

IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY
AT DAR ES SALAAM

CONSOLIDATED APPEAL CASES No. 19 AND 22 OF 2018-19

BETWEEN

M/S THENEX GmbH1ST APPELLANT

M/S JOHS. GRAM-HANSSEN A/S.....2ND APPELLANT

AND

TANZANIA AIRPORTS AUTHORITY.....RESPONDENT

DECISION

CORAM

- | | | |
|--------------------------------------|---|-------------|
| 1. Hon. Justice (Rtd), Sauda Mjasiri | - | Chairperson |
| 2. Dr. Leonada Mwangike | - | Member |
| 3. CPA, Fredrick Rumanyika | - | Member |
| 4. Adv. Rosan Mbwambo | - | Member |
| 5. Eng. Stephen Pascal Makigo | - | Member |
| 6. Mr. Rhoben P. Nkori | - | Member |
| 7. Mr. Ole-Mbille Kissioki | - | Secretary |

SECRETARIAT

- | | | |
|---------------------------|---|---------------|
| 1. Ms. Florida Mapunda | - | DST |
| 2. Mr. Hamisi O. Tika | - | Legal Officer |
| 3. Ms. Violet S. Limilabo | - | Legal Officer |

FOR THE 1ST APPELLANT

- | | | |
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| Eng. Deogratius Kweka | - | Representative |
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FOR THE 2ND APPELLANT

Mr. Thomas M.Sipemba - Advocate, Authorized Representative

FOR THE RESPONDENT

1. Mr. Elias Mwashuuya - Ag. Legal Secretary
2. Mr. Clay Apiyo - Head, Procurement Management Unit
3. Mr. Nitunga Samwel - Procurement Officer
4. Mr. Josephat Msafiri - Procurement Officer

This Appeal was lodged by M/s Thenex GmbH and M/s Johs.Gram Hanssen A/S (hereinafter referred to as "the 1st and 2nd Appellants") respectively, against Tanzania Airports Authority commonly known by its acronym, TAA (hereinafter referred to as "the Respondent").

The Appeal is in respect of Tender No. AE/027/2017/2018/HQ/G/03 for the Supply of Airport Crash/ Rescue Fire Tenders for Regional Airports, Lots 1 & 2 (hereinafter referred to as "the Tender"). The Tender was conducted using the International Competitive Bidding method specified in the Public Procurement Regulations, Government Notice No. 446 of 2013, as amended (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 facts of the Appeal may be summarized as follows:

The Respondent through the Daily News and the Guardian newspapers of 31st October 2017, invited eligible tenderers to bid for the tender. The initial deadline for submission of tenders was set for 15th December 2017, but was later on extended to 29th December 2017, whereby nine firms submitted their tenders for both lots. Tenders were then subjected

to evaluation and ultimately M/s Thenex GmbH of Germany (1st Appellant) and M/s Johs. Gram-Hanssen A/s, of Denmark (2nd Appellant) were recommended for award of the Tender for Lots No. 1&2 respectively.

On 31st May 2018, the Tender Board approved the award recommendations by the Evaluation Committee. On 12th June 2018, the Respondent issued the respective Notices of Intention to Award the contract to all bidders who participated in the Tender process. Dissatisfied with the award proposal, M/s Marcé Fire Fighting Technology challenged its disqualification. The reasons for disqualification as contained in the Notice were as follows;

- i. Quoting of 116^o minimum inter axle clearance instead of 28^o to 30^o;
- ii. Quoting of Overall Height of 3.8m instead of 3.14m;
- iii. Submitting Monitor System of 6000L/min instead of 4500L/min; and
- iv. Submitting the Engine capacity of 6V instead of 8V

On 15th June 2018, the firm applied for administrative review of the Respondent's Accounting Officer, which was however dismissed. Dissatisfied further, on 2nd July 2018, an Appeal was filed to this Appeals Authority. After the hearing, on 20th July 2018, the Appeals Authority delivered its decision in which it allowed the Appeal and nullified the proposed award to the Appellants after finding that M/s Marcé Fire Fighting Technology met the criteria which the Respondent had used to disqualify him. Thus, it ordered the Respondent to reinstate the said bidder in the Tender process and re-evaluate all tenders from the detailed evaluation stage, specifically on price comparison.

The present Appeals originate from the Respondent's second evaluation. According to the record of the Tender proceedings, on 30th July 2018, the Respondent communicated the decision of the Appeals Authority to all bidders who participated in the process. The letter also required bidders to extend the bid validity of their tenders for ninety (90) days with effect from 1st August 2018.

It is on record that out of nine firms, six, excluding the 1st Appellant extended bid validity of their tenders and the same were subjected to the second evaluation.

On 6th to 9th August 2018, the Respondent re-evaluated the said six tenders. Through this process, the tender by M/s Marcé Fire Fighting Technology was found to be the lowest evaluated for both lots and was therefore recommended for award at the contract price of TZS. 2,187,832,375.09 for Lot No. 1 and TZS. 3,617,890,982.16 for Lot No. 2, subject to successful negotiation on twelve (12) earmarked issues by the Evaluation Committee. Tenders by the 2nd Appellant were ranked second for Lot No. 1 with a contract price of TZS. 2,460,843,621.60. In relation to Lot No. 2, its bid was found to be non responsive for failure to comply with the Pumping system. Its tender had a Pumping system with a "Monitor" at the rate of 3700L instead of a "Monitor" of not less than 4500L.

On 30th August 2018, the Tender Board approved the award recommendations to M/s Marcé Fire Fighting Technology. On 5th September 2018, the Respondent through his letter with Ref. No. CED.32/208/10A/108 informed the 2nd Appellant that he intends to award the Tender to the proposed bidder. The letter also provided reasons as to why its bid was unsuccessful. Aggrieved, both Appellants lodged their respective request for administrative reviews of the decision

of the Accounting Officer. While the 1st Appellant's review failed, the 2nd Appellant received no response from the Respondent; hence, these Appeals. The 1st Appellant lodged its Appeal on 28th September 2018, while the 2nd Appellant filed its Appeal on 2nd October 2018.

SUBMISSIONS BY THE 1ST APPELLANT

The 1st Appellant's arguments as provided from the documents availed to the Appeals Authority as well as oral submissions during the hearing is summarized as follows:

The Respondent issued Notices of Intention to award the Tender to all bidders on 12th June 2018. The seven working days within which bidders were to raise objections regarding the award lapsed on 20th June 2018. Until that time no bidder had complained to the Respondent. It is on this basis the Respondent had invited them for negotiation held on 5th July 2018, through a letter dated 29th June 2018. Had there been a complaint, the said invitation would have not been written or issued to them. Thus, the assertion by the Respondent that on 19th June 2018, the proposed successful bidder had complained regarding the tender process is not true. Otherwise, the Respondent would not have issued the invitation letter.

That, the proposed successful tenderer M/s Marce Fire Fighting Technology was earlier on evaluated and found to be incompetent and was disqualified. It is surprising that the Tenderer who had been disqualified has now been found to comply with the specifications after re-evaluation.

Finally the 1st Appellant prayed for the following orders;

- i. Revocation of the Intention to Award the tender to M/s Marcé Fire Fighting Technology.

- ii. Re-tendering.
- iii. Fresh specifications and Tender Document be issued.

SUBMISSIONS BY THE 2ND APPELLANT

The 2nd Appellant's arguments as provided from the documents availed to the Appeals Authority as well as oral submissions during the hearing may be summarized as follows:

That, the Respondent acted erroneously in concluding that his tender was unresponsive with respect to Lot No. 2 on pumping systems since he indicated to have complied with the required 4500lpm pumping system under Clause 10.2.1 of the Technical Specifications. According to the 2nd Appellant, as long as it had indicated "YES" in its bid, then, its capability to meet the requirements under the said paragraph was certain. Therefore, its tender was responsive.

The Respondent had earlier on awarded Lot No. 2 to him before nullification by the Appeals Authority. This entails that its tender was responsive during evaluation despite of the additional words "*but with best range 3700lpm*" in its response to the technical specifications. It was therefore, unreasonable, unlawful, unfair and improper for the Respondent to hold its tender unresponsive for containing such words. If the word "*YES but with best range 3700lpm*" was a material deviation, the Respondent would have equally disqualified its tender regarding Clauses 5.2 and 9.9 of the technical specifications, in which it indicated " YES" and other additional words (*Scania P460*) and ("*but with temporary mounting on the vehicle*") respectively . To the contrary, the Respondent found its bid to have complied with such criteria. If the additional words were so pertinent, the Respondent would have also considered it unresponsive on clauses 5.2 and 9.9. The word "YES"was

a way of responding to the requirements and not otherwise. The assertion by the Respondent that additional words deviated the technical specification is therefore baseless.

In addition, according to Clause 11.3(a) of the guidelines issued by the Public Procurement Regulatory Authority (PPRA), a major deviation is the one that affect the scope or performance of the work to be executed. The additional words in its tender do not affect the quality.

That, the Respondent denied the 2nd Appellant the opportunity to make clarifications on the additional words contained in the technical specifications contrary to Regulation 207 (1) of GN. 446 of 2013, given the fact that its tender was responsive in the first place. The Respondent failed to invoke its powers provided for under Regulation 207 (2) (b) of GN. 446 of 2013.

That, despite its request for administrative review challenging its disqualification, nevertheless, the Accounting Officer did not act on it.

That, it was unlawful and unreasonable to award the Tender to the proposed successful tenderer while its bid was considered unresponsive to the minimum technical specifications. Therefore, awarding the tender for both Lots to the bidder who was considered unresponsive during the initial evaluation is unlawful since it contravenes Section 47 of the Public Procurement Act, which mandates the Respondent to strive to achieve the highest standards of equity when executing its duties.

He therefore prayed for the following orders;

- i. An order that the Appellant's tender was responsive given that it had indicated capability to meet the requirements under paragraph 10.2.1 of the Technical specifications.
- ii. An order that additional words added in responding to paragraph

10.2.1 of the Technical specifications did not affect its capability to meet the Technical specifications.

- iii. An order that the award of the tender for Lots 1 and 2 to the proposed successful tenderer is inappropriate given that the said bidder was unsuccessful for non compliance with the technical specifications and there was no change of Technical specifications in the re-evaluation process.
- iv. An order that the tender be awarded to him; or in the alternative; an order for re-evaluation of the submitted tenders;
- v. Costs of the Appeal and
- vi. Any other order the Appeals Authority may deem fit and appropriate under the circumstances.

REPLY BY THE RESPONDENT TO THE 1ST APPELLANT

The Respondent's written as well as oral submissions to the grounds of Appeal by the 1st Appellant can be summarized as follows:

That, he was compelled to suspend the procurement process on 19th June 2018, after he had received objection letters from M/s Marce Fire Fighting Technology (MFFT) on 15th June 2018 and from M/s NAFFCO ZFO on 18th June 2018, who challenged their disqualification. Immediately thereafter, administrative reviews were done on 25th June 2018 and the decision was communicated to all bidders.

That, postponment of negotiations with the Appellant was a result of the appeal lodged by M/s Marce Fire fighting Technology to the Appeals Authority on 2nd July 2018. The Appellant was notified of the position. The Respondent was therefore compelled to suspend the procurement process.

That, the Respondent had to respect and comply with the decision by the Appeals Authority to re-evaluate tenders. As such, the second evaluation resulted from the decision by the Appeals Authority on Appeal Case No. 1 of 2018-19.

That, bidders who participated in the tender process were requested to extend the validity period of their tenders for three months with effect from 1st August 2018, since the former bid validity period was expiring on 31st July 2018. The 1st Appellant however, did not extend its bid. The Respondent was compelled to reject its bid after the expiry of bid validity, in terms of Regulation 191(4) and (5) of GN.No. 446 of 2013. This is in conformity with the Appeals Authority's decisions in Appeal Case No. 17 of 2017-18 between M/s Professional Cleaners Ltd and Muhimbili University of Health and Allied Sciences as well as Consolidated Appeal Cases No. 24 and 25 of 2016-17 between M/s Lows Creak Timbers (Pty) Limited & M/s Maqhilika Timber (Pty) Ltd and Tanzania Electric Supply Company Limited (TANESCO). It was held by the Appeals Authority that there was no valid tender after the expiry of the specified bid validity period. The 1st Appellant's extension letter dated 2nd August 2018, was received by the Respondent on 27th August 2018, when re-evaluation had already been concluded and his bid had already expired. Thus, it has no *locus standi* before the Appeals Authority to challenge this tender as it was not subjected to the second evaluation.

The Respondent prayed for the following orders:

- i. Dismissal of the Appeals with costs;
- ii. Be allowed to proceed with the award process of the Tender; and
- iii. Any other order as the Appeals Authority may deem fit to grant.

REPLY BY THE RESPONDENT TO THE 2ND APPELLANT

The Respondent's reply to the grounds of Appeal by the 2nd Appellant can be summarized as follows:

That, negotiations with the 2nd Appellant regarding the earlier award of the contract was suspended due to nullification of the tender following a complaint lodged by one bidder.

That, the bid by the 2nd Appellant was not responsive for Lot Nos. 1 and 2 for failure to comply with the pre-requisite requirement for pumping system of not less than 4500lpm provided under Clause 10.2.1 of the Technical specifications.

According to the general provisions of the Technical Specifications for Lot No. 2, tenderers were to provide technical specifications that supersede the minimum specifications. In this matter, the 2nd Appellant contradicted himself by indicating "YES" to the minimum specifications of the pumping system while at the same time qualified it by providing specification below the minimum requirement. The 2nd Appellant's argument that its bid complied with the said technical specification lacks technical justification since the range of 3700lpm provided cannot be equated with the minimum range of 4500lpm. Therefore, it was fairly disqualified pursuant to Clause 29.2 of the Tender Document which required the Respondent to evaluate technical aspects in accordance with Instructions to Tenderers (ITT) Clause 12, and to comply with the Schedule of Requirements and Technical Specifications without any material deviation or reservation.

That, due to unavoidable circumstances, the administrative review process by the Accounting Officer was overtaken by events.

That, the Respondent had to respect and comply with the decision

issued by the Appeals Authority by re-evaluating tenders as directed, regardless of the existing status. As such, the second evaluation conducted by the Respondent was in accordance with the decision of the Appeals Authority in Appeal Case No. 1 of 2018-19 and in accordance with Section 4A(3) (b) of the Public Procurement Act. In addition, the Evaluation Committee was not prevented from correcting any anomaly which was not corrected during the nullified evaluation.

That, Regulation 207(1) of GN.No.446 of 2013 as amended referred to by the 2nd Appellant applies when a procuring entity is seeking clarification from a tenderer on matters that do not make his tender responsive; and that, no advantage is obtained from him which can impair comparison of tenders during evaluation. What is submitted by the Appellant holds no water since the requirements of the technical specifications were clear.

That, the first evaluation was nullified by the Appeals Authority through its decision delivered on 20th July 2018. Therefore, the letter dated 25th June 2018, which depicted M/s Marce Fire fighting Technology as non responsive, issued by the Respondent and which has been referred to by the 2nd Appellant was automatically overruled. Therefore, tenders were subjected to re-evaluation from the detailed evaluation, price comparison as ordered; the outcome of which fairly disqualified the 2nd Appellant. Thus, the Respondent did not contravene Section 47 of the Public Procurement Act cited by the Appellant. The award of the tender to the proposed successful bidder was made after it was found to be responsive to the requirements of the Tender Document in terms of Regulation 203 of GN.No.446 of 2013 as amended, the set criteria and order by the Appeals Authority. The bid price of the said bidder was

evaluated as the lowest

Finally, the Respondent prayed for the following orders:

- i. Dismissal of the Appeal with costs;
- ii. The outcome of re-evaluation as well as its decision regarding the tender be maintained;
- iii. Be allowed to proceed with the award process of the Tender; and
- iv. Any other order as the Appeals Authority may deem fit to grant.

In his brief rejoinder, the 1st Appellant submitted that its bid was extended on 2nd August 2018, though the Respondent was availed with extension letter on 27th August 2018. Furthermore, the letter requesting for extension of the bid issued by the Respondent did not provide the last date for bidders to submit requests for extension of the bids. According to the first Appellant if no extension was sought by them, why did the Respondent invite them for the negotiations.

On his part, the 2nd Appellant argued that if the Respondent was ordered to re-evaluate tenders from price comparison stage as submitted, such information was not availed to them in the letter by Respondent dated 30th July 2018. Had the Respondent revealed this information, the situation would have been different. In addition, if the order by the Appeals Authority was to re-evaluate tenders from price comparison, then, the Respondent did not comply with the order after taking into account other considerations. It rested its submissions by arguing that the whole tender process lacked transparency. Therefore, the tender should be nullified.

ANALYSIS BY THE APPEALS AUTHORITY

In dealing with this Appeal, the Appeals Authority having gone through the appeal records and the various documents submitted by both parties

and oral submissions during the hearing, is of the considered view that the Appeal centres on the following issues:-

1. Whether the 1st Appellant has a *locus standi*;
2. Whether the disqualification of the 2nd Appellant's tender was proper;
3. Whether the award of the contract to the proposed successful bidder was proper in law; and
4. What reliefs, if any, are parties entitled to.

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

1. Whether the 1st Appellant has a *locus standi*

In resolving this issue, the Appeals Authority considered the arguments by the Respondent that the 1st Appellant is not privy to the process since its bid expired after the lapse of its bid validity period. In the course of doing so the Appeals Authority revisited the tender proceedings and observed that the specified bid validity period for the tender was 120 days which was ending on 31st July 2018 from the date of the Tender opening. However, before the expiry of the stated period, the Respondent invoking Regulation 191(4) of the GN.No.446 of 2013, through a letter with Ref. No. CED.32/208/02A/54 dated 30th July 2018, requested the 1st Appellant to extend validity period of its tender for an additional period of ninety days (90) with effect from 1st August 2018.

It is evident from the records that the said letter was received by the 1st Appellant through its e-mail c.schmalfeldt@thenex.com as well as that of its agent, one Eng.Deogratus Kweka on the same day at 17:17:19 EAT. The fact which was not disputed. The Appeals Authority observed further that the 1st Appellant did not respond timely as requested. Its response to the letter was made on 27th August 2018, at the time when

its bid validity had already expired as correctly submitted by the Respondent. By necessary implication, the 1st Appellant failed to extend its bid validity. The Appeals Authority considered the 1st Appellant's argument that it extended its bid validity on 2nd August 2018 through the email; and it was observed that the referred e-mail c.schmalfeldt@thenex.com dated 6th August 2018, from one Claus schmalfeldt was not addressed to the Respondent but to their agent Eng. Kweka at irambi.kichao@gmail.com. The mail reads in part;

"Dear Mr. Kweka,

Here is the extension of bid validity up to 31.10.2018 as mentioned on the phone. Please submit to TAA as requested.

Best regards,

Claus".

The Appeals Authority is of the considered view that, by virtue of Regulation 191(5) of GN.NO.446 of 2013, the Respondent was right to exclude the 1st Appellant in the second evaluation since it automatically seized to be a bidder in terms of Section 3 of the Act. By virtue of Rule 4 of the Appeals Rules, GN.411 of 2014, the 1st Appellant lacked both review and appellate rights provided under the Act. The Rule provides as follows:

"Any person being a tenderer who is dissatisfied with the decision, matter, act or omission of a procuring entity or the Authority may lodge an appeal to the Appeals Authority".

In view of what has been stated herein above, the Appeals Authority finds that the 1st Appellant has no *locus standi* before this Appeals Authority.

Accordingly, his Appeal is hereby rejected in terms of Rule 17 of the Appeals Rules, GN.411 of 2014.

In view of our findings on issue No1, we shall not delve into the 1st Appellant's other grounds of appeal.

2. Whether disqualification of the 2nd Appellant's tender was proper.

In resolving this issue, the Appeals Authority revisited the Tender Document and observed that Clause 10.2.1 of the technical specifications required bidders to supply pumping system of the vehicle of not less than 4500lpm. The Appellant despite indicating "YES" entailing compliance to the requirement, it also added words "*but with best range of 3700lpm*" in its bid. When asked by Members of the Appeals Authority to explain the meaning of the additional words, the Appellant indicated that the additional words did not in anyway deviate from the required specifications.

The Appeals Authority is of the considered view that the 3700lpm Pumping system provided by the 2nd Appellant was less than 4500lpm provided. That, in the absence of any valid explanation on the inclusion of these words by the Appellant, the technical specifications were not met.

The Appeals Authority took into consideration the Appellant's argument that the Respondent could have invoked Regulation 207(1) and (2) of GN.NO.446 of 2013 to seek either clarification from it or consider the deviation as minor. In doing so, the Appeals Authority made reference to Section 72(1) of the Act read together with Regulation 203(1) of GN.NO.446 of 2013. It is evident that the Respondent was required to evaluate tenders based on the criteria explicitly stated in its Tender Document, to wit 4500lpm as the law requires. Regulation 205 (c) of GN.NO.446 of 2013, provides for the circumstances under which a bid

can be rejected, and this includes failure by a bidder to meet a major technical requirement or offering a plant capacity below the minimum specified.

In this aspect therefore, the 2nd Appellant did not comply with the requirements under the law. Accordingly, the 2nd Appellant's disqualification based on the criterion was proper in law.

3. Whether the award of the contract to the proposed successful bidder was proper in law

In resolving this issue, the Appeals Authority considered the 2nd Appellant's argument that the tender has been awarded to the bidder who was earlier on eliminated in the tender process for being non responsive. The Appeals Authority revisited the Evaluation Report and other proceedings and observed that the said bidder was re-instated after he had successfully appealed to this Appeals Authority through Appeal Case No. 1 of 2018-19. In this case it was held that, its disqualification was improper and ordered the Respondent to re-instate it and to re-evaluate the tenders, specifically on price comparison. This is the basis of its involvement in the second evaluation process. The Appeals Authority further observed that its evaluated bid price was the lowest of all bidders for both Lots.

The Appeals Authority also considered the 2nd Appellant's argument that the Respondent did not comply with the order by this Appeals Authority which required evaluation specifically on price comparison. The Appeals Authority observed indeed that, the Respondent acted beyond the given scope. However, the proposed successful bidder had the lowest evaluated prices compared to the rest of the bidders.

Accordingly, the Appeals Authority is of the settled view that the award of the contract to the proposed successful bidder was proper.

4. What reliefs, if any, are parties entitled to.

Having analyzed the contentious issues above, the prayers by the 2nd Appellant have no basis since its disqualification was proper and that the award of the bid to the proposed bidder was proper and in accordance with the law.

Accordingly, the Appeals Authority hereby dismiss the appeal and allow the Respondent to proceed with the award process as proposed.

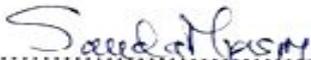
Each party to bear its own costs.

Order accordingly.

This Decision is binding on the parties and may be executed in terms of Section 97 (8) of the Act.

The Right of Judicial Review as per Section 101 of the Act is explained to the Parties.

The Decision is delivered in the presence of the Appellants and the Respondent this 9th day of November 2018.


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HON. JUSTICE (rtd) SAUDA MJASIRI
CHAIRPERSON

MEMBERS:

- 1. DR. LEONADA MWAGIKE 
- 2. ENG. STEPHEN MAKIGO 
- 3. CPA FREDRICK RUMANYIKA 
- 4. ADV. ROSAN MBWAMBO 
- 5. MR. RHEUBEN NKORI 