

**IN THE PUBLIC PROCUREMENT APPEALS AUTHORITY
AT DAR ES SALAAM
APPEAL CASE NO. 18 OF 2019-20**

**BETWEEN
M/S VIA AVIATION JV WITH NATIONAL AVIATION
SERVICES.....APPELLANT**

AND

AIR TANZANIA COMPANY LIMITED.....RESPONDENT

DECISION

CORAM

- | | |
|-------------------------------------|-----------------|
| 1. Hon. Justice (rtd) Sauda Mjasiri | - Chairperson |
| 2. CPA. Fredrick Rumanyika | - Member |
| 3. Adv. Rosan Mbwambo | - Member |
| 4. Ms. Ndeonika Mwaikambo | - Member |
| 5. Ms. Florida Mapunda | - Ag. Secretary |

SECRETARIAT

- | | |
|------------------------|-----------------|
| 1. Ms. Violet Limilabo | - Legal Officer |
| 2. Mr. Hamis Tika | - Legal Officer |

FOR THE APPELLANT

- | | |
|-----------------------|-----------------------------------|
| 1. Mr. Evans Mlewa | - Cooperate affairs Manager |
| 2. Mr. Heri R. Mbiro | - Advocate- Breakthrough Attorney |
| 3. Ms. Doreen George | - Advocate- Breakthrough Attorney |
| 4. Mr. Morren Nduguru | - Advocate- Breakthrough Attorney |

FOR THE RESPONDENT

- | | |
|--------------------------|---|
| 1. Mr. John Nzunda | - Company Secretary |
| 2. Mr. Fredrick Kukombwa | - Head of Procurement Management
Unit (HPMU) |
| 3. Mr. Kitula Yango | - Head of Planning Unit |

The Appeal was lodged by M/s Via Aviation JV with National Aviation Services (hereinafter referred to as "**the Appellant**") against Air Tanzania Company Limited commonly known by its acronym ATCL (hereinafter referred to as "**the Respondent**").

The Appeal is in respect of Tender No. PA/100/2019-2020/HQ/NC/31 for *Design, Develop, Supply and Operate of Airport Business Lounges at Julius Nyerere International Airport Terminal III* (hereinafter referred to as "**the Tender**").

The Tender was conducted using the International Competitive Bidding procedures specified under the Public Procurement Act, No. 7 of 2011 as amended (hereinafter referred to as "**the Act**") and the Public Procurement Regulations, GN. No. 446 of 2013 and GN.No. 333 of 2016 (hereinafter referred to as "**the Regulations**").

The Respondent through the Daily News newspaper dated 13th December 2019, invited eligible tenderers to participate in the Tender. The deadline for submission of Tenders was set for 13th January 2020, whereby four (4) tenders were received.

Tenders were then subjected to evaluation which was conducted into three stages namely; preliminary, detailed and financial evaluation. During preliminary evaluation two tenders including that of the Appellant were disqualified for being found non responsive to the requirement of the Tender Document. The remaining two tenders were subjected to detailed evaluation. In that process one tender was disqualified for failure to comply



with the specified requirements. The tender by M/s Tourvest Holding (PTY) Ltd JV with M/s CI Group Ltd was financially evaluated. After completion of the financial evaluation process, the Evaluation Committee recommended award of the Tender to M/s Tourvest Holding (PTY) Ltd JV with M/s CI Group Ltd at a contract price of USD 420 per Square Meter and Concession fee of 30% of the gross turnover amounting to USD 5,792,440 (Five Million Seven Hundred Ninety Two Thousand four Hundred and Forty) for the term of ten years.

The Tender Board at its meeting held on 11th February 2020, deliberated and approved the award as recommended by the Evaluation Committee subject to post-qualification, negotiation of VAT, other taxes and clarification on concession fee.

On 12th February 2020, the Respondent issued the Notice of Intention to award the Tender to all tenderers who participated in the Tender process. The Notice informed the bidders that the Tender is intended to be awarded to M/s Tourvest Holding (PTY) Ltd JV with M/s CI Group Ltd. Specifically the Appellant was informed that, its tender was disqualified at the preliminary evaluation stage for failure to submit Tax Clearance Certificate.

Dissatisfied with the reason given for its disqualification, on 19th February 2020, the Appellant applied for administrative review to the Respondent. On 24th February 2020, the Respondent issued a decision dismissing the Appellant's application for administrative review. Aggrieved by the decision, on 5th March 2020, the Appellant lodged this Appeal.



GROUND OF APPEAL

The grounds of Appeal as stated in the Appellant's Statement of Appeal as well as oral submissions during the hearing are summarised as follows:-

1. That, the Respondent erred in law for its failure to appreciate differences, powers and rights arising between preliminary and detailed evaluation of tenders. The Appellant argued that its tender was received and evaluated at all stages without being rejected. Thus, its tender was substantially responsive without any material deviation as it complied with the Instructions To Tenderers (ITT) and the Act.
2. That, if the Appellant's failure to submit Tax Clearance Certificate was fatal the Respondent ought to have rejected its tender at the Preliminary Evaluation stage pursuant to Clause 27.3 of the ITT and the Appellant should have been informed. To the contrary; the Respondent did not do so until at the time of issuance of the Notice of Intention to award, when the Appellant was informed of the reason for its disqualification.

The Appellant's Counsel added that, the Respondent erred by disqualifying the Appellant's tender for lacking Tax Clearance Certificate. According to the counsel, failure to submit a Tax Clearance Certificate cannot be termed as a material deviation which warrants rejection of the Tender. The Appellant also admitted to such omission during the Tender Opening ceremony and requested the Respondent's consent to submit it but the request was refused. Counsel for the Appellant argued that, submission of Tax Clearance Certificate at the tender opening would not have prejudiced

rights of any other bidder since it neither affected the price quoted by bidders nor the subject matter of the Tender. The Appellant insisted that its tender could have been considered at the detailed evaluation stage to determine its compliance with the requirements of the tender.

Furthermore, the Appellant's counsel argued that Tax Clearance status may change within a day, thus it is important when signing the contract and not during the tender opening. In relation to International bidders, a tax clearance certificate would have been submitted during the signing of the contract and could not have been used to eliminate them.

In addition to that the Appellant's counsel argued that, Clauses 8, 11, 12.3 and 12.5 of the Guideline for Determination of Major and Minor Deviation issued on October 2017 by the Public Procurement Regulatory Authority (PPRA) (Guidelines) provide guidance for omissions in respect of material and non material deviation. The Guideline provides that documents which cannot be tempered with by the bidders should be allowed to be submitted afterwards if the same were not submitted as part of the bid. According to Clause 12.5 of the Guideline non submission of trade licence and contractor's permit may not lead to disqualification of a tenderer. Based on such guidance, the Appellant's Counsel submitted that non submission of Tax Clearance certificate was not fatal.

3. That, the Respondent intends to award the tender to M/s Tourvest Holding (PTY) Ltd JV with M/s CI Group Ltd which lacks eligibility qualifications. The Appellant argued that, it has been in this industry for several years. The



proposed bidder is not known in the industry. Thus it lacks the required experience in running business lounges in International airports despite having quoted a higher price.

4. Finally, the Appellant prayed for the following orders which are reproduced as under:-

- i. Annulment of the decision to summarily dismiss our bid without due regard to the law and reason;*
- ii. Revision of the Respondent's decision to remove our bid from evaluation and in its place order for full re-evaluation of the tenders which were submitted as to the gist of their content since they were deemed to be substantially responsive;*
- iii. Order the Respondent to proceed with the Tender process in lawful manner after finding in affirmative prayer (i) and (ii) above;*
- iv. Alternatively and in addition to (i) and (ii) above find the intended awardee has no qualifications requisite to warrant and justify the intended award; and*
- v. Any other order and relief the Appeals Authority may deem fit to grant.*

REPLY BY THE RESPONDENT

The Respondent's reply to the Appellant's grounds of Appeal as well as oral submissions during the hearing may be summarised as follows:-



1. That, the Appellant was disqualified at the preliminary evaluation stage for failure to submit Tax Clearance Certificate contrary to Clause 9 (iv) of the Bid Data Sheet (BDS) which modified Clause 11.1(e) of the ITT. Due to that omission the Appellant's tender was not considered at the detailed evaluation stage.

2. That, the Appellant's tender was not rejected during the Tender opening ceremony, but that does not mean that it's tender went through all stages of evaluation. The Respondent submitted that the Tender Opening Committee does not have mandate to reject the tenders. Its mandate is only to receive and submit them to the procurement management unit for evaluation purpose. The Respondent argued further that, there is no law that allow rejection of the tender during opening ceremony, since all tenders received were to be subjected to evaluation to determine responsiveness. The Appellant's tender was among the four tenders received by the Respondent which were subjected to evaluation. The Appellant's tender did not include a Tax Clearance Certificate. It was therefore, disqualified at the preliminary evaluation stage.

3. That, failure to submit Tax Clearance Certificate was a material deviation which justified rejection of the Appellant's tender. The Respondent disputes the Appellant's assertion that the said omission ought to have been rectified by allowing the Appellant to submit the Tax Clearance Certificate. The Respondent argued that if the Appellant had been allowed to submit the Tax Clearance Certificate, it would have prejudiced other bidders who complied with the requirement under Clause 9 (iv) of the



BDS. The Respondent also submitted that Clause 27.1 of the ITT relied upon by the Appellant is a standard requirement. However, the Appellant was mandatorily required to comply with other requirements provided in the BDS which amends or modifies the ITT.

Furthermore, the Respondent submitted that a Tax Clearance Certificate is a floating document which needs to be ascertained at the Tender opening and not at the time of signing the contract as asserted by the Appellant. The Respondent also disputed the Guideline relied upon by the Appellant, since the same does not supersede the provisions of the Act.

4. That, the Procuring Entity has been vested with powers to determine tenderers responsiveness pursuant to the requirements of the Tender Document and in accordance with the law. The Respondent conducted evaluation process and found that M/s Tourvest Holding (PTY) Ltd JV with M/s CI Group Ltd had requisite qualifications, thus the JV was proposed for award of the Tender.
5. Finally, the Respondent prayed for the following orders which are reproduced hereunder:
 - i. The Respondent's decision should not be annulled as prayed, because the same was taken within the provision of the law; on the contrary the Appeals Authority should affirm the Respondent's decision;*
 - ii. The Respondent's decision should not be reviewed and no evaluation should be ordered because the decision has not contravened any*



provisions of the law rather it was arrived at after following the procedures as per the letter of the law;

- iii. Remedy No. (iii) should be disregarded after finding negatively in remedies No. (i) and (ii);*
- iv. Find that the intended awardee has the requisite qualifications for the intended award and hold and order accordingly;*
- v. No comment regarding remedy No. (v).*

ANALYSIS BY THE APPEALS AUTHORITY

The Appeals Authority having gone through the Appeal record and having considered submissions during the hearing is of the considered view that the Appeal centres on three main issues as agreed upon by the parties. These are as follows:

- 1. Whether the disqualification of the Appellant's tender was justified;**
- 2. Whether award of the Tender to the proposed bidder was proper in law; and**
- 3. What reliefs, if any, are the parties entitled to.**

Having identified the issues in dispute, the Appeals Authority proceeded to resolve them as hereunder:-

- 1.0 Whether the disqualification of the Appellant's tender was justified.**



In relation to issue No. 1, the Appellant readily admitted that the Tax Clearance Certificate was not attached to its tender document. However Counsel for the Appellant strongly relied on the following arguments:-

- a) Its failure to submit Tax Clearance Certificate was not a material deviation to warrant rejection of its tender; and
- b) The Respondent's failure to notify the Appellant about its rejection status immediately after the completion of Preliminary Evaluation contravened the requirement of the law.

In resolving the Appellant's first contention, the Appeals Authority revisited Clauses 11.1 (b) and (e), 12.1, 27.2, 27.3, 27.5 of the ITT, Clauses 9 and 10 of the BDS, Clauses 11, 12.3 and 12.5 of the Guideline and Regulations 202(4) and (5) and 204(2) of the Regulations.

Having reviewed the said provisions the Appeals Authority observed that Clause 11.1 of the ITT provide for documents constituting the bid. Documents constituting the bid under Clause 11.1(b) of the ITT include documentary evidence that the tenderer is eligible to bid. Documents establishing tenderers eligibility are according to Clause 12.1 of the ITT listed in Clauses 9 and 10 of the BDS. Clause 9 of the BDS referring to Clause 11.1(e) of the ITT lists documents which must be included in the bid. Amongst them is a valid Tax Clearance Certificate. Clause 9 of the BDS read as follows:-

BDS. "9 In addition to the documents stated in ITB Clause 11, the following documents must be included with the Bid

Local Operators shall submit Legal documents of



- (i) Certificate of incorporation,*
- (ii) Valid Business licence,*
- (iii) VAT and TIN Certificate*
- (iv) Valid Tax Clearance Certificate***
- (v) Letter of intent for JV (IF APPLICABLE)*

Clause 27.3 of the ITT and Regulation 202(4) and (5) of the Regulations provide as follows:-

ITT. "27.3 The Procuring Entity will confirm that the documents and information specified under ITB Clause 11 and 12 have been provided in the bid. If any of these documents or information is missing, or is not provided in accordance with the instructions to tenderers, the bid shall be rejected."

Reg. "202(4) Prior to the detailed evaluation of tenders, the tender evaluation committee shall carry out a preliminary examination of the tenders to determine whether or not-

- (a) Each tender is substantially responsive to the requirements of the tender document;*
- (b) The required securities have been provided;*
- (c) The document have been properly signed; and*
- (d) The tenders are otherwise generally in order*

(5) For the purpose of this regulation a tender is considered to be substantially responsive if it conforms to all the terms, conditions and specifications of the tender document without material deviations or reservations."



According to the Appellant, failure to submit a valid Tax Clearance Certificate was a minor deviation and if the Respondent had allowed its submission at a later stage, it would neither have prejudiced the rights of others bidders nor the Respondent's rights in the intended contract. The Appeals Authority rejects the Appellant's argument on the ground that a valid Tax Clearance Certificate was among the legal document establishing the tenderers eligibility.

Regulation 204(2) of the Regulations clearly provides what is to be considered as material deviations which justify rejection of a tender. It is provided as follows:-

Reg. "204(2) *Material deviations to commercial terms and conditions, which justify rejection of a tender shall include the following:*

(a)...

(b) failure to satisfy eligibility requirements;

(c)...

(d)...

(e)...

(f)

(g)...

(h)...

(i)...

(j)...; and

(k) failure to submit major supporting documents required by the tendering documents to determine substantial responsiveness of a tender."

In view of what has been stated herein above, it is crystal clear that the Appellant's failure to submit a valid Tax Clearance Certificate constitutes a material deviation.

In relation to Clauses 11, 12.3 and 12.5 of the Guideline, the Appeals Authority finds that despite the Guideline utmost importance it cannot override the requirement of the law and Regulations cited herein above.

In relation to the Appellant's second contention that it ought to have been notified of its non-responsiveness immediately after completion of the preliminary evaluation, the Appeals Authority is of the firm view that this is contrary to the requirements of the Act and its Regulations. According to Section 60(3) of the Act and Regulation 231(2) and (4) of the Regulations tender result are to be communicated to the tenderers after evaluation process has been completed and the Tender Board had approved award of the Tender. There is no provision under the law which requires procuring entities to communicate tender results after completion of each evaluation stage.

The Appeals Authority would like to state that under Regulation 196 of the Regulations, the duty of the Tender Opening Committee is to accept and open tenders which have been received before the deadline. The committee does not have mandate of rejecting any tender even if at the



time of tender opening some information is missing. After tender opening, the tender opening committee would submit all the tenders to the procurement management unit for further steps which includes evaluation. See Regulation 199 of the Regulations.


Given the circumstances, the Appeals Authority concludes the first issue in the affirmative.

2.0 Whether award of the Tender to the proposed bidder was proper in law.

In relation to issue No. 2 the Appellant challenged the proposed award as the successful bidder is unknown to the industry. However, the Respondent was of the view that, the intended awardee is qualified and therefore the award was proper.

In resolving this issue, the Appeals Authority reviewed the documents submitted before it and observed that the tenders were required to be evaluated into four stages namely; preliminary, detailed, financial and post-qualification. In this Tender, tenders were evaluated in the first three stages. There was no Post qualification conducted to the proposed bidder.

Clause 33 of the ITB stated in clear terms that Post-qualification would be conducted. Further to that, the Tender Board at its meeting held on 11th February 2020, had approved the award subject to Post qualification. Post-qualification would have enabled the Respondent to ascertain whether or not the proposed bidder has complied with the legal requirement, possess



the requisite experience and has capability and resources to carry out the contract effectively. See Section 53(1) of the Act.

The Appeals Authority revisited the Tender submitted by the proposed successful tenderer and observed the following:-

- a) According to Clause 4.1 of the Terms of Reference (Minimum Qualifications) the required experience is Five years. However, the proposed bidder did not indicate in its bid, compliance with such a requirement. It had attached a letter indicating that it has been providing airport lounge services under the name of Alba Easy Lounge but there is no substantial proof to that effect. There were no legal documents establishing the legal relationship between M/s Tourvest Holding (PTY) Ltd and Alba Easy Lounge. What is available is only a Joint Venture Agreement between M/s Tourvest Holding (PTY) Ltd and M/s CI Group Ltd.
- b) The experience testimonials attached in the proposed bidder's tender indicate that the firm's activities are mostly based on tourism and printing business and not airport lounge services.
- c) According to Regulation 9(10)(e) of the Regulations, the joint venture agreement should indicate the role of each party in the Joint venture. The Proposed bidder had attached the Joint Venture agreement which only indicates financial contribution of each party.



d) The Joint Venture Agreement indicates that the lead partner of the JV is M/s Tourvest Holding (PTY) Ltd. However, there is a Power of Attorney by the JV Members indicating that the lead partner is M/s CI Group Ltd. Further to that, there is a second Power of Attorney issued by all JV Members appointing Muntazir Mustafa Dato as Attorney. The Powers of Attorneys are both dated 10th January 2020.

Given the above circumstances, it is the Appeals Authority's conclusion that the award to the proposed bidder is not proper in law. Hence issue No. 2 is answered in the negative.

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

Taking cognizance of the findings on the first and second issues above, the Appeals Authority partly allows the Appeal. In view of our findings on issue No. 2 we hereby nullify the intended award to the proposed bidder. In the circumstances, the Respondent is hereby ordered to re-start the Tender process in accordance with the law. We make no order as to costs.

It is so ordered.

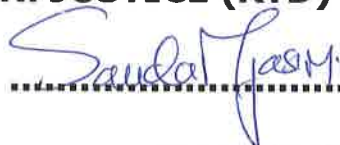
This Decision is binding and can be enforced in accordance with Section 97(8) of the Act.

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 the Respondent this 27th day of March 2020.

HON. JUSTICE (RTD) SAUDA MJASIRI


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CHAIRPERSON

MEMBERS:

1. CPA. FREDRICK RUMANYIKA.....

2. ADV. ROSAN MBWAMBO.....

3. MS. NDEONIKA MWAIKAMBO.....