

IN THE  
PUBLIC PROCUREMENT APPEALS AUTHORITY  
AT DAR ES SALAAM  
APPEAL NO. 31 OF 2018-19

BETWEEN

M/S ZECCON COMPANY LIMITED.....APPELLANT

AND

TANZANIA CIVIL AVIATION AUTHORITY.....RESPONDENT

DECISION

CORAM

- |                                     |   |             |
|-------------------------------------|---|-------------|
| 1. Hon. Justice (rtd) Sauda Mjasiri | - | Chairperson |
| 2. Adv. Rosan Mbwambo               | - | Member      |
| 3. Mr. Rhoben Nkori                 | - | Member      |
| 4. Mr. Ole-Mbille Kissioki          | - | Secretary   |

SECRETARIAT

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

FOR THE APPELLANT

- |                             |   |                   |
|-----------------------------|---|-------------------|
| 1. Mr. Ali Mbarouk Juma     | - | Managing Director |
| 2. Eng. Emmanuel Kachuchuru | - | Technical Advisor |

## FOR THE RESPONDENT

1. Mr. Vallery L. Chamlungu - Corporation Secretary
2. Mr. Yoswam M.Nyongera - Procurement Manager
3. Mr. Swalehe Nyenye - Estate Officer
4. Ms. Getrude Joseph -Principal Air Navigation Engineer
5. Mr. Amedeus Swai - Senior Procurement Officer

The Appeal at hand was lodged by M/s Zecon Company Limited (hereinafter referred to as "the Appellant") against Tanzania Civil Aviation Authority (TCAA) (hereinafter referred to as "the Respondent"). The Appeal is in respect of Tender No. AE/028/2018-2019/HQ/W/06 for the Construction of Infrastructure and Related services to support Installation of Instrument Landing System (ILS) at Abeid Amani Karume International Airport (AAKIA)–Zanzibar (hereinafter referred to as "the Tender").

After going through the records submitted by the parties to the Public Procurement Appeals Authority (hereinafter referred to as "the Appeals Authority"), the background to the Appeal can be summarized as follows:-

The Respondent through the Daily News, the Zanzibar Leo Newspapers dated 13<sup>th</sup> November 2018, the Public Procurement Regulatory Authority's Journal (TPJ) issue of 20<sup>th</sup> November 2018, as well as the Respondent's website advertised the Tender under the National Competitive Bidding (NCB) specified in the Public Procurement Act of 2011, as amended (hereinafter referred to as "the Act") and the Public Procurement Regulations, Government Notices No. 446 of 2013 and GN.NO.333 of 2016

(hereinafter referred to as “the Regulations”), inviting classes 1,2,3 and 4 registered Civil Works or Building contractors to bid for the Tender.

The deadline for the submission of tenders was initially set for 27<sup>th</sup> November 2018, but it was later on extended to 4<sup>th</sup> December 2018. By the deadline, six (6) firms responded to the invitation including the Appellant.

The submitted tenders were subjected to evaluation which was conducted into three stages, namely; Preliminary (Commercial and Technical responsiveness), Price comparison and Post qualification.

Three bids by M/s Shamjo Company Limited, M/s Ockra Construction Company Limited and the Appellant were disqualified at the preliminary evaluation stage for being non responsive to the eligibility as well as technical requirements provided in the Tender Document. Specifically, the Appellant’s tender was disqualified for failure to quote Measured works for the construction of two (2) guard houses, generator room No. 01 and 02, Access Road, Electrical works and Runway 18 and 36 provided in Addendum No. 2 issued by the Respondent. The remaining three tenders were subjected to price comparison and ranking. The Tender by M/s Masasi Construction was ranked first and was proposed for award of the contract subject to post qualification. It was found to be compliant and was therefore recommended for the award of the Tender at the contract price of TZS. 2,276,874,340.00 VAT Inclusive.

On 18<sup>th</sup> December 2018, the Tender Board approved the award recommendations which included the need to conduct negotiation with the proposed successful bidder. Negotiation between the Respondent and the proposed successful bidder was conducted on 27<sup>th</sup> December 2018

whereby parties agreed on all items that were tabled for discussion. Having obtained the necessary approvals, on 11<sup>th</sup> January 2019, the Respondent issued the Notice of intention to award to respective bidders including the Appellant. The Notice informed the Appellant that its tender was disqualified for failure to quote all items issued in Addendum No.2

Dissatisfied, on 18<sup>th</sup> January 2019, the Appellant filed an application for administrative review to the Respondent's Accounting Officer challenging its disqualification. On 22<sup>nd</sup> January 2019, the Accounting Officer issued its decision, in which it rejected the complaint for lack of merits. Aggrieved further, on 31<sup>st</sup> January 2019, the Appellant lodged this Appeal.

#### SUBMISSIONS BY THE APPELLANT

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

1. That, the Respondent invited all bidders for the pre-bid meeting in Zanzibar on 19<sup>th</sup> November 2018. During the said meeting it was agreed by the parties that all items quoted as a provisional sum in the original Tender Document should be broken down and billed separately through Bill of Quantities (BOQ) to allow bidders to fairly quote their prices and foster competition regarding such items.
2. It was agreed further that the Respondent shall extend the deadline for the submission of tenders for bidders to incorporate changes made through the Addendum. To the contrary, the Respondent did not do so.
3. That the Respondent delayed to communicate the Addendum while the deadline for the submission of tenders as earlier extended was on 4<sup>th</sup>

December 2018. Therefore, there was no time for the Appellant to seek for clarification on the Addendum which contained 11 Measured Works documents.

4. That, the reasons availed by the Respondent for not extending the deadline were not tenable. It is the Appellant's view that when the Respondent issued an extension of time for the submission of tenders it intended to allow bidders to incorporate changes contained in the Addendum. If there was no addendum, no extension of time would have been granted by the Respondent. Therefore, it was imperative and proper for the Respondent to extend the submission deadline to provide more time for bidders to submit responsive bids and also to adhere to the fairness principle taking into account that the scope of the work had been enlarged. To the contrary, the Respondent did not do so.
5. That the Addendum contained twenty eight (28) substantial discrepancies earmarked by the Appellant that needed clarifications from the Respondent. However, due to time constraint the Appellant did not seek clarifications taking into account that Clause 8.2 of the Instructions To Tenderers (ITT) required all clarifications to be made seven days prior to the deadline for the submission of tenders.
6. That the assertion by the Respondent that Addendum No.2 and the Instructions issued were clear and supported by the pre-tender meeting is false, since the Respondent did not provide enough inputs to enable its agent to prepare realistic Tender Document as recorded in the pre-bid meeting. Under the circumstances, it was prudent for the Appellant to quote all items as provided in the original Tender Document under

“Provisional Sum”. The Respondent should have evaluated the tenders by disregarding the Addendum as guided under Clause 31.2 (b) of the ITT.

7. That, the assertion by the Respondent that the Appellant did not quote all items in the Addendum is strongly disputed since some of the items in the Addendum were the same as those in the original Bill of Quantities and thus, it made no difference in applying the terms in the original BOQ or those in the Addendum. All these items were contained in the Appellant’s tender.
8. That, the Respondent did not seek clarification from the Appellant regarding its tender as provided under Clause 27.1 of the ITT. Had the Respondent sought the clarification, its tender would have no material deviation.
9. That, the Respondent did not indicate the evaluation criteria to be used to evaluate tenders on equipment contrary to the requirements of the tendering procedures and principles provided for in the Regulations.

Finally, the Appellant prayed for the following orders:-

- i. A declaration that the whole tendering process is a nullity and the Respondent be ordered to prepare afresh tender document and re-tender
- ii. The Respondent be ordered to pay the tendering costs amounting to TZS. 500,000/-
- iii. The Respondent be ordered to pay the Appellant’s costs of TZS. 1,500,000/-for engaging an expert to handle this Appeal.

- iv. The Appeals Authority should give clear instructions to the Respondent on how tendering process is to be done in future.
- v. Any other remedy the Appeals Authority may deem necessary to grant.

#### REPLY BY THE RESPONDENT

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

1. That, in terms of Clause 22.2 of the ITT as well as Regulation 134 of GN.NO.446 of 2013, extension of time for the submission of tenders is discretionary to the procuring entity and not mandatory as contended by the Appellant.
2. That, the Respondent had earlier on extended the deadline from 27<sup>th</sup> November to 4<sup>th</sup> December 2018 for bidders to incorporate changes made through the Addendum. It was therefore, irrational for a national tender whose limit is 14 days to be extended for another 14 days for no good reason. This would have defeated the economy principle provided for under Regulation 187(4) of the GN.NO.446 of 2013 as amended.
3. That, all issues related to Addendum No. 2 were discussed during the pre-bid meeting held in Zanzibar on 19<sup>th</sup> November 2018. It was directed in the said meeting that any tenderer wishing to seek clarification may do so timely for the Respondent to respond and communicate to all bidders. The Appellant neither sought for clarification nor extension of time as agreed. Its silence indicated that it was satisfied with the content of the Addendum. It's claim that it had

insufficient time to incorporate changes in the Addendum is an afterthought.

4. That, the Appellant should have sought for extension of time before the deadline rather than submitting its tender without including the requirements in Addendum No. 2 and subsequently complaining that the tender period was inadequate. The Appellant's complaint has no basis.
5. That, all the bidders quoted all items in the Addendum save for the Appellant and were evaluated and ranked on equal basis. The Appellant contravened Regulation 205(a) and (b) of GN.NO.446 of 2013 as amended. Therefore, its disqualification was based on Regulation 206(2) of GN.NO.446 of 2013.
6. That, there was no need for the Respondent to seek clarification from the Appellant as the Tender Document was clear and the Appellant failed to comply.
7. That, the Appellant's disqualification was neither based on the failure to list equipment nor the failure to comply with the qualification criteria.
8. That, the tender process was fair and transparent in compliance with Section 4(A) of the Act.

Finally, the Respondent prayed for the following orders:-

- i. Dismissal of the Appeal for lack of merits.
- ii. Costs of the Appeal at the tune of TZS. 10,000,000/-
- iii. Any other order this Appeals Authority shall deem fit and just to grant.

## ANALYSIS BY THE APPEALS AUTHORITY

The Appeals Authority having gone through the appeal record, Tender proceedings including various documents and the oral submissions by the parties, is of the view that the Appeal is centred on two main issues calling for determination. These are:-

1. Whether the disqualification of the Appellant's tender was justified
2. What reliefs, if any, are parties entitled to

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

1. Whether disqualification of the Appellant's tender was justified

In resolving this issue, the Appeals Authority reviewed the Tender Document and minutes of the pre-bid meeting held between the Respondent and the bidders *vis-a-vis* the applicable law. In the course of doing so, the Appeals Authority observed that the original Tender Document issued by the Respondent had no description of works to be executed in relation to preliminary Works, Measured Works for two toilets, two power rooms, demolition costs and the access road. Instead, a provisional sum of TZS. 150,000,000/- was set aside for these Works collectively. However, during the site visit and the pre-bid meeting held in Zanzibar, bidders observed and proposed that the items that were to be executed using the provisional sum be quantified through BOQ for them to fairly quote on it. The proposal was granted by the Respondent. The Respondent and the bidders agreed further that the BOQ to be prepared

by the Agent (Consultant) was to reach the Respondent by 23<sup>rd</sup> November 2018. Indeed, the agent fulfilled the promise. Upon approval by its Tender Board, the Respondent communicated the BOQ by issuing an Addendum No. 2 on 27<sup>th</sup> November 2018. Furthermore, the Respondent extended the initial submission deadline from 27<sup>th</sup> November to 4<sup>th</sup> December 2018, to allow bidders to incorporate changes contained in the Addendum.

The Appeals Authority observed that on the deadline for the submission of tenders, the Appellant submitted its bid using the provisional sum contained in the original Tender Document and without taking into consideration what was contained in the Addendum.

The Appeals Authority revisited Regulation 13 (3) and (4) of GN.NO 446 of 2013 as amended and observed that once an Addendum is issued by a procuring entity the same has a binding effect to the parties. This legal position was acknowledged by the Appellant during the hearing of this Appeal.

For purposes of clarity, the said provision is reproduced hereunder:

*"Reg. 13 (3) At any time prior to the deadline for submission of tenders, the procuring entity may, for any reason, whether on its own initiative or as a result of a request for clarification by a tenderer, modify the solicitation document by issuing an addendum.*

*(4) The addendum shall be communicated promptly to all tenderers to which the procuring entity has provided the solicitation documents and shall be binding on those tenderers provided that the procuring entity shall*

*extend the tender period if it deemed necessary"*

(Emphasis Added)

In view of Regulation 13 (3) and (4), the Appeals Authority is of the settled view that the Appellant's failure to take into account what was in the Addendum was contrary to the requirements under the law and was indeed contrary to what had been agreed upon by the parties. The Appeals Authority therefore rejects the Appellant's argument that it was proper to base its quotations using the original Tender Document rather than the Addendum issued. Given the above mentioned Regulation, the Appellant was duty bound to quote all the items in the Addendum. It failed to do so.

In relation to the complaint on the extension of time and clarification, the Appeals Authority is of the considered view that the Respondent was neither duty bound to extend the deadline for the submission of tenders nor required to seek clarification from the Appellant. Clauses 9.3, 22.2 and 27.1 of the ITT relied upon by the Appellant do not compel the Respondent to either extend the time or seek clarification from the bidders. The Respondent has discretion to do so if it deemed it necessary.

Clauses 9.3 and 22.2 (supra) provide as follows:-

*Clause 9.3 "In order to allow prospective tenderers reasonable time in which to take an addendum into account in preparing their Tenders, the PE at its discretion shall extend, as necessary, the deadline for submission of tenders, in accordance with ITT 21.2"*

Clause 22.2 *"The PE may, in exceptional circumstances and at its discretion, extend the deadline for the submission of Tenders by amending the Tendering Documents in accordance with ITT 9."* (Emphasis Added)

The Appeals Authority further observed that despite the Appellant's contention that the Respondent should have used its wisdom to extend the deadline for the submission of tenders, it neither sought for clarification nor extension of time after the Addendum to the Tender Document. It was the duty of the Appellant to request for extension of time. The Appellant having noted the discrepancies, if any, should have challenged the Respondent in terms of Sections 95 and 96(4) of the Act read together with Regulation 104 of GN. No. 446 of 2013. However, it did not do so.

In view of what has been stated hereinabove, the Appeals Authority is of the settled view that pursuant to Section 72 of the Act, read together with Regulation 203(1) of GN.NO 446 of 2013, the Respondent was required to consider the criteria provided for in the Addendum as the basis for evaluation. Thus, by virtue of Regulation 205 (a) and (b) of GN.NO 446 of 2013, the Appellant's tender was non-responsive for failure to tender at the required scope of Work. Therefore, the application of Clause 27.1 as relied upon by the Appellant is misconceived.

Accordingly, the Appeals Authority's conclusion with regard to the first issue is that disqualification of the Appellant's tender was justified.

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

Having answered the first issue in favour of the Respondent, the Appeals Authority hereby dismisses the Appeal for lack of merits.

Each party to bear its own costs. It is so ordered.

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.

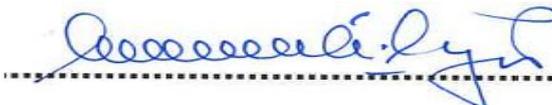
This Decision is delivered in the presence of the Appellant and the Respondent this 28<sup>th</sup> day of February 2019.



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HON. JUSTICE (RTD) SAUDA MJASIRI

MEMBERS:

1. MR. RHOBEN NKORI 

2. ADV. ROSAN MBWAMBO 