

IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY
AT DAR ES SALAAM

CONSOLIDATED APPEAL CASES NO. 17, 19 AND 21 OF 2015-
16.

BETWEEN

M/S NAGLA GENERAL SERVICES LIMITED.....1ST APPELLANT

M/S PORTABLE ENTERPRISES LIMITED.....2ND APPELLANT

M/S CARNIVAL INVESTMENTS LIMITED.....3RD APPELLANT

AND

TANZANIA PORTS AUTHORITY.....RESPONDENT

AND

M/S HAI SUB SUPPLIER COMPANY LIMITED.....INTERESTED
PARTY

DECISION.

CORAM

- | | |
|------------------------------|----------------|
| 1. Mrs. Rosemary A. Lulabuka | Chairperson |
| 2. Mr. Louis P. Accaro | - Member |
| 3. Eng. Francis T. Marmo | -Member |
| 4. Ms. Florida Mapunda | -Ag. Secretary |

SECRETARIAT

Mr. Hamisi O. Tika - Legal Officer

FOR THE 1ST APPELLANT

1. Mr. Julius Kalolo Bundala -Advocate, M.A. Ismail & co. advocates
2. Mr. Bethuel Peter -Advocate, M.A. Ismail & co. advocates
3. Mr. crispin Mtete -Consultant
4. Mr. Mohamed A. Seif -Managing Director
5. Ms. Fauzia M. Seif -Managing Director

FOR THE 2ND APPELLANT

1. Mr. George Michael -Managing Director
2. Mr. Deus Mjenge -Corporate General Services
3. Mr. Thobias J.Kigodi -Corporate General Services

FOR THE 3RD APPELLANT

1. Mr. Mohamed H. Omari -Operation Manager.
2. Mr.E.S. Makaranga -Advocate

FOR THE INTERESTED PARTY

1. Mr. Mohamed S. Hemed -General Manager
2. Mr. Hamidu J.Killa -Supervisor

FOR THE RESPONDENT.

1. Mr. Erasto Lugenge -Senior Legal Officer
2. Mr. Alex Seneu -Legal Officer
3. Mr. Daudence Mwano -Legal Officer
4. Mr. Ramadhani Kabelwa -Procurement Officer
5. Mr. Frederick T. Mndewa -Procurement Officer (MOT)
6. Ms. Lenna Nkaya -Labour Officer

FOR THE OBSERVERS

1. Mr. Shadrack Mkwelele – Kiomboi Holdings Ltd.
2. Mr. Barnabas Mrope - usafirishaji Afrika Limited.

This Decision was due for delivery today 19th January 2016 and we proceed to do so.

This Appeal was lodged by M/s Nagla General Services Limited, M/s Portable Enterprises Limited and M/s Carnival Investment Limited (hereinafter referred to as “the 1st, 2nd and 3rd Appellants”) respectively, against the Tanzania Ports Authority commonly known by its acronym, TPA (hereinafter referred to as “the Respondent”). Upon notification of the existence of the Appeal by the Appeals Authority to other tenderers who participated in the tender process, M/s Hai Sub Supplier Company Limited opted to join as an Interested Party.

The said Appeal is in respect of Tender No. AE/016/2013-14/DSM/NC/15 for the Provision of Labourers for Operational Services at Dar es Salaam Port-(Re-tendered) (hereinafter referred to as “the tender”). The said tender was divided into four groups namely; General Cargo Handling, RO-RO and Lighter Quay Operations, Container Handling Operations and Container Freight Services.

After going through the record of proceedings submitted to the Public Procurement Appeals Authority (hereinafter referred to as “the Appeals Authority”), as well as oral submissions by the parties during the hearing the facts of the Appeal may be summarized as follows:

The Respondent vide the Guardian Newspapers dated 10th September 2015, invited tenderers to submit their bids for the above Tender, the subject matter of this Appeal.

The said tender was conducted through National Competitive Tendering procedures specified in the Public Procurement Regulations, Government Notice No. 446 of 2013 (hereinafter referred to as "GN. 446/2013")

The deadline for the submission of the tenders was set for 6th October 2015, whereby eighteen (18) tenders were received from various tenderers; the Appellants inclusive.

The tenders were then subjected to two stages of evaluation, namely; preliminary and detailed evaluation.

At the preliminary evaluation stage, twelve tenders including the tender by the 3rd Appellant, M/s Carnival Investments Limited were disqualified for being none responsive to the Tender Document. The reason for its disqualification was that they had submitted irrelevant Business License contrary to Clause 11.1(h) of the Tender Document. The remaining six tenders including the tender by the 1st and 2nd Appellants qualified for the detailed evaluation.

That, during detailed evaluation, three tenders including the tender by the 2nd Appellant was disqualified for non compliance with the Tender Document. The Evaluation Committee observed its tender to have contained incomplete wage rate since it did not include double payments during weekends.

The three remained tenders by the 1st Appellant, M/s Hai Sub Supplier Company Limited and M/s Kiomoi Holdings Investments Limited were therefore subjected to price comparison and ranking. In that process, the Evaluation Committee observed that the tender price by the 1st

Appellant was higher compared to the two remaining tenders by M/s Hai Sub Supplier Company Limited and M/s Kiomboi Holdings Investments Limited. The Evaluation Committee observed further that, groups one and two in the tender have more port operations than groups three and four and that M/s Hai Sub Supplier Company Limited more experienced in performing port related works than M/s Kiomboi Holdings Investments Limited. They thus, recommended M/s Hai Sub Supplier for the award of the contract for groups 1 and 2 and M/s Kiomboi Holdings Investments Limited for groups 3 and 4 respectively for a period of two years.

The Tender Board at its meeting held on 10th November 2015 approved the recommendations by the Evaluation Committee and awarded the tender to M/s Hai Sub Supplier Company Limited and M/s Kiomboi Holdings Investments Limited for groups 1 & 2 and 3 &4 respectively.

That, on 11th November 2015, the Respondent vides a letter with Ref. No. DPS/3/1/18 notified the Appellants and other bidders of its intention to award the Tender to the proposed successful tenderers.

That, between 25th November 2015 and 4th December, 2015, the Appellants being dissatisfied with the Respondent's intention to award the Tender to the proposed successful tenderers, at different occasions sought for administrative review by the Respondent's Accounting Officer on the following consolidated grounds;

1. That, M/s Hai Sub Suppliers Company Limited lacks two years minimum work experience as provided in the Tender Document since it had been incorporated on 22nd May 2015.
2. That, there were other tenderers such as M/s CXC Africa Limited; M/s Dynamics Ship Contractors Limited and M/s Labour Pool Limited who qualified in terms of minimum work experience; and that their prices were lowest. Therefore, there

was no basis for the award to be preferred to M/s Hai Sub Suppliers Company Limited who has been recently incorporated.

3. That, the Respondent had already shown interest in favouring the proposed successful tenderer M/s Hai Sub Supplier Company Limited;
4. The tender was not widely advertised as required by the law.

That, between 30th November, 2015 and 4th January, 2016, the Respondent's Accounting Officer delivered his decision by dismissing the complaints and re-iterated his position to award the contract to the proposed successful tenderers.

That, aggrieved by the said decisions, between 8th December 2015 and 4th January 2016 respectively, the Appellants lodged their Appeals to the Appeals Authority.

The Appeals Authority having revisited the Appellants' grounds of Appeals contained in their statements deemed it prudent to consolidate the said grounds as hereunder;

SUBMISSIONS BY THE APPELLANTS

The consolidated Appellants' grounds of Appeal may be summarized as follows;

- i. That, the proposed successful tenderer M/s Hai Sub Supplier Company Limited lacks the minimum experience required under Clause 12.6 of the Instructions To Tenderers (ITT) and Clause 17 of the Tender Data Sheet (TDS), to wit, 2 years experience, since it was incorporated on May 22nd 2015. By that time, the company could not have met the requisite two years experience contained in the Tender Document. The

Respondent was therefore wrong to include work experience of the firm before it was registered as a company. They further stated that the two have different legal personalities.

- ii. That, during the Tender Opening Ceremony, the Chairman of the Tender Opening Committee disqualified M/s Kiomboi Holdings Investments Limited for not meeting the requirements of the Tender Document. He thus ought not to have emerged the winner. Therefore, the Respondent's proposal to award them a tender is contrary to Clause 11.1 (a) (b) and (c) and Clauses 12.2 and 12.3 of the ITT which provided for eligibility of the bidders.
- iii. That, both proposed successful bidders did not quote the lowest prices. Their prices were the highest compared to other bidders in the tender process. Awarding them tenders is defeating Regulations 212(a) and 213 of GN.NO.446/2013.
- iv. That, the Respondent is misleading by interpreting non-existing Section 14 (c) of the Employment and Labour Relations Act, 2004, since the workers on specific works cannot be considered as employees. The quotation of prices by both M/s Hai Sub Supplier Co. Ltd and M/s Kiomboi Holdings Investments Ltd was contrary to the law on specific works. Therefore, the Respondent was wrong to disqualify the 2nd Appellant in this regard.
- v. That, the tender was not widely advertised.

Finally the Appellants severally prayed as hereunder;

1st Appellant;

- i. Annulment of the decision by the Respondent to award the tender to the proposed successful tenderers.
- ii. Payments of compensation to the tune of TZS. 50,000,000/-
- iii. Award the tender on Group 1-General Cargo Handling to them or any other qualified bidder.

2nd Appellant

- i. Declaration that the Respondent's Notice of Intention to award the tender is in breach of the law because it intends to award the contract to bidders who do not meet the required conditions. The same should be cancelled and re-tendering order be issued.
- ii. Compensation of the costs incurred in relation to buying and participation in the tender process to the tune of TZS. 1,200,000/-
- iii. Payment of legal fees and costs incurred in relation to lodging of the Appeal to the tune of TZS. 500,000/- as per the following breakdown;
 - Legal fees TZS. 300,000/-
 - Appeal filing fees TZS. 200,000/-
- iv. Any other cost the Appeals Authority deems fit to grant.

3rd Appellant.

- i. Compensation of the costs incurred in relation to the buying and participation in the tender process to the tune of TZS. 11,750,000/-

- ii. Payment of legal fees and costs incurred in relation to lodging of the Appeal to the tune of TZS. 1,000,000.00 as per the following breakdown;
 - Legal fees TZS. 800,000/-
 - Appeal filing fees TZS. 200,000/-
- iii. Any other costs which the Appeals Authority may deem fit to grant.

REPLIES BY THE RESPONDENT TO THE GROUNDS OF APPEAL.

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

1. That, it is true that M/S Hai Sub Supplier Company Limited was incorporated on 22/05/2015 and that Clause 17 of the TDS and ITT Clause 12.6(b) provided for the experience to be demonstrated by a bidder to include a minimum the bidder has executed during the last two years; and the bidder was required to demonstrate as the prime provider of labourers in the provision of at least one service of a nature and complexity equivalent to the service required in this Tender. The Interested Party met this criterion since he has been rendering similar services to the Respondent for the past two (2) years.
2. That, M/S Hai Sub Supplier Company Limited has been operating as the sole proprietor using the above business name in rendering services and has since May, 2015 changed her status to a company limited by shares. Legally by changing her status she only acquired more responsibilities and liabilities different from the Directors. The former meant that she was the sole trader; where as in the latter the business is separate legal entity. By claiming that M/s Hai Sub

Supplier Company Limited had no required experience is to unfairly disqualify her on the basis that her status had changed. Changing status does not erase the experience one had acquired from performing similar activities for a number of years and even worth noting that M/S Hai Sub Supplier Company Limited did undertake and still performing similar services for the Respondent to date. The Respondent referred an example of Geita Gold Mine Company Limited's case, when it changed to ACCIA. The Respondent questioned as to whether the later would not carry over the experience of the former after the change of the name.

3. That, M/S Hai Sub Supplier Company Limited has for a number of times been providing services to the Respondent in several lots, although this was not the criteria used for selection but the criteria attributed her experience as per ITT.
4. That M/S Hai Sub Supplier Company Limited did on 3rd August, 2015 notified the Respondent that it has changed her status from sole proprietor to a Limited Liability Company and would in that regard assume the name of M/S Hai Sub Supplier Company Limited. The Respondent consented to the change and has continued operating with them under the new status.
5. That, the Directors of the Company have remained the same as well as offices, address, account number and personnel. Furthermore, in August, 2015 the Respondent executed an addendum with M/S Hai Sub Supplier Company Limited for provision of operational services at Dar es Salaam port. Thus, M/s Hai Sub Supplier Company Limited has been recognized as the

same supplier who assumed the services under similar terms and conditions.

6. That, all bidders were subjected to fair evaluation in strict adherence to the principles of procurement enshrined under the Public Procurement Act and its Regulations. The Respondent therefore, acted in due regard to basic principles of public procurement to make the best possible use of public funds with honesty and fairness; the best interests of a public body in giving all eligible tenderers equal opportunities to compete in providing services.
7. The Appellants failed to distinguish between lowest evaluated tender and the lowest prices. The other tenderers referred to by the Appellants were disqualified at the preliminary stages hence one cannot claim to have been the lowest evaluated tenderer by quoting lowest prices.
8. In response to the claims that M/S Hai Sub Supplier Company Limited violated the law in that the price tendered included statutory taxes payable exclusively by the employees in social security schemes, which cannot be borne by the employer or the Respondent; the Respondent stated that, it is misconception by the Appellants that statutory taxes do not include social security contributions. Such contributions are made by both employees and the employers, in this case employee and M/S Hai Sub Supplier Company Limited. Therefore it is illogical to assume that the Respondent would pay such contributions on behalf of the employer i.e M/S Hai Sub Supplier Company Limited. There must

be employment relationship between the Respondent and the employee so as to enable the Respondent to deduct and remit such contributions.

9. The assertions that M/s Kiomboi Holding Investment Limited was disqualified on the tender opening date for non-compliance with minimum wage rate is misleading since the records of the opening meeting does not provide for the same. However, whoever said so acted *ultra vires* the law.

10. That, the wage rate by the 2nd Appellant only showed rate paid to casual labourers for stevedoring operation was doubled and the other wage rates were not doubled as per minimum wage rate requirement under labour laws. Even the rate for service of stevedoring operations was not properly filled as it failed to show how much will be paid to casual labourers during the public holidays/weekend. Also the Appellant submitted differently the prices in the wage analysis sheet meaning that stevedoring operations had alternative rate which is contrary to Tender Data Sheet.

11. That all prices were to be quoted by all tenders as provided in the Tender Document and that they had to comply with labour laws.

Finally, the Respondent prayed for the following;

i. This Honourable Appeals Authority makes a declaration that the Respondent did conduct the procurement process in observance of the Public Procurement Law and Regulations.

- ii. That this Honourable Authority give a strong warning to the Appellants and deter such wishful tenderers who hope to illegally gain advantage through judicial process.
- iii. That, the Appellant be given a strong warning against attempts to prejudice decision of this Appeals Authority or future tendering process.
- iv. Dismissal of all reliefs made through this illegal and misguided approach.
- v. That his Appeal fail since it has no merit.

SUBMISSIONS BY THE INTERSTED PARTY.

The Interested Party's submissions in respect of the grounds of Appeal by the Appellants may be summarized as follows;

1. That, they have the requisite experience to perform the work they had been proposed to be awarded as opposed to the Appellant's assertions. The Tender Document required a bidder to demonstrate that he was a prime provider of labourers in the provision of at least one service of a nature and complexity equivalent to services required in the tender.
2. That, their firm was found in 2006 as Hai Sub Supplier which operated as a sole proprietor but later on, on 22nd May, 2015 upgraded its status to a limited liability company, with the same addresses and owners/ Directors.
3. That, they formed the firm for purposes of providing casual labourers services. Since then, to date, they have been undertaking the same works and services. And has been proving services to TPA under

various lots. All Appellants are well informed of the fact. It is therefore absurd for the Appellants to contend that they have no requisite experience to undertake the task while they are currently rendering services to the Respondent.

4. That, immediately after the change of their status from sole proprietor to a Limited liability company they informed the Respondent on the change.
5. That, Appellants fall short of differentiating between the lowest evaluated bidder and the lowest price. Therefore, their argument regarding this matter bears no legal stand.
6. They believe that the Respondent evaluated this tender in observance of the law and its intention to award the tender to them is proper taking cognizance that efficiency in Dar es salaam Port has increased with zero complaint from the Respondent.

Finally the Interested Party prayed for the following;

- i. A declaration that the Respondent rightly awarded them the tender in observance of the law hence they should proceed to award the contract.
- ii. Dismissal of the Appeal in its entirety.

ANALYSIS BY THE AUTHORITY

It should be noted from the outset that, on 13th January 2016, the 1st Appellant M/s Nagla General Services Limited lodged to this Appeals Authority an application that intended to amend his former statement of and add a new ground that M/s Hai Sub Supplier Company Limited 's tender did not disclose that one of his directors is an employee of the

Respondent – Dar es salaam port, thereby being in a position of insider dealing contrary to the law and hence vitiating their company's tender. During the hearing of the Appeal, the Appeals Authority rejected the said application on the ground that rule 13 (2) of the Public Procurement Appeals Rules 2014, GN.NO.411 of 2014, allows amendments of the statement of Appeals to be made within five (5) days from the date of lodging the former statement of Appeal. The Appeals Authority observed that, the 1st Appellant lodged his Appeal on 03rd December 2015, and that its application to amend the statement ought to have been made before 8th December 2015. To the contrary, the same was submitted almost forty (40) days later. The Appeals Authority observed further that, the 1st Appellant had knowledge of the new requested ground through information given to them by BRELA vide its letter with Ref. No. MIT/RC/117454/3 dated 30th November 2015, before they lodged their Appeal. The Appeals Authority is of the view that, 1st Appellant could have included such a ground when they lodged their Appeal on 3rd December 2015. It thus, rejected the Application.

It is also worth noting that, during the hearing, the counsel for the 2nd and 3rd Appellant's abandoned 3rd Appellant's contentions with regard to assertions that the tender was not widely advertised. In view of the above, the Appeals Authority would not delve with those issues.

In dealing with this Appeal therefore, the Appeals Authority having gone through the tender proceedings including various documents submitted by both parties and oral submissions during the hearing, it is of the view that the Appeal has been centred on three main issues calling for determination; and these are:-

1. Whether the proposed award of the tender to the proposed successful tenderers was proper at law.
2. Whether the second Appellant was unfairly disqualified.
3. To what reliefs, if any, are parties entitled to.

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

1. Whether the proposed award of the tender to the proposed successful tenderers was proper at law.

In resolving this issue, the Appeals Authority took cognisance of three contentions by the Appellants that; the M/s Hai Sub Supplier Company Limited did not meet the requisite experience provided in the tender document; M/s Kiomboi Holdings Investments Limited was disqualified during the tender opening ceremony and lastly that, the prices of both proposed successful tenderers were higher than few other bidders. In view of these contentions, the Appeals Authority deemed it prudent to frame the following sub issues;

- i. Whether M/s Hai Sub Supplier Company Limited had the requisite experience provided in the Tender Document
- ii. Whether it was proper to award M/s Kiomboi Holdings Investments Limited a contract while he was disqualified during Tender Opening Ceremony.
- iii. Whether the proposed successful tenderers' tender prices were the highest.

- i. Whether M/s Hai Sub Supplier Company Limited had the requisite experience provided in the Tender Document

In resolving this sub issues, the Appeals Authority revisited the cited Clause 17 of the TDS and observed that it required bidders to demonstrate experience as prime provider of at least one service of a nature and complexity during the last two (2) years.

The Clause reads;

"The experience required to be demonstrated by the bidder should include as a minimum the Bidder has executed during the last two (2) years the following;

Experience as prime provider of labourers in the provision of at least one service of a nature and

complexity equivalent to the service required in this tender.” (Emphasis supplied)

The Appeals Authority revisited the availed documents and observed that M/s Hai Sub Supplier Company Limited, the Interested Party, was incorporated on 22nd May 2015, as correctly submitted by the Appellants. Thus, counting from that date, to the date when tender were evaluated or proposed to be awarded the contract, the said company never had a minimum two years requisite experience as provided for under the TDS. The Appeals Authority noted that at the time the tender was floated, the company had only five months of operations. The company had offering similar services to the Respondent as a firm with a business name of Hai Sub Supplier, before it changed to a limited liability company.

The Appeals Authority further revisited Clause 5 of the TDS and observed that the eligible tenderers that were invited by the Respondent to bid for this Tender were the companies incorporated under the Companies Act Cap 212 R.E. 2002 and not as sole proprietors or individual persons. This entails therefore that, the experience the Respondent required related to the companies and not otherwise. The Appeals Authority reproduces Clause 5 of the TDS hereunder;

Clause 5. (i) *Eligible tenderer must be a limited company incorporated under company Act Cap 212 R.E. 2002*

(ii) *N/A*

In view of the above findings, it the Appeals Authority's considered views that it was wrong for the Respondent and the Interested Party to assume the experience of the defunct firm to transfer to the newly incorporated company since the two have separate legal entities as correctly submitted by the Appellants. The Respondent therefore ought to have disqualified them at the preliminary evaluation stage for failure to meet eligibility requirement so provided. In view of the above findings, the Appeals Authority's conclusion with regard to this sub issue is that M/s Hai Sub Suppliers Company Limited had no requisite experience provided for in the Tender Document.

ii. Whether it was proper to award M/s Kiomboi Holdings Investments Limited a contract while he disqualified during tender opening ceremony

In resolving this sub issue, the Appeals Authority considered the contentions by the Appellants that the said bidder was disqualified during the tender opening ceremony for lack of stamps/ company seal in their Form of Tender and Bid Securing Declaration. He therefore, ought

not to have been proposed to be awarded the tender. The Appeals Authority revisited Minutes of the Tender Opening Ceremony and could not find anything in support of the Appellants' contentions. The minutes identified only four items that were checked during the tender opening ceremony; and the bidders' representatives' one Mr. George Michael from the 2nd Appellant's signed them on behalf of other bidders. By signing the sheet confirms what transpired at the Opening Ceremony. The Appeals Authority observed that nowhere in the said Minutes indicates that M/s Kiomboi Holdings Investments Company Limited was disqualified at that juncture.

The above findings notwithstanding, the Appeals Authority revisited Clause 24 of the ITT which is a replica of Regulation 196 of GN.NO. 446/2013, which details the manner in which tenders are to be opened. The Clause does not provide for a disqualification of a bidder in event he did not submit a certain pertinent information or document. Clause 24 (3) of the said Clause provides in no uncertain terms what is to be read out during the tender opening ceremony, to include; Tender prices, the total amount of each tender and of any alternative tender (if have been requested or permitted), any discounts, the presence or absence of tender security or tender securing declaration and any other details specified in the Tender Data Sheet. The Appeals Authority revisited the

TDS and observed that none of the provision provided for the requirement of a bid to be stamped or sealed.

Apart from the above observation, the Appeals Authority is of the firm view that the Tender Opening Committee has no mandate under the law to disqualify a bidder at the tender opening ceremony even if such a bidder does not submit important information. Under the Act together with its regulations, the powers to disqualify a tenderer is vested unto the Evaluation Committee as per Section 40 of the Act and Regulations 202(1) and (3) of GN.NO 446/2013 and not the Chairman of the Tender Opening Ceremony as contended by the Appellants.

Accordingly, the Appeals Authority's conclusion with regard to this sub issue is that it was proper for the Respondent to propose award of tender to M/s Kiomboi Holdings Investment Limited, since, the termed disqualification during tender opening ceremony was tenuous.

- iii. Whether the proposed successful tenderers' tender prices were the highest.

The Appellants in their submissions contended that neither of the two proposed successful tenderers' tender prices was lower compared to some other tenderers' tender prices at the opening ceremony. Therefore,

awarding them vitiates Regulations 212 and 213 of GN.NO.446/2013 as their prices are higher.

The Appeals Authority revisited the Tender Document and observed that Clauses 27 to 34 of the ITT provided for evaluation stages under which tenders were to be subjected to, prior to award. Under the above clauses, clause 27 provided for a preliminary evaluation stage, in which, eligibility requirements were to be assessed. Those who met eligibility requirements were to be subjected to another stage provided under Clause 28 of the ITT, to wit; examination of terms and conditions specified in the General Conditions of the Contract (GCC) and the Special conditions of the Contract (SCC) and finally, those who passed the first two stages were to be commercially evaluated by assessing their prices before award as per Clauses 31, 33 and 35 of the ITT. The Clauses reads;

Clause 31 .1. The Procuring Entity shall evaluate and compare only the Tenders determined to be substantially responsive pursuant to ITT Clause 27 and the proposals of which have been determined to be adequate in accordance with ITT sub –Clause 28.2 or 28.3 (which in deed provided for the requirement of evaluation of technical aspects specified in the tender

document and rejection of the tender which is found to substantially non-responsive).

Clause. 33 "The tender with the lowest evaluated price from among those who are eligible, compliant and substantially responsive shall be the lowest evaluated tender. (Emphasis Added)

The Appeals Authority revisited the Evaluation Report and observed that all bidders referred to by the Appellants were eliminated at various stages of evaluation for failure to meet some eligibility criteria. These included 2nd and 3rd Appellants, respectively. It was therefore not proper for those bidders to be subjected to price comparison since they did not reach that stage. The Appellants reliance to Regulations 212 and 213 is misconception of the law since the said bidders ought to have passed the requirements of Regulation 204, that is, checking of substantial responsiveness to commercial terms and conditions; Regulation 205, that is, checking of substantial responsiveness to the technical requirements and finally price determination as provided for under Regulations 212 and 213 relied upon by the Appellants. The Appeals Authority concurs with the Respondent that only bidders whose bids were substantially responsive to the tender document were to be considered for price comparison. Therefore, by quoting low prices does not entail that the

respective bidder should necessarily win the tender. As they must undergo scrutiny through evaluation and finally price determination. The Appeals Authority does not agree with the Appellants that the proposed successful tenderers prices were higher as opposed to those named by them since the same were disqualified for non-conformity to the tender requirements.

Accordingly, the Appeals Authority's conclusion with regard to this sub issue is that the proposed successful tenderers' tender prices were not the highest as contended by the Appellants save for its findings under sub issue one.

In view of the above conclusions and findings on sub issues one, two and three above, the Appeals Authority's conclusion to the first issue is that the proposed award of the tender to M/s Kiomboi Holdings Investments Limited was proper at law save for the Interested Party.

2. Whether the 2nd Appellant was unfairly disqualified.

In resolving this issue, the Appeals Authority taking cognizance of the 2nd Appellant's submissions that the Respondent is misleading by interpreting non-existing Section 14 (c) of the Employment and Labour Relations Act, 2004, since the workers on specific works cannot be considered as employees and that the quotation of prices by both M/s

Hai Sub Supplier Co. Ltd and M/s Kiomboi Holdings Investments Ltd was contrary to the law on specific works.

The Appeals Authority revisited the Evaluation Report and observed that the 2nd Appellant was disqualified for failure to indicate wage rates on weekends and Public Holidays, a ground which he disputed to the Accounting Officer and again to this Appeal Appeals Authority.

Having revisited the Tender Document, the Appeals Authority observed that Clause 12 of the TDS required bidders to submit detailed wage rates payable to its labourers per shift of 8 hours, per unit, per 50kg, per TEUs as per Laws and Regulations of the United Republic of Tanzania. This information was equally provided for in the price schedules in which a bidder was to indicate. To the contrary, the 2nd Appellant did not comply with the requirement on the ground that payments of labourers depend on specific work and not what has been alluded by the Respondent. With due respect, the Appeals Authority does not buy the 2nd Appellant's idea. The law as provided under Regulation 203 (1) of GN.NO.446/2013 requires procuring entity to evaluate tenders based on what has been provided in the Tender Document. The proviso reads;

203(1) the tender evaluation shall be consistent with the terms and conditions prescribed in the tender documents and such evaluation shall be carried using criteria explicitly stated in the tender document.

In view of the above, the Appeals Authority does not hold the 2nd Appellant's submissions that the tender related to the specific work and that it did not entitle payments in the modality the Respondent had provided in the Tender Document. The Appeals Authority is of the considered view that, the 2nd Appellant upon realizing existence of such a criterion, he was under obligation to seek clarification from the Respondent on the matter immediately after he had purchased the Tender Document in terms of Regulation 13(1) of GN.NO.446/2013. And upon dissatisfaction, he ought to have complained to the Accounting Officer in terms of Sections 95 and 96 of the Act, prior to the proposed award. To the contrary, the 2nd Appellant remained silent until the award had been proposed. For purposes of clarity, the Appeals Authority reproduces Regulation 13 (1) as hereunder;

"Reg. 13(1) a tenderer may request a clarification of the solicitation documents from a procuring entity, provided that such a request is submitted to a procuring entity at least:

- (a) *In the case of competitive tendering methods, fourteen days prior to the deadline for the submission of the tenders: and*
- (b) *In the case of non competitive tendering methods, three days prior to the deadline for the submission of the tenders”.*

In view of the above findings, the Appeals Authority is of the firm view that, the 2nd Appellant assumed the role of the Tender Document while indeed was supposed to comply with the requirement so provided. The Respondent was therefore justified to disqualify the 2nd Appellant in terms of Regulation 205(a) of GN.NO. 446/ 2013.

Accordingly, the Appeals Authority's conclusion with regard to this issue is that the 2nd Appellant was fairly disqualified.

3. To what relief(s), if any, are parties entitled.

In resolving this issue, the Appeals Authority took cognizance of its findings on the first and second issues above and observed that the proposed award of the tender to M/s Kiomboi Holdings Investments Limited was in compliance with the law save for the Interested Party; M/s Hai Sub Supplier Company Limited. The Appeals Authority therefore nullifies the proposed award of tender to M/s Hai Sub Supplier Company but rejects the prayers to annul the proposed award of tender to M/s Kiomboi Holdings Investments Limited.

With regard to prayers for compensation for damages or preparations of the tenders by Appellants, the Appeals Authority cannot grant such a prayer since neither of the Appellants has justified the damage had suffered. Furthermore, all bidders are aware that in procurement proceedings, one or two bidders could emerge the winner(s) and that preparation of the tender is part and parcel of the process. However, the Appeals Authority accepts the prayers for award of costs regarding Appeal filing fees and legal fees as per the following breakdown;

- i. 1st Appellant- Appeal filing fees TZS. 200,000/-
- ii. 2nd Appellant - Appeal filing fees TZS. 200,000/- and legal fees TZS. 500,000/-
- iii. 3rd Appellants - Appeal filing fees TZS. 200,000/- and legal fees TZS. 500,000/-

With regard to the prayers by the Respondent that the Appeals Authority declares the procurement process was in observance of the law, the Appeals Authority partly accepts this prayer as the documents submitted so speak, save for the proposed award of the tender to the Interested Party M/s Hai Sub Supplier Company Limited.

With regard to the prayer for dismissal of the Appeal by the Appellants and all reliefs made therein, the Appeals Authority rejects this prayer as established above.

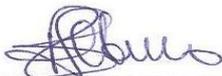
On the basis of the aforesaid conclusions, the Appeals Authority partly upheld the Appeal and orders the Respondent the following;

- i. To proceed with other necessary steps to award the qualified proposed successful tenderer for Groups 3 &4
- ii. To review the decision to award the Tender for Groups 1& 2 in observance of the law and Appeals Authority's findings and conclusion in sub issue I
- iii. Compensate the Appellants a sum of TZS. 1,600,000/ being legal and Appeal filing fees as described above.

It is so ordered.

Right of Judicial Review as per Section 101 of the PPA/2011 explained to parties.

This Decision is delivered in the presence of the 1st, 2nd and 3rd Appellants and their counsels, the Interested Party and the Respondent this 19th January, 2016.

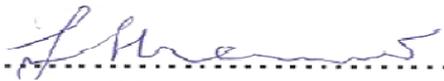


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MRS. R. A. LULABUKA

CHAIRPERSON

MEMBERS:

1. ENG.F.T.MARMO



2. MR. LOUIS ACCARO

