

**IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY**

AT DAR ES SALAAM

APPEAL CASE NO. 39 OF 2016-17

BETWEEN

**M/S IMMUNOLABS MEDICAL SUPPLIES
LTD.....APPELLANT**

AND

**MINISTRY OF HEALTH, COMMUNITY DEVELOPMENT
GENDER, ELDERLY AND CHILDREN.....RESPONDENT**

RULING

CORAM

- | | |
|-------------------------------------|------------|
| 1. Hon. Vincent K.D Lyimo, J. (rtd) | -Chairman |
| 2. Mrs. Rosemary A. Lulabuka | -Member |
| 3. Eng. Fransis T. Marmo | -Member |
| 4. Mr. Ole-Mbille Kissioki | -Secretary |

SECRETARIAT

- | | |
|-------------------------|-----------------------|
| 1. Ms. Florida Mapuanda | -Senior Legal Officer |
| 2. Mr. Hamisi O. Tika | -Legal Officer |

FOR THE APPELLANT

- | | |
|--------------------|--------------------------------|
| 1. Mr. Heri Zuka | -Advocate, Joel &Co. Advocates |
| 2. Mr. Kepha Mwiti | -Managing Director |

3. Ms. Grace Urassa -Managing Director

FOR THE RESPONDENT

1. Mr. Castro E. Simba -Director of Procurement Management
2. Mr. Isaya Makoko -Legal Officer
3. Mr. Deogratias Kayombo -Administrator
4. Mr. Amandus M. Rutahiwa -Senior Supplies Officer

This Ruling was scheduled for delivery today 23rd June 2017, and we proceed to do so.

The Appeal was lodged by M/S Immunolabs Medical Supplies Ltd (hereinafter referred to as **“the Appellant”**) against the Ministry of Health, Community Development, Gender, and Elderly and Children (hereinafter referred to as **“the Respondent”**).

The Appeal is in respect of Tender No. **ME/007/2015/2016/EI/01** for the Supply, Installation and Maintenance of Diagnostic system for National Blood Transfusion Services (hereinafter referred to as **“the Tender”**).

Pursuant to 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 12th October 2015, the Respondent invited four (4) shortlisted firms to submit their proposals for the above Tender. The deadline for the submission of the proposals was set for 25th November 2015,

whereby all four invited firms responded and timely submitted their respective proposals.

The Evaluation Committee subjected the proposals to both technical and financial evaluations and ultimately, M/s Immunolabs Medical Supplies Ltd in JV with Ilex South Africa (Pty) Ltd. was recommended for award of the contract.

The Tender Board at its meeting held on 4th February 2016, did not approve the recommendations as the Board was not certain on the availability of the earmarked funds. The Tender Board directed the Procurement Management Unit (PMU) to make a follow-up with the Director of Curative Services (DCS) and to find solution on the availability of funds. However, on 26th May 2016, the Tender Board through a Circular Resolution approved the award of the contract to M/s Immunolabs Medical Supplies Ltd in JV with Ilex South Africa (Pty) Ltd at a contract price of TZS. 54,799,680,000.00 for five (5) years.

On 31st May 2016, the Respondent and the Appellant held negotiations on the contract price, delivery plan and the payment schedule. During the said negotiations, the Appellant requested to be paid an advance payment of fifteen percent (15%) to facilitate the implementation of the contract. The Respondent however, declined the request on the ground that the Tender Document had specifically provided for the payments modality; i.e. the payments were to be effected in accordance with the delivery schedule.

On 3rd June 2016, the Respondent issued the acceptance letter and the Appellant acknowledged the award of the contract on 8th June 2016.

It is on record that on 24th October 2016, the Appellant informed the Respondent that he had already instructed the manufacturer to produce the relevant instruments and was waiting for shipment. He further informed the Respondent that he had neither received the contract document nor confirmation on when he should proceed with delivery and installation. Apart from that, the Appellant informed the Respondent that he had sent some of his employees to Italy for training on the equipment and the smooth operation of the project.

On 8th December 2016, the Respondent replied to the Appellant's letter referred to above, informing the Appellant that the delay in the signing of the contract had been caused by Appellant's request for advance payment, a new term or counter offer not allowed under the Tender document. In that regard, the Appellant by his letter dated 16th December 2016, informed the Respondent that he was ready to embark on the project without relying on advance payment. In response, the Respondent on 6th March 2017, invited the Appellant for negotiations.

During negotiations held on 7th March 2017, the Respondent informed the Appellant that he intended to reject the tender due to the following reasons:-

- i. No funds had been released from the development partners who were to fund the project;
- ii. Budgetary constraints during the FY 2015/16 in which the Ministry could not solely finance the TZS. 54.7 billion Project.
- iii. Appellant's demand for advance payment of 15% that needed discussions by the management to determine whether they can afford such payments.

The Appellant disagreed with the Respondent's propositions on the grounds that following the acceptance letter issued by the Respondent; he had already mobilized both human and financial resources and had incurred considerable costs in preparation for the execution of the contract.

The Tender Board, at its meeting held on 17th March 2017, deliberated and approved the rejection of the Tender. Consequently, on 24th March 2017, the Respondent officially notified the Appellant that the tender had been rejected.

On 10th April 2017, the Appellant applied for administrative review to the Respondent's Accounting Officer disputing the rejection of the Tender. The Respondent however, did not respond to the Appellant's request.

Dissatisfied, on 15th May 2017, the Appellant lodged this Appeal.

SUBMISSIONS BY THE APPELLANT

The Appellant's ground of Appeal is centered on rejection of the proposal as hereunder:-

- i. That, the Respondent's decision to reject the proposal was made *per incuriam* hence null and void;
- ii. That, the Respondent did not comply with the procedures set under the law in rejecting the proposal; and
- iii. That, the Respondent's decision to reject the Proposal was erroneous since it attempted to reject a non-existent proposal.

Finally the Appellant prayed for the following orders:-

- i. The Respondent to compensate the Appellant costs incurred in mobilization and preparation of performance of the contract;
- ii. General damages;
- iii. Costs of this Appeal; and
- iv. Any other relief the Appeals Authority deems fit to grant.

REPLIES BY THE RESPONDENT

In reply the Respondent stated as follows;

- i. That, the rejection of the proposal was valid as it was caused by the Appellant's breach of the terms and conditions stated in the RFP. In expounding the point, the Respondent submitted that, the Appellant was supposed to supply, install and maintain machines from his own sources of income as per the RFP. To the contrary, the Appellant demanded advance payment of 15% for the installation of machines as opposed to

the RFP, entailing that, the Appellant submitted a counter offer that changed the Respondent's mind and frustrated the tender since there was no funds set aside as advance payment at that particular time and neither was a condition precedent for commencement of the contract.

- ii. That, considering the complexity of the project and the responsibilities of each party, it was necessary for the Appellant to consult the Respondent's first and gets instruction from him before incurring any cost for mobilization of the project as claimed.
- iii. That, the acceptance of the tender by itself is not final until signing of the formal contract to implement the project pursuant to Section 60 (7) of the Public Procurement Act, 2011 (hereinafter referred to as the Act read together with Regulation 233(1) of the Public Procurement Regulation of 2013 (hereinafter referred to GN.No. 446/2013. The Appellant was also required to wait for vetting of the contract as well as fulfilling the requirement to submit Performance Security before commencement of the project. Therefore, the Appellant's assertion that the decision to reject the tender was made *per incuriam* is disputed.
- iv. The assertion that the rejection of the tender did not complied with the law is disputed since the same was approved by the Ministerial Tender Board and also the Respondent made effort to meet with the Appellant's representatives and discuss the possibility of rejecting the tender due to budget constraints.

- v. That, at the time of rejection of the tender, the tender was still valid as other procedures were yet to be fulfilled for the formal contract to be signed pursuant to Section 60(7) of the Act read together with Regulation 233(1) of GN.No.446 of 2013, and allow implementation of the project. Thus, since the some procedures were yet to be fulfilled, the tender was pre-mature to be termed as a formal contract in its strict sense. Therefore, there was no reason for the Appellant to commence mobilization and commitment of funds before ascertaining the outcome of other procedures.

Finally the Respondent prayed for the following orders:-

- i. Rejection of all claims for compensation;
- ii. Rejection for general damages;
- iii. Respondent to be awarded costs for this Appeal;
- iv. Any other relief the Appeals Authority deems fit to grant.

ANALYSIS BY THE APPEALS AUTHORITY.

When the Appeal was called for hearing on 20th June 2017, the Appeals Authority having revisited various documents availed by the parties, noted the following facts:

- i. This Tender was floated in 2015, and was processed before the amendments to the Act which became effective in July 2016.
- ii. The Bid Validity Period for this Tender was one hundred and twenty (120) days and was never extended. As the

bids were opened on 25th November 2015, 120 days expired on 24th March 2016.

- iii. The Letter of offer of Contract was extended to the Appellant some seventy (70) days after the expiration of the Bid Validity Period.

In view of the above, the Appeals Authority asked the parties to consider as one of the main issues of the Appeal, whether there was in place a tender capable of review by way of an appeal before embarking onto the merits of the Appeal.

By consent the parties agreed that the matter be determined by the Appeals Authority basing on the documents submitted by them.

With that background, the Appeals Authority proceeded to determine the Appeal principally in terms of Part II of GN 411 of 2014, Rule 5(1)(a). The Appeals Authority is of the views that this Appeal has been centred on two major issues calling for determination. These are:-

1. **Whether there existed a valid tender for consideration after lapse of the bid validity period.**
2. **What relief(s), if any are parties entitled to**
 1. **Whether there existed a valid tender for consideration after lapse of the bid validity period**

In resolving this issue, the Appeals Authority revisited the Tender Document and observed that the Bid Valid Period for this tender as provided under Clause 25.1 of the Proposal Data Sheet (PDS) was

one hundred and twenty (120) days. According to the tender proceedings, the proposals were opened on 25th November 2015. In that respect, 120 days expired on 24th March 2016. According to Section 71 of the Act, read together with Regulation 191(3) of GN.NO.446/2013, the period for Bid Validity should be sufficient to enable the Respondent to finalize all procurement processes including the signing of the contract. Under certain conditions, the period may be extended to foster fair competition amongst the various bidders, to enhance fairness in the treatment of potential tenderers for purposes of enhancing value for money. In this Tender, neither the Respondent nor the Appellant found it appropriate to seek extension of the Bid Validity Period. It is on record that the letter of acceptance was issued by the Respondent on 3rd June 2016, which was outside the Tender Validity Period by almost seventy (70) days.

For purposes of clarity Section 71 of the Act and Regulation 191(3) of GN.NO.446/2013 is reproduced hereunder:-

Section 71: “The procuring entity shall require tenderers to make their tenders and tender securities including tender securing declaration valid for the periods specified in the tendering documents, sufficient to enable the procuring entity to complete the comparison and evaluation of the tenders and for the appropriate tender board to review the recommendations and approve the contract or contracts to be awarded **whilst the tenders are still valid**”.

Reg. 191(3): The period fixed by a procuring entity shall be sufficient to permit evaluation and comparison of tenders, for obtaining all necessary clearances and approvals, and for the notification of the award of contracts and finalize a contract but the **period shall not exceed one hundred and twenty days from the final** date fixed for submission of tenders.

In view of the above, the Appeals Authority is of the settled view that the award of the contract made by the Respondent after the lapse of the Bid Validity Period is impaired and that the subsequent actions by the parties were of no legal effect.

In this Appeal, and as shown above, the Bid Validity Period having expired on 24th March 2016, and without being extended, the Tender had effectively ceased to exist. The Appeals Authority is of the firm view that the act by the Respondent of rejecting the Tender a year later is tantamount to reject something that does not exist.

Accordingly, the Appeals Authority's conclusion with regard to the first issue is that there existed no valid tender for consideration after lapse of the bid validity period.

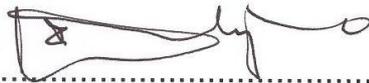
2. What relief(s), if any, are parties entitled to

In resolving this issue, the Appeals Authority took cognizance of its findings on the first issue and observes that since there is no valid Tender calling for determination, the Appeal at hand cannot stand. And it is hereby struck out. It is so ordered; and each party to bear own costs.

This Ruling 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 Ruling is delivered in the presence of the Appellant and the Respondent this 23rd June, 2017.



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HON. V.K.D. LYIMO (J) RTD

CHAIRMAN

MEMBERS:

1. **MRS. R.A LULABUKA**



2. **ENG. F.T MARMO**

