

IN THE  
PUBLIC PROCUREMENT APPEALS AUTHORITY  
AT DAR ES SALAAM  
APPEAL CASE No. 19 OF 2016-17

BETWEEN

M/S NYAKIRANG'ANI CONSTRUCTION LTD.....APPELLANT

AND

MUSOMA MUNICIPAL COUNCIL .....RESPONDENT

DECISION

CORAM

- |                           |   |                 |
|---------------------------|---|-----------------|
| 1. Ms. Monica P. Otaru    | - | Ag. Chairperson |
| 2. Mr. Louis Accaro       | - | Member          |
| 3. Eng. Aloys Mwamanga    | - | Member          |
| 4. Ms. Florida R. Mapunda | - | Ag. Secretary   |

SECRETARIAT

- |                           |   |               |
|---------------------------|---|---------------|
| 1. Ms. Violet S. Limilabo | - | Legal Officer |
|---------------------------|---|---------------|

FOR THE APPELLANT

- |                          |   |                          |
|--------------------------|---|--------------------------|
| 1. Mr. Mahuza Mumangi    | - | Managing Director        |
| 2. Dr. G.W. Mazara       | - | Chairman                 |
| 3. Mr. Jeremiah Mtobesya | - | Advocate                 |
| 4. Mr. Kusaya Wambura    | - | Project Manager          |
| 5. Mr. Samwel Mangesho   | - | Legal Manager – CBA Bank |

## FOR THE RESPONDENT

1. Mrs. Fidelica G. Myovella - Municipal Director
2. Ms. Savella Paulo - Principal Legal Officer
3. Mr. John Masero - Member of Tender Board
4. Eng. Faustin M. Tarai - Regional Secretariat Engineer
5. Eng. Joseph Mkwizu - Municipal Engineer- Musoma
6. Mrs. Juliana S. Mboye - Head of PMU
7. Eng. Shemangace Davis - PC-WBWG, PO-RALG
8. Mr. Gilbert Mfinanga - SPC- ULGSP, PO-RALG

This Decision was set for delivery today, 14<sup>th</sup> March 2017, and we proceed to deliver it.

This Appeal was lodged to the Public Procurement Appeals Authority (hereinafter referred to as "the Appeals Authority") by M/s Nyakirang'ani Construction Limited (hereinafter referred to as "the Appellant") against Musoma Municipal Council (hereinafter referred to as "the Respondent") and collectively referred to as "the Parties". The Appeal is in respect of Tender No. LGA/064/2016/2017/W/R/01 for Upgrading of Musoma Urban Roads to Bitumen Standard (hereinafter referred to as "the Tender").

After going through the records submitted by the Parties, the facts of the Appeal may be summarized as follows:

The Respondent vide the Daily News newspaper dated 3<sup>rd</sup> November 2016 invited tenderers to submit tenders under the International Competitive Tendering procedures specified in the Public Procurement

Act of 2011, as amended, (hereinafter referred to as "the Act") and Public Procurement Regulations, GN. No. 446 of 2013 (hereinafter referred to as "GN. No. 446 of 2013"). By the deadline of 25<sup>th</sup> November 2016 only two tenders were received from the following firms:-

- i) M/s Nyakirang'ani Construction Ltd; and
- ii) M/s Nyanza Road Works Ltd.

The tenders were subjected to evaluation which was conducted in three stages namely; Preliminary, Detailed and Post-qualification evaluation. The tender submitted by the Appellant was found to be non-responsive at the Preliminary Evaluation.

The remaining tender by M/s Nyanza Road Works Ltd was subjected to further Detailed and Post Qualification evaluation. After completion of the evaluation processes, the Evaluation Committee found the tender to be substantially responsive and therefore recommended it for the award of the contract. The Evaluation Committee further recommended negotiations to be carried on with the proposed successful tenderer on various areas including; price, availability of missing equipment, availability of qualified personnel and re-submission of works program.

The Tender Board at its meeting held on 28<sup>th</sup> December, 2016, approved negotiations with the proposed successful tenderer. On 06<sup>th</sup> January, 2017, the negotiations between the Respondent and the proposed successful tenderer were conducted, in which; amongst others, the contract price of TZS 11,912,857,618.93 (VAT exclusive) was reduced to TZS 9,930,059,618.54 (VAT exclusive). On 03<sup>rd</sup> February 2017 the Tender Board approved the negotiations report and the award of the

contract to M/s Nyanza Road Works Ltd at the above quoted contract price.

On 07<sup>th</sup> February 2017, the Respondent issued a notice of intention to award the contract to all bidders who participated in the Tender. The said notice informed the Appellant that his tender was disqualified for being non-responsive.

Aggrieved by the Respondent's intention to award the Tender to the proposed successful tenderer, the Appellant on 10<sup>th</sup> February 2017 wrote a letter to the Respondent seeking to be availed reasons for their disqualification.

On 15<sup>th</sup> February 2017 the Respondent replied that the Appellant's tender was disqualified for failure to comply with Clause 17 of the ITT. The Respondent further informed the Appellant that, its complaint was not proper in the eyes of the law as it failed to comply with requirements of Regulation 42 of the Local Government Authorities Tender Boards Establishment and Proceedings Regulation of 2014, (hereinafter referred to as "GN. No. 330 of 2014").

Dissatisfied with the response, on 20<sup>th</sup> February 2017 the Appellant lodged this Appeal to the Appeals Authority.

#### SUBMISSIONS BY THE APPELLANT

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

That the Respondent erred in law for failure to inform the Appellant reasons for disqualification of their tender contrary to Regulation 231(4) of GN. No. 446 of 2013. The Appellant contended that, they became aware that their tender was disqualified for a defective Bid Security only after receiving the Respondent's replies to the Statement of Appeal lodged to this Authority.

The Appellant contended further that, they had submitted a valid Bid Security as per the requirement of the Tender Document. Having one signature could not have invalidated it. It was claimed that according to the issuing bank-CBA, the Bid Security signed by a Branch Manager alone was valid. The Bid Security was to expire on 24<sup>th</sup> May 2017, however, in the letter of clarification dated 8<sup>th</sup> December 2016, the CBA Bank, mistakenly informed the Respondent that the same had expired on 24<sup>th</sup> May 2016, even before it was issued. The Appellant vehemently argued that, it is simply not possible for the bank to issue a Bid Security which had already expired, thus, it was evidently a typographical error which the Respondent should have ignored.

With regard to the price quoted by the successful tenderer, the Appellant submitted that, the Respondent's award proposal contravened the law since the Appellant had quoted lowest price (TZS 12,272,036,066/-VAT inclusive) compared to that of the successful tenderer; therefore they deserved to be awarded the Tender. The Appellant submitted further that, they were shocked to see major changes that have been done on the price of the proposed successful tenderer. Claiming that the price of almost TZS 14 billion (VAT inclusive), was unscrupulously reduced to TZS 9,930,059,618.54 (VAT exclusive).

It was further argued that, the Respondent erred in law for refusing to entertain the Appellant's application for administrative review. That according to Section 96 of the Act, the Respondent was required to entertain the application for administrative review as lodged; to the contrary, the Respondent refused to entertain it asserting that it failed to comply with Regulation 42 of GN. No. 330 of 2014. The Appellant argued further that, their application for administrative review complied with the said Regulation 42 and the Respondent ought to have entertained it. They further stated that as the law does not give Accounting Officers a fallback position in case of non-compliance, the Respondent ought to have entertained the Appellant's complaint under any circumstances.

Finally, the Appellant prayed for the following orders:-

- a. Review the whole procurement process and assess the authenticity of the award.
- b. Nullify the award of the Tender to the proposed successful tenderer.
- c. Order the Respondent to award the Tender to the bidder who deserves and who had met the evaluation criteria and offered the lowest evaluated price.
- d. Cost of the Appeal as per the following breakdown;
  - i) Appeal Filing fees TZS 200,000/-
  - ii) Transport and accommodation from Musoma to Dar es salaam TZS 1,000,000/-
  - iii) Advocates fees TZS 5,000,000/-
- e. Any other relief the Authority may deem just and fit to grant.

## REPLIES BY THE RESPONDENT

The Respondent's replies on the grounds of Appeal may be summarized as follows;

That, the Appellant's tender was disqualified at the Preliminary Evaluation for failure to comply with Clause 17 of the ITT. That the Respondent's notice of intention to award was in accordance with the law and it informed the Appellant that its tender was disqualified for being non responsive. Furthermore, the Respondent submitted that, his letter dated 15<sup>th</sup> February 2017 informed the Appellant that its tender was disqualified for failure to comply with Clause 17.1, 17.3 and 17.6 of the ITT. Since the Appellant participated in this tender process, it was presumed that they were aware of Clause 17 of the ITT on Bid Security issues. Thus, it was not proper for the Appellant to claim that they were not given reasons for their disqualification.

On the point of Bid Security, the Respondent persisted that, the Appellant's tender was disqualified at the Preliminary Evaluation for having submitted a defective Bid Security which lacked signature of the authorizing personnel. The Bid Security bore two stamps, one had a signature of the Branch Manager and the second one was not signed.

The Respondent sought for clarifications about the validity of the Bid Security from the issuing bank, CBA Bank. In response, the Bank confirmed that the Bid Security was issued by them and it was valid. The Bank stated further that the Bid Security "expires on 24<sup>th</sup> May 2016". From the response of the Bank the Respondent observed that the Bid Security had already expired at that time of bidding and thus they disqualified the Appellant's tender.

In addition to the above reason, the Respondent claimed that the Appellant's tender was also disqualified for failure to attach certified copies of legal documents contrary to Clause 11.1(h) of the ITT read together with Clause 8 of the Tender Data Sheet (TDS).

In response about the reduction of price quoted by the proposed successful tenderer, the Respondent submitted that, the changes in price were caused by two factors; namely, deduction of VAT and negotiations. The Respondent contended that, although after correction of errors the price of the proposed successful tenderer increased to 14 billion, since the project is funded by the World Bank and is not subject to VAT, the VAT was deducted. The balance was subjected to negotiations as per Section 76(2) of the Act and it was reduced to TZS 9,930,059,618.54.

With regard to the Appellant's claim that the Respondent refused to entertain his application for administrative review, the Respondent submitted that, they had not refused to handle the said claim. That having responded in writing was a clear evidence that the claim was entertained. The Respondent continued to persist that, the Appellant did not comply with the requirements of GN. No.330 of 2014.

Finally, the Respondent prayed for the following reliefs;

- a) A declaration that the procurement process was conducted in accordance with the law;
- b) An order that the Respondent be allowed to carry on with the project as it is funded by the World Bank and it phases out in December 2017.



- c) A declaration that the Appellant was fairly disqualified and award to M/s Nyanza Road Works Ltd be maintained.
- d) Payment of compensation to the tune of TZS 20,000,000/- being transport costs, accommodation and disturbance.
- e) Any other relief the Authority may deem just and fit to grant.

### ANALYSIS BY THE APPEALS AUTHORITY

In this Appeal, it is our considered view that there are four triable issues to be determined. These are:-

1. Whether the disqualification of the Appellant was proper in law;
2. Whether the award to the proposed successful tenderer is justified;
3. Whether the Appellant's letter of 10<sup>th</sup> 2017 February is an application for administrative review; and
4. To What reliefs, if any, are the parties entitled to.

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

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

In order to determine the above issue, the Appeals Authority revisited the documents submitted *vis-as-vis* the applicable law. The Evaluation Report indicates that the Appellant's tender was disqualified for submitting a defective Bid Security and uncertified legal documents.

Clause 17 of the ITT as modified by Clause 13 of the TDS provides guidance on the Bid Security issues. Clause 13 of the TDS required bid security to be in the form of bank guarantee with amount of TZS 130,000,000/- and be valid for 28 days beyond the validity period of the Tender. The Appeals Authority revisited the tender submitted by the Appellant and noted that the same was attached with a Bid Security in the form of bank guarantee from CBA Bank. The Bid Security was worth TZS 130,000,000/- and was valid until 24<sup>th</sup> May 2017. The Appeals Authority observed further that the said Bid Security lacked signature of one of the authorizing personnel and the said anomaly was also noted by the Respondent who sought for clarification from the Bank. It was observed further that the Bank confirmed that the Bid Security was “valid and it expires on 24<sup>th</sup> May 2016”. The Appeals Authority observed that, the Respondent having received such clarification from the Bank disqualified the Appellant’s tender for the reason that the Bid Security had already expired.

From the above facts, the Appeals Authority is of the firm view that, it was not proper to disqualify the Appellant’s tender for the reason of Bid Security. This is based on the fact that, after the Respondent had received confirmation that the Bid Security was valid from the CBA Bank (issuer of the same), they ought to have proceeded to evaluate the Appellant. The issue of expiry date ought to have not caused the Appellant’s disqualification because the original Bid Security attached to the Appellant’s bid clearly showed that the expiry date was 24<sup>th</sup> May 2017 and not 24<sup>th</sup> May 2016. The Appeals Authority observed further that, the CBA Bank after realizing that they had made a mistake in

specifying the Bid Security's expiry date, wrote another letter to the Respondent correcting their own mistake by clearly specifying that the Appellant's Bid Security's expiry date was 24<sup>th</sup> May 2017. Furthermore, the Appeals Authority finds it to be impossible for the Bank to have issued a Bid Security which had already expired; however, if that is possible then it would be expected the original bid security to bare a date which shows that it had already expired. Therefore, the Appeals Authority is of the settled view that, much as the CBA Bank confirmed that the bid security was valid for having only one signature, the issue of Bid Security's expiry date carries no weight in this regard.

The Appeals Authority considered the second reason for disqualification of the Appellant's tender that they had attached uncertified legal documents and find it proper to substantiate the same by reviewing the Tender Document and the Appellant's bid. In the course of so doing, the Appeals Authority observed that Clause 8 of the TDS required tenderers to submit certified copies of the documents which prove legality of their existence in the industry. For purposes of clarity the Appeals Authority reproduces Clause 8 of the TDS as hereunder;

"Other information or materials required to be completed and submitted by tenderers include;

- a) Certified copies of original documents defining the constitution or legal status, place of registration and principal place of business; written power of attorney authorizing the signatory of the bid to commit the bidder (TIN, VRN, Business Licence, CRB Registration and Technical CV's" (Emphasis supplied).

Having noted that the above quoted provision clearly entails that the attached legal documents were to be certified, the Appeals Authority revisited the Appellant's tender and observed that, the attached legal documents like Certificate of Incorporation, CRB Registration Certificate, TIN, VAT Certificate and Business License were not certified. The Appeals Authority finds the Appellant to have failed to comply with requirement of Clause 8 of the TDS and therefore the Respondent was justified to reject their tender.

From the above facts the Appeals Authority is of the settled view that the Appellant has been fairly disqualified for failure to attach certified legal documents as it was required by the Tender Document. Therefore the first issue is answered in the affirmative.

## 2.0 Whether the award to the proposed successful tenderer is justified

In resolving this issue the Appeals Authority considered the Appellant's contention that they doubt the validity of the award to the proposed successful tenderer since there was a substantial difference between quoted price and the awarded price.

In order to substantiate the validity of the Appellant's claim, the Appeals Authority revisited the documents submitted and observed that, the read out price for the proposed successful tenderer was TZS 13,902,438,769.49 (VAT inclusive). During detailed evaluation the tender of the proposed successful tenderer was found with computational errors amounting to TZS 154,732,993.25; hence his quoted price increased to

TZS 14,057,171,762.74. The Appeals Authority observed further that, the Respondent deducted VAT since the project is funded by the World Bank and it is VAT exclusive; hence the price changed to TZS 11,916,857,426.05. It was further observed that TZS 11,916,857,426.05 was subjected to negotiations and as a result the price was reduced to TZS 9,930,059,618.54.

From the analysis made in the Evaluation Report as well as in the Negotiation Report the Appeals Authority is satisfied that the changes made on the price of the proposed successful tenderer were proper and in accordance with the law.

Therefore, the Appeals Authority is of the firm view that the award to the proposed successful tenderer is proper and justified. As such, the second issue is answered in the affirmative as well.

### 3.0 Whether the Appellant's letter of 10<sup>th</sup> February 2017 is an application for administrative review

In resolving this issue the Appeals Authority considered the Respondent's contentions that the Appellant's application for administrative review to them was not proper in the eyes of the law as it contravened Regulation 42(1),(2) and (3) of GN. No. 330 of 2014.

Clause 3 of the Invitation to Tender clearly indicates that the applicable Regulation for this Tender is GN. No. 446 of 2013. Clause 46 of the ITT provides guidance on submission of applications for administrative review. This Clause 46 read together with Regulation 105 of GN No. 446 of 2013 requires an application for administrative review to include

details of the disputed procurement process, provisions which have been breached, an explanation of how they were breached and remedies sought. The Appellant's letter dated 10<sup>th</sup> February 2017 complied with these requirements save for the point of remedies sought. The Appellant challenged the Respondent's failure to include reasons for their disqualification in the notice of intention to award. We are in agreement with the Appellant that the notice of intention to award failed to comply with Regulation 231(4)(c) of GN No. 446 of 2013 as it did not specify the specific reasons for Appellant's disqualification. The reason contained in the said notice (reason for non-selection:-Non-responsive) is vague and not specific. Having so noted the Appeals Authority is satisfied that the Appellant's letter qualifies to be an application for administrative review. Further to that, the only remedy the Appellant could have sought was to be given specific reasons for their disqualification and the same was indeed sought.

Furthermore, since the Tender Advertisement had clearly specified that the applicable Regulation for this Tender is GN. No. 446 of 2013, the Appeals Authority finds it inappropriate to reject the Appellant's application for administrative review for failure to observe GN. No.330 of 2014.

Therefore, the Appeals Authority is of the considered view that the Appellant's letter to the Respondent dated 10<sup>th</sup> February 2017 is a proper application for administrative review. The Appeals Authority is of the firm view that the application for administrative review was entertained by the Respondent although they did not provide specific reasons for the

Appellant's disqualification, as a result the Appellant correctly opted to seek for further recourse from this Appeals Authority.

Accordingly, the Appeals Authority concludes the third issue in the affirmative.

#### 4.0 To what reliefs, if any, are the Parties entitled to

In determining the prayers by the Parties, the Appeals Authority took cognizance of its findings made on issue one above that the Appellant was fairly disqualified for failure to submit certified copies of legal documents and state that their disqualification was fairly made. The Appeals Authority finds the Appeal to partly have merits since the Respondent also erred in law for failure to give the Appellant specific reasons for their disqualification until the matter was submitted before the Appeals Authority.

Therefore, the Appeals Authority partly dismisses the Appeal to the extent above indicated and partly upholds it and allows the Respondent to proceed with the tender process. The Appeals Authority orders the Respondent to compensate the Appellant the sum of TZS 2,200,000/- which include Appeal filing fees and other costs incurred by the Appellant in this Appeal.

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 both Parties, this 14<sup>th</sup> March, 2017.

  
.....

MONICA P. OTARU  
AG. CHAIRPERSON

MEMBERS:

1. ENG. ALOYS MWAMANGA   
.....

2. MR. LOUIS ACCARO   
.....