

IN THE  
PUBLIC PROCUREMENT APPEALS AUTHORITY  
AT DAR ES SALAAM  
APPEAL CASE NO. 41 OF 2018-19  
BETWEEN  
M/S TAV OPERATIONS SERVICES .....APPELLANT  
AND  
TANZANIA AIRPORTS AUTHORITY.....1<sup>ST</sup> RESPONDENT  
M/S MITSPRITS COMPANY LIMITED.....2<sup>ND</sup> RESPONDENT

DECISION

CORAM

- |                            |                |
|----------------------------|----------------|
| 1. Adv. Rosan Mbwambo      | - Ag.Chairman  |
| 2. CPA. Fredrick Rumanyika | - Member       |
| 3. Dr. Leonada Mwangike    | - Member       |
| 4. Ms. Florida Mapunda     | - Ag.Secretary |

SECRETARIAT

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

FOR THE APPELLANT

- |                             |  |
|-----------------------------|--|
| 1. Mr. Moses Stewart Kaluwa | -Advocate, Phoenix<br>Advocates AM           |
| 2. Mr. Cagdas Ozey          | - Head of Region,<br>TAV Operations Services |

## FOR THE 1<sup>ST</sup> RESPONDENT

1. Mr. Elias Mwashivya - Legal Secretary
2. Mr. Geoffrey Muchuruza - Ag. Head of Procurement Management Unit
3. Mr. Josephat Msafiri - Principal Supplies Officer

## FOR THE 2<sup>ND</sup> RESPONDENT

Absent

This Appeal was lodged by M/s TAV Operations Services (hereinafter referred to as "the Appellant") against Tanzania Airports Authority commonly known by its acronym "TAA" (hereinafter referred to as "the 1<sup>st</sup> Respondent") and M/s Mitsprits Company Limited (hereinafter referred to as "the 2<sup>nd</sup> Respondent")

The Appeal is in respect of Tender No. AE-027/2017-2018/JNIA/N/1 Lot 1 for Leasing of Spaces for Operating Restaurants at Julius Nyerere International Airport Terminal III- (hereinafter referred to as "the Tender"). The tender is divided in two restaurants namely; operation of restaurant I of square meter 203.73 and operation of restaurant II square meter 237.46.

According to the documents submitted to the Public Procurement Appeals Authority (hereinafter referred to as "the Appeals Authority"), the background of the Appeal may be summarized as follows:

The Tender was conducted through the International tendering procedures specified in the Public Procurement Regulations, Government Notice No.

446 of 2013 and No.333 of 2016 (hereinafter referred to as “the Regulations”).

On 7<sup>th</sup> January 2019, the 1<sup>st</sup> Respondent invited thirteen shortlisted firms to participate in the Tender. The deadline for submission of the tender was initially set on 18<sup>th</sup> January 2019, but it was later extended to 8<sup>th</sup> February 2019. Eight firms submitted their respective tenders including the Appellant and the 2<sup>nd</sup> Respondent.

The tenders were then subjected to evaluation. The evaluation was conducted in three stages, namely preliminary, detailed and financial evaluation. During preliminary evaluation four tenders were disqualified for failure to comply with the requirements of the Tender Document. The remaining four tenders were subjected to detailed evaluation. In that process, two tenders including the tender by the Appellant were disqualified for failure to comply with technical specifications. Specifically, the Appellant's tender was, according to the letter of intention to award, disqualified for want of required experience.

The remaining two tenders were subjected to financial evaluation. After completion of the evaluation process, the Evaluation Committee recommended award of the Tender to M/s Mitsprits Company Limited for restaurant I and to M/s Dough Works Limited for restaurant II. The Tender Board at its meeting held on 20<sup>th</sup> March 2019, approved the award as recommended.

On 21<sup>st</sup> March 2019, the 1<sup>st</sup> Respondent informed all tenderers its intention to award the Tender to lease and operate restaurants I and restaurant II to M/s Mitsprits Company Limited and M/s Dough Works Limited respectively. The said letter also informed the Appellant that its tender was disqualified for lack of requisite experience. Dissatisfied with the reason provided, on 29<sup>th</sup> March 2019, the Appellant applied for administrative review. The 1<sup>st</sup> Respondent did not respond to the complaint. Consequently, on 17<sup>th</sup> April 2019, the Appellant filed this Appeal.

#### SUBMISSIONS BY THE APPELLANT

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

The learned counsel for the Appellant submitted that the Appellant was pre-qualified by the Respondent to participate in the Tender. The counsel referred to section 3 of the Public Procurement Act, No. 7 of 2011, as amended (hereinafter referred to as "the Act"). In this section Pre-qualification has been defined to mean *"a formal procedure whereby suppliers, contractors or consultants are invited to submit details of their resources, and capabilities which are screened prior to invitation to tender on the basis of meeting the minimum criteria on experience, resources, capability and financial standing."*

Based on the above definition the Appellant was pre-qualified and was issued with the Tender Document. Having been issued with the Tender Documents it meant that the Appellant had met all the requirements stated therein including the pre-requisite experience, the learned counsel

contended. To the Appellant's surprise, it received a Notice of Intention to award stating that it has been disqualified for lack of experience. The learned counsel cited the provisions of section 52(1) of the Act and Regulations 116(1)(a), 119(1)(c) and (3) of GN.No.446 of 2013, in support of his proposition. He therefore asked the Appeals Authority to find that the 1<sup>st</sup> Respondent act of disqualifying the Appellant is unlawful.

It was also submitted that at pages 21-30 of the Appellant's bid it exhibited vast experience on the business ranging from the year 2002 up to this year 2019. Further that currently, the Appellant is operating in 8 countries and 17 airports.

The Appellant contended further that the proposed award of the Tender to the 2<sup>nd</sup> Respondent is not proper since the latter's representative failed to clarify on rent and the concession rate during the Tender opening ceremony.

Finally, the Appellant prayed for the following reliefs: -

- i. That the Respondent's decision issued on 21<sup>st</sup> March 2019 may be quashed;
- ii. That the Respondent's decision of awarding the Tender to M/s Mitsprits Company Ltd and M/s Dough Works Ltd may be quashed;
- iii. That the Respondent may be directed to award the Tender to the Appellant;

- iv. The Respondent to pay costs of this Appeal and administrative review; and
- v. Any other reliefs the Appeals Authority may deem fit and just to grant.

#### REPLY BY THE 1<sup>ST</sup> RESPONDENT

The 1<sup>st</sup> Respondent's reply to the grounds of Appeal was preceded by the Preliminary Objection (PO) on points of law to wit:-

- a) That, the Appellant does not have *locus standi* to file this Application; and
- b) That, the Appeal does not disclose a cause of action against the 1<sup>st</sup> Respondent or any other person whatsoever.

The 1<sup>st</sup> Respondent however, withdrew these POs at the hearing. The same are accordingly, marked as withdrawn.

The 1<sup>st</sup> Respondent's reply to the grounds of Appeal may be summarised as follows:-

That, the Appellant was fairly disqualified since it failed to meet the requirement of five years experience stated in the Tender Document. Therefore the Appellant's Tender was, under Regulation 204.-(1) and (2)(f)&(k) of the GN.No.446 of 2013, properly rejected. The Respondent submitted that despite the waiver given by way of clarification during the site visit held on 11<sup>th</sup> and 25<sup>th</sup> January 2019 which the Appellant attended still it submitted one reference letter with a content that does not comply with what was provided in the Tender Document as to experience.

The Respondent argued further that the Appellant's tender indicated that it is operating in several Airports across the globe without stating a number of years it had been operating in those airports as per the requirement of the Tender Document. The Respondent insisted that the evaluation process was conducted in accordance with Regulations 203(1) of GN. No.446 of 2013.

Regarding complaint that the proposed award to the 2<sup>nd</sup> Respondent is improper the 1<sup>st</sup> Respondent argued that clarification was sought and obtained from the 2<sup>nd</sup> Respondent in relation to the rent and concession rate. After evaluation the 2<sup>nd</sup> Respondent's bid became responsive and hence was proposed for the award of the contract.

However, the 1<sup>st</sup> Respondent confirmed that the 2<sup>nd</sup> Respondent has, through a letter served upon it, declined the offer. Therefore, the 1<sup>st</sup> Respondent is considering appropriate action to take in the circumstances.

Finally, the Respondent prayed for the following reliefs: -

- i. Dismissal of the Appeal for lack of merits with costs;
- ii. An order directing the 1<sup>st</sup> Respondent to proceed with the contract execution in respect of the Tender in issue; and
- iii. Any other order the Appeals Authority may deem fit to grant.

REPLY BY THE 2<sup>ND</sup> RESPONDENT

The 2<sup>nd</sup> Respondent's reply to the grounds of Appeal was that the Tender process was fair. However, it is no longer interested with the proposed award of the tender to its firm. It attached a letter submitted to the 1<sup>st</sup> Respondent to indicate that due to financial constraint it would not accept the proposed award of the Tender.

#### ANALYSIS BY THE APPEALS AUTHORITY

In view of the fact that the 2<sup>nd</sup> Respondent has declined the offer of the proposed award, the Appeals Authority would not delve on the issue regarding the proposed award to the 2<sup>nd</sup> Respondent. There remain therefore, two main issues for determination. These are:-

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

Having identified the issues in dispute the Appeals Authority proceeds to determine them as hereunder: -

1. Whether the Appellant was fairly disqualified

In resolving this issue, the Appeals Authority reviewed the Tender Document, particularly the Terms of Reference. It can be observed that tenderers were required to provide documentary proof of one site where they have been operating a similar business for at least five years, in the form of lease contract and a reference letter. It was further observed that, tenderers were also required to submit general information showing their experience of developing and running food beverage business for the last three years. The Terms of Reference read as follows:-

*"RELEVANT EXPERIENCE*

*The successful service provider shall provide documentary proof of one site where they are operating a similar restaurant for at least five (5) years, in the form of Lease contract and reference letter addressed to Director General, Tanzania Airports Authority."*

*"FINANCIAL PERFORMANCE*

*The qualified Companies/Operators should observe the following instructions (Specific Requirements);*

*(i) N/A*

*(ii) N/A*

*(vi) The Operator shall provide information indicating its General Experience of developing and running food and beverage business for the last three years."*

The Appeals Authority also reviewed the Appellant's tender and observed that it did attach a reference letter dated 15<sup>th</sup> January 2019 from Oman Airport. However, the letter states that the Appellant has operated at that airport from March 2018. During the hearing the Appellant conceded to have submitted only one reference letter. However, the Appellant argued that since the 1<sup>st</sup> Respondent had already pre-qualified it, there was no need of attaching other documents to prove its experience. The 1<sup>st</sup> Respondent on the other hand pointed out that during the site visit held on 11<sup>th</sup> and 25<sup>th</sup> January 2019 it agreed to waive by way of clarification the

requirement of submitting copies of lease contracts. An extract from clarification of questions raised during the site visit reads as follows:-

S/ No.	QUESTION RAISED	CLARIFICATION
6	<i>In page 76- "Documentary evidence such as copies of lease/ agreements/ contracts, signed between operator and the listed Airport." Due to the confidentiality clauses of the agreements we signed with the related authorities, we are not able to share the agreements with 3<sup>rd</sup> parties. Please kindly confirm that reference Letters will be sufficient for this purpose."</i>	<i>Reference letters will be sufficient for this purpose.</i>

The 1<sup>st</sup> Respondent insisted that the waiver as to copies of lease contract did not mean that the proof of five years experience has been waived. The reference letter should have indicated the requirement as per the Tender Document.

From the submissions and analysis, the Appeals Authority finds that the reference letter from Oman Airport did not indicate that the Appellant has experience of at least five years as required in the Tender Document.

Furthermore, the Appeals Authority considered the Appellant's argument that at pages 21 and 25 of its bid it indicated that it has worked in 8 countries and 17 airports. This, in the Appeals Authority's view, is not, documentary evidence in the form of a reference letter to prove the required experience.

With regard to the argument that, the Appellant was pre-qualified, the Appeals Authority disagrees with the Appellant's argument. This is because pre-qualification and tendering are distinct processes in the tender proceedings. The Appeals Authority is of the firm view that, the law does not prohibit a procuring entity from requiring tenderers who have been prequalified to demonstrate their qualifications at the tendering stage. This finding is in line with the provisions of Regulation 218(1) of G.N. No. 446 of 2013 which reads:-

*Reg. 218 (1) Whether or not it has engaged in pre-qualification proceedings, a procuring entity may require the tenderers submitting the tender that has been found to be the successful to demonstrate again its qualifications."*

The Appeals Authority agrees with the Appellant that the purpose of pre-qualification is to shortlist tenderers who are capable to perform the required task pursuant to Regulation 119(1) of GN. No.446 of 2013. However, that provision does not, in the Appeals Authority's view, mean that upon being shortlisted and issued with the Tender Document then a tenderer need not have to comply with the requirements set in the Tender

Document. Therefore, the Appellant was obliged by the law to comply with what was stated in the Tender Document.

From the above findings, the Appeals Authority is of the firm view that rejection of the Appellant's tender was fair and justified pursuant to Regulation 204(1)(2)(f) and (k) of GN.No.446 of 2013. The provisions read as follows:-

*"Reg.204 (1) All tenders shall be checked for substantial responsiveness to the commercial terms and conditions of the tendering documents.*

*(2) Material deviations to commercial terms and conditions which justify rejection of a tender shall include the following;*

*(f) failure to comply with minimum experience criteria as specified in the tendering documents;*

*(k) failure to submit major supporting documents required by the tendering documents to determine substantial responsiveness of a tender."*

Therefore, the first issue is answered in the affirmative that the Appellant was fairly disqualified.

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

Having held that the Appellant was fairly disqualified, the Appeal is hereby dismissed for lack of merits. The Respondent is ordered to proceed with the tender process accordingly. The Appeals Authority is unable to determine the relief as to costs since none of the parties indicated in its

submissions what it claims as costs. In the circumstances the Appeals Authority makes no order as to costs.

It is so ordered.

This Decision is binding and can be enforced in accordance with Section 97(8) of the Act.

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

This Decision is delivered in the presence of the 1<sup>st</sup> Respondent and in the absent of the Appellant and the 2<sup>nd</sup> Respondent this 21<sup>st</sup> day of May 2019.

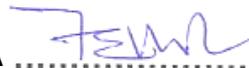


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ADVOCATE ROSAN MBWAMBO

Ag: CHAIRMAN

MEMBERS:

1. CPA. FREDRICK RUMANYIKA



2. DR. LEONADA MWAGIKE.....

