondent"). The Appeal is in respect of Tender No.PA/011/NC/2016/2017/26 for Operating Hill Park Restaurant and Bar (hereinafter referred to as "the Tender").

After going through submissions by the parties, the Public Procurement Appeals Authority (hereinafter referred to as "the Appeals Authority"), summarized the facts of the Appeal as follows:-

The Respondent through the Mwananchi newspaper dated 20<sup>th</sup> November 2017 advertised the Tender pursuant to the Public Procurement Act of 2011, as amended (hereinafter referred to as "the Act") and the Public Procurement Regulations, Government Notice No. 446 of 2013 (hereinafter referred to as "G.N. No. 446 of 2013"). The deadline for submission of tenders was set for 18<sup>th</sup> December 2017; whereby six firms responded.

After the opening ceremony the tenders were subjected to evaluation which was conducted in three stages, namely; Preliminary, Technical and Commercial Evaluations. During Preliminary Evaluation the Appellant's tender was disqualified for failure to attach Audited Accounts. The remaining five tenders were subjected to Technical Evaluation whereby one tender was disqualified for failure to comply with experience requirement. The remaining four tenders were subjected to Commercial Evaluation. M/s Nice Catering Company Limited emerged to be the highest evaluated tenderer thus was recommended for award of the Tender. The recommendation of the Evaluation Committee was approved by the Tender Board through Circular Resolution No. 2017/2018/071.

On 31<sup>st</sup> January 2018, the Respondent issued Notice of Intention to Award and the Appellant was informed that his tender was disqualified for failure to attach Audited Accounts. Dissatisfied with reason given for his disqualification, the Appellant submitted application for administrative

review to the Respondent on 12<sup>th</sup> March 2018, then on 26<sup>th</sup> March 2018, the Appellant filed this Appeal.

### SUBMISSIONS BY THE APPELLANT

The Appellant's grounds of Appeal are summarized as follows;

1. That, the Appellant disputes that he failed to attach Audited Accounts as required by Clause 13 of the Bid Data Sheet (BDS), claiming that the same were attached and verified by the tenderers' and the Respondent's representatives who attended the Tender opening ceremony. Thus, it is not proper for the Respondent to disqualify their bid basing on failure to attach Audited Accounts.
2. That, the Respondent contravened the requirement of Section 60(3) and (5) of the Act which requires procuring entities to issue the Notice of Intention to award to tenderers immediately after receipt of the approval from the Tender Board. The provisions also require tenderers to be accorded time for submitting complaints, if any. Expounding on this point the Appellant submitted that, although the Notice of Intention to Award is dated 31<sup>st</sup> January 2018 it was received by him on 8<sup>th</sup> March 2018 after physical follow ups.
3. The Appellant argued that, although the Respondent claimed to have sent the Notice of Intention to Award to him through his postal address; the said notice never arrived at his box. The Appellant challenges the Respondent's conduct in this regard since the communication between the two was normally done physically as both are located within the same compound. Further, the Appellant contended that, he is the current service provider and the Respondent knows exactly where to find them within the University campus; hence, there was no need of using postal services, thus the Respondent's conduct in this regard indicates that they had ill motive against them.

Expounding further on this point, the Appellant submitted that, he received the notice of intention to award thirty-six (36) days after it was

issued and after the acceptance letter was issued to the proposed successful tenderer. That while the Notice of Intention to Award is dated 31<sup>st</sup> January 2018 and posted to the tenderers on 9<sup>th</sup> February 2018, the Respondent issued the acceptance letter on 14<sup>th</sup> February 2018; that is, three working days from the date the Notice of Intention was sent. Section 60(3) of the Act requires procuring entity after issuing the Notice of Intention to Award to accord tenderers seven working days to submit complaint(s), if any. In this Tender the Respondent failed to comply with this requirement as the award letter was issued prior to the expiration of the seven working days. The Appellant suspects that the delay in serving him with the Notice of Intention to Award was done deliberately so as to prevent them from challenging the process.

4. That, the Respondent erred in law for failing to issue his decision with respect to the application for administrative review filed on 12<sup>th</sup> March 2018. According to Section 96(6) of the Act, the Respondent was required to issue his decision within seven working days but he failed to do so.
5. That, the whole Tender process was marred with irregularities as it was conducted not in observance of the Act and G.N. No 446 of 2013.

Finally, the Appellant prayed for the following orders;

- a) The Respondent's decision to disqualify the Appellant be declared null and void.
- b) The Respondent's decision to award the Tender to M/s Nice Catering Company Limited be declared null and void.
- c) The Respondent be ordered to award the Tender to the Appellant.
- d) Any other remedy this Appeals Authority deems fit to grant.

## REPLY BY THE RESPONDENT

The Respondent's submissions in response to the grounds of Appeal are as follows;

1. That, the Appellant was fairly disqualified from the Tender process for failure to submit Audited Accounts as required by Clause 13 of the Bid Data Sheet (BDS) which modified Clause 11.1 of the Instructions to Bidders (ITB). Expounding on this point the Respondent submitted that, the Appellant attached to his bid a Financial Statement as opposed to Audited Accounts, as a result, his tender was non responsive.

Expounding further on this point, the Respondent submitted that, the Appellant attached to his bid the Financial Statement without the auditor's opinion to indicate that the Financial Statement was audited. Therefore, the Appellant's bid was fairly disqualified for failure to attach Audited Accounts. And in any case, he submitted the Financial Statement for one year while the requirement under Clause 13 of BDS was to submit Audited Accounts of the last two years. Thus, the Appellant's bid did not and could not qualify.

2. That, regarding the communication of the Notice of Intention to Award to the unsuccessful tenderers, the Respondent submitted that, the notice was prepared on 31<sup>st</sup> January 2018 and sent to the tenderers through their postal addresses on 9<sup>th</sup> February 2018. The unsuccessful tenderers were accorded time to submit complaint(s) as per Section 60(3) of the Act. The Appellant failed to submit his complaint within the stipulated time; as such the Respondent issued the acceptance letter to the proposed successful tenderer on 22<sup>nd</sup> February 2018.
3. That, the Respondent denies the Appellant's allegation that they failed to issue the decision with respect to the Appellant's application for review within the statutory time. The Respondent averred that, to the contrary, the Appellant was the one who failed to submit his

complaint within the seven working days as stipulated under Section 60(3) of the Act and Regulation 231(2) of GN No. 446 of 2013. The Respondent submitted further that, since the Appellant's application for review was submitted beyond the stipulated time, hence, there was no complaint lodged by the Appellant. Nevertheless the Respondent claimed that they replied out of courtesy on 20<sup>th</sup> March 2018.

4. That, regarding the Appellant's assertion that the tender process was marred by irregularities, the Respondent submitted that there were no irregularities in this Tender since the same was conducted pursuant to the requirements of the law.

Finally, the Respondent prayed for the following;

- a) The Respondent's decision to disqualify the Appellant be upheld as it was made within the dictates of the law.
- b) The decision to award the Tender to M/s Nice Catering Company Limited be upheld.
- c) Any other remedy this honourable Appeals Authority deems fit to grant.

#### ANALYSIS BY THE APPEALS AUTHORITY

The Appeals Authority having gone through the Tender proceedings including various documents and the oral submissions submitted by the parties, is of the view that the Appeal is centred on three main issues, which were agreed by the parties, as follows:-

- Whether the disqualification of the Appellant was proper in law;
- Whether the Tender process was marred by irregularities; and
- What reliefs, if any, are the parties entitled to.

Having identified the issues, we proceeded to determine them as hereunder:-

#### 1.0 Whether the disqualification of the Appellant was proper in law

In substantiating if the Appellant's disqualification from the Tender process was proper we revisited Clause 13 of the BDS which provides as follows;

13. "In addition to the documents stated in Clause 11, the following documents must be included with the bid;

(vi) Audited Accounts of last two (2) years.

.....". (Emphasis added)

The requirements of Clause 13 of the BDS were also amplified in Clause 30 of the BDS which provides evaluation criteria for the Tender. The said provision reads;

30. "the criteria for bid evaluation shall be;

d. Qualification information (Company registration, business license, TIN, VAT (if registered) and TFDA Registration, tax clearance certificate and Audited Accounts for the last two (2) years." (Emphasis supplied).

The above quoted provisions provide in clear terms that tenderers were required to attach to their bid Audited Accounts for the last two years.

During the hearing, the Appellant was asked whether the Financial Statement and Audited Accounts were one and the same. The Appellant answered that they are not the same but insisted that the so called Financial Statement should be regarded as Audited Accounts since the firm which prepared it had audited the accounts before issuing the final report. The Appellant contended further that, Auditors' reports are only issued to registered companies and not to sole proprietors like the Appellant, in

which case Financial Statements are sufficient proof that the business is audited.

The Appeals Authority revisited the Appellant's bid and observed that it was attached with one year Financial Statement prepared by certified accountants operating under the name of Karishoi Business Advisory Services. The Financial Statement was preceded with Accountant's Report indicating that Karishoi Business Advisory Services was responsible only to prepare a Financial Statement.

From the Appellant's bid it is crystal clear that he had attached Financial Statement and not Audited Accounts as required by Clauses 13 and 30 of the BDS quoted hereinabove. The Appeals Authority is of the view that, if the Appellant believed that Financial Statement serves the same purposes as Audited Accounts he ought to have sought for clarification from the Respondent on that requirement prior to submission of bids pursuant to Clause 8 of the Instruction To Bidders (ITB).

The Appeals Authority considered the Appellant's argument that during the Tender opening it was observed that he had attached the Audited Accounts, thus his disqualification was not proper. The Minutes of the Tender opening, consistent with Regulation 196(4) of GN No. 446 of 2013, indicate that only the tenderers names, Tender prices, Tender Securities and Power of Attorney were read out. These Minutes which the Appellant signed as the representative of bidders do not indicate that Audited Accounts were also read out. The Appeals Authority therefore rejects the Appellant's argument in this regard as the Tender opening was conducted pursuant to Regulation 196(4) of GN No. 446 of 2013.

From the above, we are of the settled view that the Appellant's disqualification from this Tender is proper in the eyes of the law. Thus, the first issue is answered in the affirmative.

## 2.0 Whether the Tender process was marred by irregularities

The Appeals Authority takes cognizance of the Appellant's assertion that the Tender process was marred by irregularities. The Appeals Authority revisited the records of the Tender proceedings and observed that the tender opening, evaluation process and approval of award were properly conducted in accordance with the law. We however, observed that there was premature issuance of the acceptance letter which the Appellant claimed that it was done due to the Respondent's ill motive towards their tender.

It is not disputed that the Notice of Intention to Award is dated 31<sup>st</sup> January 2018. The Respondent claimed to have dispatched the notices on 9<sup>th</sup> February 2018. Although there is no indication that the same was received by the Appellant until he made a personal effort on 8<sup>th</sup> March 2018, the Respondent submitted a Form from Tanzania Post Office as proof that the notice was dispatched on 9<sup>th</sup> February 2018. Having reviewed the said form we observed that it has the date, amount paid and the postal stamp without any names of recipients.

From the above facts, the Appeals Authority is of the settled view that, much as the Respondent claims to have dispatched the Notice of Intention to Award on 9<sup>th</sup> February 2018, to unsuccessful tenderers, there is no sufficient proof that the notices were dispatched. In any case, even if the said notices were dispatched as claimed the acceptance letter was issued on 14<sup>th</sup> February 2018. Counting from the date the Respondent dispatched the Notice of Intention to the date of issuing the acceptance letter, there is no doubt that the Respondent awarded the Tender within three working days instead of seven working days, contrary to Section 60(3) of the Act which provides as follows;

“Upon receipt of the notification, the accounting officer shall, immediately thereafter issue a notice of intention to award the contract to all tenderers who participated in the tender in question

giving them seven working days within which to submit complaints thereof, if any". (Emphasis supplied).

Relating the above quoted provision to facts of this Appeal it is crystal clear that the unsuccessful tenderers were not accorded sufficient time to submit their complaints, if any, after issuance of the intention to award.

We are of the view that, much as the Respondent has contravened the law in that regard, the Appellant's rights of review were not affected. The Appellant was able to challenge the Tender results despite his receipt of the Notice of Intention to Award late. We have failed to see the Respondent's ill motive in this Tender as the Appellant was not prejudiced in any way whatsoever.

Therefore, it is the Appeals Authority's conclusion that the procurement process itself up to the issuance of notices was not marred by irregularities. Irregularity can be observed in the issuance of acceptance letter, which however, did not prejudice the Appellant in any way whatsoever.

### 3.0 What reliefs if any are the parties entitled to

Taking cognizance of the findings above, the Appeals Authority hereby dismisses the Appeal.

The Respondent is hereby allowed to proceed with the award of the Tender in observance of the law as the Appellant was fairly disqualified.

Each party to bear own costs.

It is so ordered.

This Decision is binding on the parties 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 today 27<sup>th</sup> April 2018.

*M. Otaru*  
.....  
**Ms. MONICA P. OTARU**  
**Ag. CHAIRPERSON**

**MEMBERS:**

1. **ENG. FRANCIS MARMO** ..... *F Marmo*

2. **MR. LOUIS ACCARO** ..... *L Accaro*