

**IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY
AT DAR ES SALAAM**

APPEAL CASE NO. 50 OF 2018-19

BETWEEN

M/S BAMB SOLUTION (T) LIMITEDAPPELLANT

AND

KARIAKOO MARKET CORPORATION.....RESPONDENT

DECISION

CORAM

- | | |
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| 1. Hon. Justice (rtd) Sauda Mjasiri | - Chairperson |
| 2. Dr. Leonada Mwangike | - Member |
| 3. Mr. Rhoben Nkori | - Member |
| 4. Ms. Florida Mapunda | - Ag.Secretary |

SECRETARIAT

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

FOR THE APPELLANT

- | | |
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| 1. Mr. Kuzeny Msungu | - General Manager |
| 2. Mr. Brian Kikoti | - Director |
| 3. Mr. Matokeo Barnabas | - Operations Manager |

FOR THE RESPONDENT

1. Mr. Erasto M. Njalika - Legal Officer
2. Ms. Huba Abou - Ag. HPMU

This Appeal was lodged by M/s Bamm Solution (T) Ltd (hereinafter referred to as "**the Appellant**") against Kariakoo Market Corporation (hereinafter referred to as "**the Respondent**"). The Appeal is in respect of Tender No. PA/109/KMC/2019/2020/NC/08 for Provision of Public Toilet Services to the Main Market (hereinafter referred to as "**the Tender**").

The Tender was conducted through National Competitive Bidding procedures specified in the Public Procurement Act of 2011, as amended (hereinafter referred to as "**the Act**") and Public Procurement Regulations, Government Notices No. 446 of 2013 and No.333 of 2016 (hereinafter referred to as "**the Regulations**").

After going through the record of Appeal submitted to the Public Procurement Appeals Authority (hereinafter referred to as "**the Appeals Authority**"), the Appeal may be summarized as follows:-

On 30th April 2019, the Respondent invited eligible tenderers to submit bids for the Tender. The deadline for submission of tenders was set for 13th May 2019, whereby seven firms submitted their tenders.

Tenders were then subjected to evaluation which was conducted into three stages namely; preliminary, detailed evaluation and price comparison.



During the preliminary evaluation one tender was disqualified for failure to comply with the requirement of the Tender Document. The remaining six tenders were subjected to detailed evaluation. At this stage three tenders including that of the Appellant were disqualified. The Appellant's tender was disqualified for failure to indicate methodology for the assignment. The remaining three tenders were subjected to price comparison. After completion of the evaluation process the Evaluation Committee recommended award of the Tender to M/s Kahangara General Store Company Ltd at the contract price of TZS One Hundred Fifty Seven Million Two Hundred Thousand (157,200,000.00) per year. On 30th May 2019, the Tender Board approved the award as recommended.

On 10th June 2019, the Respondent issued the Notice of Intention to award the Tender to all bidders who participated in the Tender. The Notice informed the Appellant that the Respondent intends to award the Tender to M/s Kahangara General Store Company Ltd at the contract price of TZS Thirteen Million One Hundred Thousand (13,100,000) per month. The Notice also informed the Appellant that its tender was disqualified for failure to indicate the methodology to undertake the assignment contrary to Clause 28.3 of the Instructions To Tenderer (ITT).

Dissatisfied, on 11th June 2019, the Appellant applied for administrative review to the Respondent's Accounting Officer challenging the reason given for its disqualification. On 19th June 2019, the Respondent issued its decision which dismissed the Appellant's complaint. Dissatisfied further on 27th June 2019, the Appellant filed this Appeal.



The following issues were agreed upon by the parties and approved by the Appeals Authority:-

- 1. Whether the Appellant was unfairly disqualified; and**
- 2. What reliefs, if any, are the parties entitled to.**

SUBMISSIONS BY THE APPELLANT

The Appellant's grounds of Appeal as well as oral submissions during the hearing of the Appeal may be summarized as follows:-

1. That, the Appellant disputes its disqualification for failure to attach the required methodology in its bid. It submitted that the required methodology was attached in its bid through Activity Schedule which was based on the scope of work. According to the Appellant the Activity Schedule and Methodology had the same content describing how the tenderer would undertake the assignment. To comply with such requirement the Appellant indicated that it would comply with Activity Schedule.
2. That, the Respondent conceded that the Appellant had attached Activity Schedule for cleaning and maintenance services which is a part of scope of work, action plan as well as Methodology. The Appellant stated further that the Respondent has failed to differentiate the two in terms of the contents. In this Tender the two meant the same thing.
3. That, Activity Schedule forms part of the contract pursuant to Clause 2.4 of the General Conditions of Contract (GCC), which the Appellant



had complied with. Therefore, disqualifying it from the Tender Process on that basis is not justified.

4. That, the ground for its disqualification is irrelevant, since the Appellant complied with the requirements of the Tender Document.
5. That, the Respondent proceeded with signing of the contract while it was aware that there were complaints raised against the award made to the successful bidder. The Respondent ought to have suspended the Tender proceedings until determination of the matter.
6. That, the Appellant was the highest bidder compared to the successful bidder. Therefore if the Respondent had awarded the tender to it, it would have benefited in terms of revenue collection.

Finally, the Appellant prayed for the following orders:-

- i. To nullify the signed contract;
- ii. Evaluation process be reviewed so as to determine if it was based on an unknown criteria and
- iii. Review the tender by the proposed bidder to ascertain if it complied with the requirements.

REPLY BY THE RESPONDENT

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



1. That, the Appellant was disqualified from the tender process for its failure to indicate methodology to undertake the assignment contrary to the requirements of Clause 28.3 read together with Clause 22 of the Tender Data Sheet (TDS).
2. That, the Appellant failed to differentiate between methodology to undertake the assignment and Activity Schedule provided in the Tender Document. Activity Schedule listed the activities to be performed and tenderers were required to provide for a means (Methodology) of the activities which would be undertaken.
3. That, the Appellant's disqualification complied with the requirement of Section 72(1) and (2) of the Act.
4. That, the Tender was awarded to M/s Kahangara General Store Company Ltd as the firm was found to have complied with the requirements of the Tender Document.

Finally the Respondent prayed for the following orders:-

- i. A declaration that M/s Kahangara General Store Ltd was a successful tenderer;
- ii. Appeal be dismissed with costs;
- iii. Any other relief the Appeals Authority deems fit and just to grant.

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ANALYSIS BY THE APPEALS AUTHORITY

On issue No. 1, that is, whether the Appellant was unfairly disqualified, the Appeals Authority revisited Clause 28 of the ITB which was modified by Clause 22 of the TDS which is reproduced as under:-

BDS. 22 "Criteria for Tender evaluation shall be:-

- (i) Experience in similar assignment: Mention at least five firms and contact person where such services had been contracted for at least three years.*
- (ii) Key personnel: Five years experience in Service of an equivalent nature and volume.*
- (iii)*
- (iv) **Methodology** and those mentioned in TDS Clause 10 and ITT Clause 11.1."*

During the hearing the Appellant insisted that it complied with such a requirement by indicating in its bid that it will comply with the Activity Schedule provided under Section VII of the Tender Document. According to it, the Activity Schedule contained a specific requirement which shows how cleaning services would be done. The Appellant had indicated that it will comply with the said requirements.

The Respondent was asked by Members of the Appeals Authority to explain the difference between the Methodology and specific requirements provided under Section VII of the activity Schedule. In its response, it

stated that the Activity Schedule and Methodology were provided under different sections of the Tender Document. It further added that bidders were required to comply with Methodology by stating various means that would be used in Provision of Toilet Services. When further asked how the bidders were assessed in the absence of detailed explanations in terms of the required Methodology, the Respondent replied that, bidders were evaluated by indicating methodology they will employ in executing the contract.

According to the record of appeal and the submissions by the parties, the Appeals Authority is of the considered view that, the methodology criterion was not clearly set out in the Tender Document. The Tender Document merely stated *methodology* was one of the criteria to be evaluated. Therefore it was not easy to evaluate the said criterion. The law requires that the criteria should be clearly set out in order to determine how it would be evaluated. The Appeals Authority is of the considered view that this is necessary to ensure that equal treatment is accorded to all the bidders. Failure to do so contravene the requirements under Section 72(1) (2) of the Act read together with Regulations 184(2) of the Regulations, which provide that the criteria for evaluation shall be set out in the Tender Document and the same must be quantifiable and able to be evaluated. The provision read as follows:-

Sec. 72(1)" The basis for tender evaluation and selection of the successful tenderer shall be clearly specified in the tender document.



(2) The tender documents shall specify factors, in addition to price, which may be taken into account in evaluating a tender and how such factors may be quantified or otherwise evaluated."

Reg. 184(2) "The solicitation documents shall be prescribed to permit and encourage competition and such documents shall set out clearly and precisely all information necessary for a prospective tenderer to prepare a tender."

[Emphasis added]

According to Oxford Advanced Learner's Dictionary; 7th Ed. at p. 926; the term methodology is defined as "*a set of methods and principles used to perform a particular activity.*"

The Respondent should have clearly indicated the *methodology* criterion.

The Appeals Authority revisited the tender by the successful bidder and observed that it attached a document titled methodology on how the activity would be performed. The Appeals Authority observed that the document reproduced the scope of work provided under item 1.2 Section VI of the Tender Document. Even though the Respondent claimed that the firm complied with Methodology requirement, the Appeals Authority is of the firm view that the said firm did not comply with Methodology requirement as the same was not specified.

In relation to the Appellant's argument that, the Respondent has proceeded with signing of the contract while a complaint was filed before this Authority, the Appeals Authority observed that, the Respondent



issued its decision in relation to the Appellant's complaint on 19th June 2019, the appeal was filed to the Appeals Authority on Thursday 27th June 2019. The Respondent signed the contract on 29th June 2019 prior to the notification from the Appeals Authority which was received on 1st July 2019.

Given our conclusions hereinabove, it is crystal clear that the tender process was irregular and it follows that the award made to the successful bidder was improper in the eyes of the law.

Based on the above findings the Appeals Authority is of the settled view that the Appellant was unfairly disqualified. Therefore the Appeals Authority concludes the first issue in the affirmative.

In relation to the second issue, that is, what reliefs, if any, are the parties entitled to, taking cognizance of the findings on the first issue, the Appeals Authority hereby allows the Appeal and nullifies the award. The Respondent is ordered to do the following:-

- To re-tender by issuing a new Tender Document in compliance with the law; and
- Given the nature and delicacy of the tender which involves cleaning and maintenance of toilets at Kariakoo Market, the Respondent is required to proceed with the services with M/s Kahangara General Stores Limited for a period of two months from the date of the issuance of this decision up to the date of finalization of the new tender process that is by the end of September 2019.



- We make no order as to costs.

Order accordingly.

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 29th July 2019

HON. JUSTICE (RTD) SAUDA MJASIRI


.....
CHAIRPERSON

MEMBERS:

1. DR. LEONADA MWAGIKE.....

2. MR. RHOBEN NKORI.....