

**IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY
APPEAL CASE NO. 16 OF 2016-17**

BETWEEN

M/s AKO GROUP LIMITED..... APPELLANT

AND

TANZANIA FOOD AND

DRUGS AUTHORITY..... RESPONDENT

DECISION

CORAM

- | | |
|----------------------------|-------------------|
| 1. Ms. Monica P. Otaru | - Ag. Chairperson |
| 2. Mr. Louis P. Accaro | - Member |
| 3. Eng. Aloys J. Mwamanga | - Member |
| 4. Mr. Ole-Mbille Kissioki | -Secretary |

SECRETARIAT

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

FOR THE APPELLANT

- | | |
|---------------------------|---------------------------------|
| 1. Ms. Happiness Kategile | - Director of Corporate Affairs |
| 2. Mr. Solomon Mgunda | - Business Development Manager |
| 3. Mr. Gabriel Masinga | - Advocate, Vam Associates |

FOR THE RESPONDENT

1. Mr. Anael Kaale - Head, Procurement Management Unit
2. Ms. Donesta Simon - Legal Officer

This Decision was scheduled for delivery today 17th February, 2017 and we proceed to deliver it.

The Appeal at hand is in respect of Tender No. AE/004/2016-17/HQ/IV/01 for Provision of Catering Services (hereinafter referred to as "the Tender"), lodged by M/s Ako Group Limited (hereinafter referred to as "the Appellant") against Tanzania Food and Drugs Authority, commonly known by its acronym TFDA (hereinafter referred to as "the Respondent").

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:

On 14th November 2016, the Respondent issued mini competition quotations to five shortlisted suppliers approved by the Government Procurement Services Agency (GPSA). The deadline for submission of the tenders was on 21st November 2016, whereby two tenders were received from the Appellant and M/s Mageta General Services Limited.

The two tenders were subjected to evaluation which was conducted in three stages namely; Preliminary, Detailed and Post Qualification Evaluation. Both passed the Preliminary as well as the Detailed Evaluation

stages. At Post Qualification process, the tender by M/s Mageta General Services Limited was ranked first and was considered to be the lowest evaluated tender. It was thus recommended for award of the contract by the Evaluation Committee and the recommendation was approved by the Tender Board at its meeting held on 5th December, 2016.

The Appellant received a letter from the Respondent with Ref. No. AB.124/444/01/22 dated 21st December 2016 as a Notice of Intention to award the contract to M/s Mageta General Services Ltd., without reasons why his tender was unsuccessful.

Aggrieved, on 27th December 2016, the Appellant sought for administrative review to the Respondent's Accounting Officer on the following grounds;

- i. That, the Notice of Intention to Award the contract issued by the Respondent was not signed by the Respondent's Accounting Officer;
- ii. That, they have been providing catering services to the Respondent for the past six years with no record of complaints on either the service or the quality of the food they served;
- iii. That, their company is compliant to the Tender Document and that they have been registered with GPSA, OSHA() and the Respondent (TFDA) himself. Additionally, they are recognized for having ISO() certificate for catering services. Thus, they qualify to provide services to the Respondent and had an added advantage over the proposed successful tenderer;

- iv. That, they are more experienced in the business than the proposed successful tenderer as verified by their track record contained in their tender;
- v. They are financially sound to provide desired services to the Respondent even on longer credit terms; and
- vi. They doubt whether the proposed successful tenderer has such attributes.

On 4th January 2017, the Respondent delivered his decision, admitting and rectifying the error of not signing the letter; informing the Appellant that the previous contract between them was not on a rolling basis as well as stating that the evaluation process was fairly done.

Dissatisfied further by the Respondent's decision, on 17th January 2017, the Appellant filed this Appeal.

SUBMISSIONS BY THE APPELLANT

The Appellant submitted on the following grounds;

- i. That, the decision to disqualify their tender did not state the grounds for their failure;
- ii. That, his bid is more responsive than that of the proposed successful tenderer who lacks the requisite experience.

In expounding his grounds of Appeal, the Appellant's counsel submitted that, the Respondent's Notice of Intention to award the Tender dated 21st December 2016, did not contain reasons for his disqualification. According to the Appellant, this act is contrary to the law.

With regard to the second ground of Appeal, the counsel for the Appellant submitted that the Respondent has awarded the Tender basing on the lowest price and without considering other requirements of the Tender document including experience, which according to them, the proposed successful tenderer lacked.

When asked by the Members of the Appeals Authority where in the Tender Document the requirement of experience was provided, the counsel admitted that it was not there but can be understood by "necessary implication".

In finalizing his submissions, the Appellant's counsel submitted that the business relationship they have built with the Respondent for the past six years does not justify rejection of their tender.

Finally the Appellant prayed for the following reliefs:-

- a. Order for nullifying the award of the contract to the proposed successful tenderer.
- b. Order the Respondent to award the contract to the Appellant.
- c. Any other Order the Appeals Authority may deem just to grant.

SUBMISSIONS BY THE RESPONDENT

The Respondent's written as well as oral replies to the grounds of Appeal may be summarized as follows:-

- i. That, they had complied with Regulation 231(1),(2) and (4) of the Public Procurement Regulations GN. No. 446 of 2013 (hereinafter referred to as the Regulations). In notifying the Appellant of intention to award the contract and accord him the right to complain and appeal.
- ii. That, the Tender Document did not provide for the requirement of experience for the tenderers. Thus, the Award of Tender to the proposed successful tenderer was proper since they relied upon GPSA shortlist of such service providers.
- iii. That, the Award of the Tender is proper as it was made to the lowest evaluated tenderer, which the Appellant was not.

Finally the Respondent prayed for the following reliefs:-

- a) Order to dismiss the Appeal;
- b) Order to uphold their decision to award the contract to the proposed successful bidder; and
- c) Any other Order the Appeals Authority deems just to grant.

ANALYSIS BY THE APPEALS AUTHORITY

It should be noted from the outset that, amongst the grounds of Appeal is the Respondent's failure to avail reasons for disqualification of the Appellant's tender. The Appeals Authority observed that, the Appellant while seeking for administrative review did not list this as a ground. The Appeals Authority invoking Section 88(4) of the Public Procurement Act, Act No. 7 of 2011 (hereinafter referred to as the Act) as amended, together with Rule 13(5) of the Public Procurement Rules, (GN.No.411 of 2014),

rejects this ground for the reason that the same was not in the Appellant's grounds for administrative review but an afterthought. To entertain this ground at this juncture would be a clear violation of the law.

Therefore, the Appeals Authority is of the view that there are two main issues calling for determination of the Appeal, these are;-

1. Whether the award of the tender to the proposed successful tenderer was justified; and
2. What reliefs, if any, are the parties entitled to

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

1. Whether the award of the tender to the proposed successful tenderer was justified

In resolving this issue, the Appeals Authority took cognizance of the Appellant's contention that the proposed successful bidder had no experience compared to them. Indeed nothing has been attached to indicate his experience in provision of catering services. On the other hand, as rightly pointed out by the Respondent, the Tender Document in which Terms of Reference are provided did not require bidders to prove their experience. Therefore, the Appeals Authority is of the settled view that since experience was not among the requirements provided for in the Tender Document, the same is immaterial.

The above notwithstanding, the so called Statement of Requirements is vague and couched in generic terms contrary to Section 72 (1) and (2) of the Act which require criteria to be measurable and quantifiable. For purposes of demonstration some of the unquantifiable and unmeasurable Requirements are reproduced herein below;

(iii) Ensure proper selection of food materials to minimize chances of preparing low quality or unfit food

(iv) Ensure adherence to Good Hygiene Practises during food preparation and handling to avoid contamination.

(x) Staff employed by the service provider must undergo medical examination after every six months.

(xi) If preferred food is to be kept for sometimes before being served, it should be kept at a temperature above 60 Centigrade to minimize growth of disease causing micro-organism.

(xiv) Food handlers having sore and any other skin diseases likely to contaminate food should not allowed to handle food until medical personnel has certified that he/she is no longer suffering from the said disease.

Logic dictates that the above quoted Requirements could not assist the Evaluation Committee to adequately evaluate and subsequently obtain a substantially responsive bidder for provision of the intended services as the same are neither measurable nor quantifiable.

In the course of reviewing the Evaluation Report, the Appeals Authority observed that tenders were subjected to three evaluation stages in order to determine their responsiveness. However, those stages are not provided for in the Tender Document. It is therefore a mystery as to where from the Evaluation Committee derived these stages. Regulation 203(1) of the Regulations requires all criteria to be explicitly stated in the Tender Document and tender evaluation to be consistent with the terms and conditions prescribed therein.

It was further observed with utter dismay that the Evaluators just indicated the word "Comply" beside each refined Statement of Requirement without showing in detail how the said bidders complied with these requirements.

That being not enough, both bidders was subjected to Post Qualification evaluation while Regulation 224(1) of the Regulations requires Post Qualification to be conducted to the lowest evaluated bidder only. Thus, the Respondent erred in law for post-qualifying both bidders.

Furthermore, the Appeals Authority observed in the same aspect that, the criteria used to post qualify the bidders were not provided for in the Tender Document. This is contrary to Regulation 224(2) of the Regulations which requires the criteria for post qualification to be indicated in the Tender Document. As a result, the Appellant together with the proposed successful tenderer were post qualified using different criteria. Therefore, the Appeals Authority is of the considered view that the Respondent's acts in this

regard contravened the law as well as the procurement principle enshrined under Section 4A (3) of the Act which reads;

Procuring entities shall, in the execution of their duties, undertake to achieve the highest standards of equity, taking into account-

- a) Equality of opportunity to all tenderers;
- b) Fairness of treatment to all parties.

(Emphasis Added)

From the above analysis the Appeals Authority is of the firm view that, it was difficult to ascertain the validity of the award to the proposed successful tenderer. Accordingly, the Appeals Authority's conclusion with regard to the first issue is that the Award of the Tender to the proposed successful tenderer was not justified.

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

In resolving this issue, the Appeals Authority took cognizance of its findings on issue No. 1 above and prayers by the parties. In so doing, the Appeals Authority observed that the tender process was marred by irregularities and that the award of the Tender was not justified. The Award of the Tender to the proposed successful tenderer is therefore void. The prayer to order the Respondent to award the contract to the Appellant cannot be issued for lack of mandate.

With regard to the prayers by the Respondent, the Appeals Authority rejects them based on findings of the Appeals Authority on the first issue above.

On the basis of the aforesaid conclusions, the Appeal succeeds to the extent stated. The Respondent is ordered to re-tender in observance of the law.

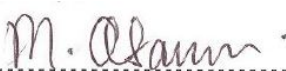
It is so ordered.

Each party to bear own costs.

This Decision is binding and may be enforced in accordance with Section 97(8) of the Act, as amended.

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

This Decision is delivered in the presence of the Appellant accompanied by Josephat Ndelembi and Daniel Eliamani (legal Counsels) and in absence of the Respondent, this 17th day of February, 2017.


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Ms. MONICA P.OTARU
Ag. CHAIRPERSON

MEMBERS:

1. ENG. ALOYS MWAMANGA 

2. MR. LOUIS ACCARC 