

IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY
AT DAR ES SALAAM
APPEAL CASE No. 08 OF 2017-18
BETWEEN
M/S NYALINGA INVESTMENT COMPANY LTD..... APPELLANT
AND
MPANDA URBAN WATER SUPPLY AND SANITATION
AUTHORITY.....RESPONDENT

DECISION

CORAM

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

SECRETARIAT

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

FOR THE APPELLANT

1. Mr. Titus J. Lugoye - Site Agent

FOR THE RESPONDENT

1. Mr. Justine Wambari - Financial Manager
2. Mr. Nikodemus Komu -Procurement Consultant
3. Ms.Beatha Minde - Procurement Consultant

This decision was scheduled for delivery today 15th September 2017, and we proceed to do so.

The Appeal at hand was lodged by M/s NYALINGA INVESTMENT COMPANY LTD (hereinafter referred to as "the Appellant") against MPANDA URBAN WATER SUPPLY AND SANITATION AUTHORITY commonly known by its acronyms MUWASA (hereinafter referred to as "the Respondent"). The Appeal is in respect of Tender No. MPN/UWSA/2015/16/W/01-Lot 2 for the Supply of Pipes and Construction of Gravity Main from Manga intake to Mpanda District Hospital Water Storage Tank 14 KM (hereinafter referred to as "the Tender")

According to the documents submitted by the Parties to the Public Procurement Appeals Authority (hereinafter referred to as "the Appeals Authority"), the facts of the Appeal may be summarized as follows:

On 9th June 2016, the Respondent vide the Nipashe, Mwananchi, Daily News and the Guardian newspapers invited tenderers to tender for the project. The deadline for the submission was on 8th July 2016, whereby thirteen (13) firms submitted their tenders.

The tenders were then subjected to evaluation process in which M/s Giriso Investment Co. Ltd was proposed for award of the contract at a contract price of TZS. 565,637,500.00 VAT Exclusive.

The Respondent then issued Notices of Intention to Award the contract to all tenderers who participated in the tender process and attached with it, a summary of the Evaluation Report which indicated reasons for their disqualification. As for the Appellant, he was ranked the second as his price was higher than that of the proposed successful tenderer. The Appellant was however dissatisfied with the Respondent's proposition to

award the contract to the proposed bidder and his disqualification. The Appellant contended that the proposed successful tenderer's tender price was higher than his. The Appellant being dissatisfied applied for administrative review from the Respondent's Accounting Officer. The Accounting Officer having scrutinised the complaint dismissed it for lack of merits. Dissatisfied further by the said decision, the Appellant lodged Appeal Case No. 26 of 2016-17 to this Appeals Authority raising several issues, amongst others being that;

- i. The Evaluation Committee erroneously evaluated his tender as VAT exclusive while it was neither VAT inclusive nor exclusive since its tender was quoted in compliance with Item 20 of the Preamble to the Bill of Quantities (BoQ), which stated that the prices indicated by the bidders should contain taxes and other levies payable by the contractor.
- ii. If his tender was properly evaluated he would have been ranked the first since his price would have been either TZS. 575,224,500.00 VAT inclusive or TZS. 487,478,390.00 VAT exclusive. Thus, by all means his tender should have been the lowest evaluated tender compared to that of the proposed successful tenderer M/s Girison Investment Co. Ltd.

On 25th April 2017, the Appeals Authority delivered its decision, in which it nullified the proposed award of the tender to the proposed successful tenderer after it had realized that the said bidder had quoted a higher price of TZS. 667,452,250.00 VAT inclusive and surprisingly the Respondent's Tender Board approved award of the contract to him at contract price of TZS. 565,637,500.00, which is less than the quoted price and without stating the circumstances that led to such a reduction.

Thus, the Appeals Authority ordered the Respondent to proceed with the tender process by post qualifying the Appellant's tender prior to award of the same.

In implementing the Appeals Authority's order it is on record of the Respondent's documents that on 24th may 2017, the Respondent re-evaluated all tenders afresh, in which the Appellant's tender was ranked the 1st and was therefore subjected to Post Qualification. In that process, the Evaluation Committee observed that the Appellant's tender was non responsive for failure to meet various requirements of the Tender Document as hereunder;

- i. That, the Appellant did not have/ possess the base truck (Ten tones and above) contrary to Clause 12.5(d) of the Instructions To Bidders (ITB).
- ii. The Appellant did not have a project manager for the project contrary to Clause 12.5(d) of the ITB
- iii. The Appellant lacks the minimum liquid assets of TZS. 200,000,000.00 specified under Clause 12.5 (f) of the ITB.
- iv. The Appellant has lower (decrease) quantity by 23% instead of 15% of the Engineering estimate cost in his bidding, contrary to Clause 37.1 of the ITB
- v. The Appellant lacks the annual volume of construction works.
- vi. The Appellant did not meet the requirement of experience as a prime contractor.

Having observed the above pitfalls, the Respondent finally decided to reject the Appellant's tender and went to the 2nd lowest evaluated tenderer to wit; M/s Girison Investment Co. Ltd. The Evaluation Committee was satisfied that the said bidder has met the requisite

requirements of the Tender Document and proposed that the award of contract be made in their favour.

On 12th June 2017, the Respondent through his letter with Ref. No. MPN/UWSA/T.20/67/02 informed the Appellant the results of post qualification conducted and required him to produce evidence of various noted concerns in his bid.

On 13th June 2017, the Appellant responded to the letter and informed the Respondent that his observations were invalid since his tender met all pre-requisite requirements of the Tender Document and that he deserves to be awarded the tender. The Respondent however, proceeded to reject his tender. The Tender Board, at its extra ordinary meeting held on 8th July 2017, approved the recommendation to reject the Appellant's tender and ordered for re-tendering without specifying as to why they did not go to the 2nd lowest evaluated tenderer.

On 27th July 2017, the Appellant requested for administrative review from the Respondent's Accounting Officer challenging the reasons for rejection of his bid. The Appellant contended that the reasons availed by the Respondent's Tender Board are not true since he possesses the requisite experience and resources to effectively carry out the contract, if awarded. He therefore, requested the Respondent to thoroughly review all documents annexed to his tender for verification. The Respondent however did not respond to the request. Aggrieved, on 9th August, 2017, the Appellant lodged this Appeal.

SUBMISSIONS BY THE APPELLANT

The Appellant's arguments as deduced from the documents availed to the Appeals Authority as well as oral submissions during the hearing may be summarized as follows;

1. The Respondent erred in law by holding that the Appellant has no experience as the main contractor and has executed small annual volume of construction works of similar nature, while the works they have executed is 95% similar to the current tender. The Appellant submitted further that what was required by the Respondent was the work of similar nature and complexity. The Tender Document did not provide for the volume regarding such project. According to their tender, they indicated a project worth TZS. 18 million which they executed to DED Mpanda. The said project is of similar nature to the current tender, therefore they met the requirement and that the Respondent's averment signifies lack of competence in evaluation of the tenders.
2. The Respondent erred in law by holding that the Appellant has no requisite equipment, specifically vehicles with ten tones capacity to carry pipes. The Appellant submitted that he has motor vehicles of the specified capacity. To substantiate that they possess such vehicles he had attached certificates of registration of vehicles in his bid. However, the Respondent did not bother to visit the Appellant and make verification of the same.
3. The respondent erred in law by holding that the Appellant has no capabilities with respect to personnel (Project Manager). The Appellant submitted that a list of key staff containing certificates

were attached to his bid. The Appellant submitted further that according to his knowledge in the construction industry, a project manager is appointed by the respective respondent and not the bidder. Having such knowledge, they did not indicate the project manager as the Respondent would appoint him in future. However, they indicated in their tender, qualifications of the site manager who would be under obligation to take charge of their site. Thus, the Respondent erred in disqualifying them based on this requirement.

4. The Respondent erred in law in holding that the Appellant has no financial capability to perform the contract while he had attached copies of Audited Financial Accounts, cash available at the bank (NMB) and a guarantee security from the National Insurance Corporation worth TZS. 100,000,000/00. Additionally, the National Microfinance Bank confirmed to the Respondent through a letter attached to their tender that the Appellant is liquid enough to perform the contract. They wonder how could the Respondent ignore all those instruments and label him as a non responsive.
5. The Respondent erred in law by holding that the Appellant's bid price was 23% below the engineer's estimates while it was only 8%. The engineer's estimates was TZS. 634,725,000.00 while the Appellant's bid was TZS. 575,224,500.00. The Respondent's computation on this aspect indicates total incompetence of the evaluators who failed to even calculate properly the simple mathematics.

Finally, the Appellants prayed for the following orders;

- i. This Appeal be allowed
- ii. The Respondent's decision be quashed
- iii. The Appellant be awarded the tender
- iv. Costs of the Appeal to be paid to him by the Respondent.

REPLIES BY THE RESPONDENT

The Respondent's oral submissions during the hearing were as follows;

1. That the Appellant did not possess the required ten tone trucks. The truck indicated in his bid is a seven tone and not ten.
2. The Appellant's Audited Financial Statements are not stamped by Auditors who audited the accounts. Thus, the same was not taken into account during evaluation.
3. With regard to the Project manager and the assertion that the bid prices were below compared to the engineer's estimates by 23%, the Respondent conceded to have improperly used the requirements. The Respondent's Consultant one, Mr. Nikodemus submitted that it is a duty of the client to select the project manager and not the contractors.

Finally the Respondent submitted that the bid validity period of the tender has lapsed, therefore, re-tender is justified.

ANALYSIS BY THE APPEALS AUTHORITY.

It should be noted from the outset that the Respondent in this matter has refused or neglected to submit Statement of Reply on issues raised by the Appellant despite receiving a letter from the Appeals Authority compelling him to do so as per Section 97(4) of the Public Procurement Act, as amended, read together with Rule 12(2) of GN.NO. 411 of 2014.

The Appeals Authority made relentless efforts requiring the Respondent to do so, but its effort ended in vain. This Appeal therefore, ought to have either been heard ex-parte the Appellant or allow the Appeal in its totality. However, due to the sensitivity of the matter in dispute, that is, provision of water to the needy Tanzanian citizens of Mpanda and the public interest at large, the Appeals Authority allowed the Respondent to reply orally the issues raised by the Appellant during the hearing. It is the ardent wish of the Appeals Authority that the respective organs shall take stern measures against any person involved in the mischief for failure to comply with the lawful orders provided for under the law.

The above notwithstanding, in dealing with this Appeal, the Appeals Authority having gone through the tender proceedings including various documents submitted by both parties and oral submissions during the hearing, it is of the view that the Appeal has been centred on two main issues calling for determination; and these are:-

1. Whether rejection of the Appellant's tender is justified.
2. What reliefs, if any, are parties entitled to?

Having framed the above issues, the Appeals Authority proceeded to resolve them seriatim as follows;

1. Whether rejection of the Appellant's tender is justified.

In resolving this issue, the Appeals Authority observed that the Appellant's tender was to a great extent disqualified for failure to comply with criteria provided for under Clause 12.5 of the ITB as modified by Clause 9 of the Bid Data Sheet. The Appeals Authority therefore, deemed necessary to revisit the said grounds, the Evaluation Report vis- a -vis the referred Clauses of the ITB in order to verify the validity of the Appellant's disqualification. In the course of doing so, the Appeals

Authority revisited each criterion used to disqualify the Appellant as analysed hereunder;

i. Appellant have no Long Base Trucks

It is on record of the post qualification evaluation that the Respondent indicated that the Appellant does not have or posses two Long Base Trucks for carrying out the assignment. The Appeals Authority revisited the Tender Document and observed that Clause 9 item 1 of the BDS required bidders to indicate the essential equipment which were to be made available in event a tenderer is awarded the contract. The Appeals Authority revisited the Appellant's tender and observed that apart from indicating a table of requirements that he possesses the said trucks he had also ttached motor vehicle registration cards as follows;

- Isuzu Tipper- Reg.No. T.601 BSD owned by Mr. Shukuru Elias Nyalinga
- Fuso Tipper – Reg. No. T 246 BWU owned by Mr. Shukuru Elias Nyalinga

When asked by the Members of the Appeals Authority to justify the Appellant's disqualification based on this criterion, the Respondent contended that one of the Appellant's vehicles is not a 10 tone as required by the Tender Document rather a 7 tone vehicle which was contrary to the requirement of the Tender Document. The Appeals Authority observed that the Tender Document under the said Clause 9 of the BDS allowed the bidder to hire or lease the said equipment in event of being considered as a successful bidder. Much as this criterion intended to foster timely execution of the contract as stated in the Tender Document, the Respondent was not right to disquslify the Appellant, taking into cognisance that he did not dispute the existance of

the other truck listed and the option of hiring or leasing equipment. Furthermore, the Respondent admitted before this Appeals Authority that the said aspect would have been taken on board during negotiations with the Appellant but to the contrary they did not do so. Therefore, the Appeals Authority is of the considered view that the Appellant was unfairly disqualified in this criterion.

ii. The Appellant did not have a Project Manager

In resolving this item, the Appeals Authority further revisited Clause 9 of the BDS and observed that all bidders were required to indicate in their bids, they would be project managers for the contract with a 10 years experience, of which 5 years in projects of similar nature. The Appellant on his side did not indicate the Project Manager rather he had indicated a site engineer for the project who will be responsible for day to day supervision of the project at site.

When the Respondent was asked by the Members of the Appeals Authority to identify as to whose responsibility to appoint the project manager, the Respondent without colour of doubts conceded that such a responsibility is vested unto clients. He therefore admitted that the criterion was wrongly used or applied.

The Appeals Authority agrees with both the Appellant and the Respondent that this criterion was misplaced. Additionally, as indicated in the Respondent's Tender Document, specifically on the General and special conditions of the contract (GCC) and (SCC), the powers of the project manager includes but not limited to requiring a contractor to replace any key personnel to suit the procuring entity's demands and qualities of the desired work. Under this obligation therefore, the bidder can not supervise or inspect the work of his own as well as verifying on

behalf of the procuring entity. Furthermore, the Appeals Authority observed that Clause 12.3(e) of the ITB required a tenderer to include in his bid qualifications and experience of key site management and technical personnel proposed for the contract. The Appellant had complied with these requirements as analysed here in above. the Appellant had indicated that the site manager is qualified and duly registered Civil Engineer as well as other personnel which the respondent did not dispute.

iii. The Appellant lacks the minimum liquid assets of TZS. 200,000,000.00

In resolving this matter, the Appeals Authority revisited the referred Clause 12.5 (f) of the ITB and observed that the criterion required bidders to indicate or provide evidence that they possess the minimum assets and or credit facilities net of other contractual commitments of TZS. 200,000,000.00. The Respondent contended in the post qualification report that the Appellant did not have the amount since he had attached only a bank statement worth TZS. 13 Million from NMB Bank.

To justify the validity of the Respondent's assertion on the ground, the Appeals Authority revisited the Appellant's tender and observed that he had attached various documents substantiating his liquidity to carry out the project as follows;

- Audited financial Account for the year 2015, with liquid assets of TZS. 148,383,037.00
- Bank statement by NMB with cash of TZS. 31,085,418.55
- A guarantee from National Insurance Corporation worth TZS. 100,000,000.00

When asked by the Members of the Appeals Authority to amplify and clarify the meaning of the Clause, the Respondent ended up admitting that indeed the Appellant had met the requirement save that the attached Audited Financial Accounts were not stamped by the Auditors, therefore the same could not carry weight. The Appeals Authority revisited the Minutes of the Tender Board meetings which deliberated the tender and observed nothing as regards to the issue of stamping of Audited Financial Accounts. The Appeals Authority therefore does not agree with the Respondent since his averment is just an afterthought which are not reflected in the Tender Board deliberations. What has been indicated in the Tender Board deliberations is that the Appellant has only 31 Million shilings and not otherwise. Additionally, the Appeals Authority is of the considered view that since the Respondent was conducting the post qualification evaluation, he was under obligation to verify the authenticity of the Audited Accounts with the respective Auditors and not otherwise. To the contrary he did not do so. Accordingly, the Appellant's disqualification based on this criterion was equally not justified.

- iv. The Appellant has lower (decrease) quantity by 23% instead of 15% of the Engineer's estimate

In resolving this aspect, the Appeals Authority observed that the Respondent disqualified the Appellant asserting that his quoted price is lower by 23% compared to the Respondent's estimates contrary to Clause 37.1 of the ITB. The Appeals Authority revisited the cited Clause and observed that the same empowers a procuring entity to either increase or decrease a scope of work at the time of awarding the contract by 15% specified in Clause 24 of the BDS. To the contrary, the Respondent did not do so, rather he computed the deviation of the

Appellant's bid price in comparison to the Respondent's estimates. When asked by the Members of the Appeals Authority to clarify the applicability of the Clause, the Respondent's consultant Mr. Nikodemus Komu conceded that the Clause had been misconstrued since it does not mean what the Respondent has done. The Appeals Authority agrees with the consultant since the clause does not support what have been done by the evaluators. Thus, disqualification based on this criterion was not proper.

v. The Appellant lacks the annual volume of construction works

The Respondent asserted in his post qualification report that the Appellant did not meet the annual volume of construction works. However, the Respondent did not indicate how the same was not met. The Appeals Authority revisited the Tender Document and observed that Clause 12.3 of the ITB as modified by the BDS Clause 9 required bidders to submit evidence of experience as prime contractor in construction of at least one project of similar nature and complexity for the last two years. In the course of doing so, the Appeals Authority observed that the Appellant has annexed two projects which he had currently executed as hereunder;

1. Supply of Meter and pump testing and installation to Muwasa for TZS. 518,000,000.00
2. Extension of water supply scheme from Karema to Itetmya for TZS. 18,294,000.00 by DED Mpanda

The Appeals Authority is of the considered view that much as the Tender Document required at least one project of similar nature and complexity, the project executed by the Appellant to DED- Mpanda, that is extension of water supply scheme from Karema to Itetmya is of similar nature and

complexity. Had the Respondent intended for similar volume, he would have explicitly stated the required amount in the BDS. The Respondent's criterion in this regard was vague which could not assist the bidders or the evaluator. Much as the Appellant had attached evidence of the said executed project, which has now been fully executed, it suffices to conclude that the Appellant had met the requirement. Therefore, the Appellant's disqualification based on this criterion is impaired.

vi. The Appellant did not meet the requirement of experience as a prime contractor

In ascertaining the validity of the Appellant's disqualification based on this aspect, the Appeals Authority revisited the Post Qualification report and observed that the Appellant was disqualified for failure to meet the requirement of being a prime contractor. However, the report does not give details as to how does the Appellant failed to meet the requirement. The Appeals Authority revisited Clause 12.5(b) of the ITB as modified by BDS and observed that it provided for a requirement of the would be successful bidder to have at least 5 years experience as prime contractor. The Appeals Authority revisited the Appellant's tender and observed that his firm was duly registered by the Registrar of Companies on 9th August, 2010 with Certificate of Incorporation No. 118-997-433. The Appellant is also registered by the Contractor Registration Board (CRB) in Civil and building works. The Appellant had been executing various works since its incorporation as both main and sub contractor. The Respondent however, did not bother to take cognisance of the same. The Appeals Authority is of the considered view that the Respondent's evaluators were not keen in executing tasks vested by the law. Accordingly, this aspect has not been substantiated by the Respondent.

In view of the above findings and analysis, the Appeals Authority's conclusion with regard to the first issue is that the rejection of the Appellant's tender is not justified.

Last but not least, during the hearing of this matter, the Respondent informed the Appeals Authority that the bid validity for this tender has lapsed and that their desire to re-tender is a better option. He submitted further that since the tender has taken long to be concluded, cost of the items to be procured by the Appellant in event he is successful might have changed in the market. Furthermore, he insisted to assist him to perform the contract effectively and without incurring loss, thus, re-tendering of the same could be the best option for the Appellant and other bidders to adjust their prices.

Having considered the Respondent's arguments, the Appeals Authority does not grasp with the mind the Respondent's wishes. It is so because when this matter was filed for the first time by the Appellant through Appeal case No. 26 of 2016-17, the Appeals Authority observed that the Appellant was unfairly disqualified. It thus, ordered the Respondent to conduct post qualification of the Appellant's tender who was found to be not only substantially responsive tenderer but also the lowest evaluated tenderer. The Appeals Authority's decision was delivered on 25th April 2017. All this time the Respondent was aware that he was under obligation to request the Appellant and other tenderers to extend their bid validities of their tenders in order to be able to execute the given order. To the contrary, the Respondent did not do so. The Appeals Authority observed in the tender proceedings availed by the Respondent for the second time that instead of conducting post qualification as ordered, the Respondent went to conduct evaluation afresh for all bids. It is the Appeals Authority's view that the Respondent had a deliberate

mission of not only delaying the tender process but also of not executing a lawful order given by this Appeals Authority for reasons best known to him. The Appeals Authority condemns this act and is not ready to bless by all means. Agreeing with his proposition for re-tendering based on expiry of bid validity, which was deliberately been left to expire, entails that the Appeals Authority is blessing the Respondent's negligence and misdeeds; and curtail the bidder's rights as well as defeating the purpose of the law.

In view of the above, the Appeals Authority is enjoined by the principle enshrined in the famous case of *Riggs v. Palmer*, 115 N.Y. 506 (1889), that; "No one should benefit out of his own wrong". Therefore, blessing re-tendering in this tender based on expiry of bid validity as the Respondent wishes is to benefit him unfairly and to the detriment of the Appellant and the public at large.

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

Having analyzed the contentious issues in dispute, the Appeals Authority considered the prayers by the parties as hereunder;

With regard to the Appellant's prayers, the Appeals Authority is satisfied that the Appeal lodged has merits since the Respondent unfairly rejected the Appellant's tender as analysed under issue No. 1 above. In view of that the Respondent's decision to reject the Appellant's tender is hereby quashed. The Appellant deserves to be awarded the tender since he is qualified in all aspects as per set criteria. The Appeals Authority invoking section 97(5) (e) orders the Respondent to award and sign the contract with the Appellant immediately.

With regard to prayer for costs, the Appeals Authority orders the Respondent to compensate the Appellant the following;

- i. Appeal filing fees of TZS. 200,000.00
- ii. Transport and accomodation of TZS. 300,000.00

Regarding the Respondent's prayer that the Appeal be dismissed for lack of merits, the Appeals Authority rejects the prayes since as established above, the Appellant was unfairly disqualified.

The decision of this Appeals Authority is binding upon the parties and may be executed in terms of 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 the Respondent this 15th day of September, 2017.



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MRS.ROSEMARY A. LULABUKA

AG: CHAIRPERSON

MEMBERS:

1. MR LOUIS ACCARO 
2. ENG. ALOYS J. MWAMANGA 