

IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY
AT DAR ES SALAAM
APPEAL NO. 09 OF 2017-18

BETWEEN

M/S PAMBA ROAD SERVICE STATION..... APPELLANT

AND

MWANZA URBAN WATER SUPPLY
AND SANITATION AUTHORITY..... RESPONDENT

DECISION

CORAM

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| 1. | Eng. Francis Marmo | - | Ag. Chairman |
| 2. | Mr. Louis Accaro | - | Member |
| 3. | Eng. Aloys Mwamanga | - | Member |
| 4. | Mr. Ole-Mbille Kissioki | - | Secretary |

SECRETARIAT

- | | | | |
|----|---------------------|---|----------------------|
| 1. | Ms. Florida Mapunda | - | Senior Legal Officer |
| 2. | Ms. Violet Limilabo | - | Legal Officer |
| 3. | Mr. Hamis Tika | - | Legal Officer |

FOR THE APPELLANT

- | | | | |
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| 1. | Mr. Mark Aloyce Ole Sululu | - | Accountant |
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FOR THE RESPONDENT

1. Mr. Meck Manyama - Commercial Manager
2. Mr. Oscar Twakazi - Legal Secretary
3. Mr. Renatus Fulla - Administration Manager
4. Mr. Poas Kilangi - Ag. Head Procurement Management Unit

This Decision was set for delivery today 8th September 2017 and we proceed to deliver it.

The Appeal was lodged by M/s Pamba Road Service Station (hereinafter referred to as "the Appellant") against Mwanza Urban Water Supply and Sanitation Authority (hereinafter referred to as "the Respondent"). The Appeal is in respect of Tender No. AE/042/2016-2017/G/09 for the provision of Fuel Filling and Supply of Lubricants for Motor vehicles, Motor cycles and Plants (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 facts of the Appeal can be summarized as follows:-

The Tender under Appeal was initially floated using National Competitive Bidding method through the Daily News newspaper dated 16th May 2017. After completion of the evaluation process recommendations for the award of the tender were submitted to the Tender Board on 28th June 2017 for deliberations. The Tender Board observed that there were

discrepancies on the prices quoted by all tenderers; hence ordered re-tendering through restrictive tendering method.

On 10th July 2017, the Respondent invited seven tenderers to participate in the Tender under Appeal. The re-tendered Tender was conducted through restrictive tendering method pursuant to the Public Procurement Act of 2011 (as amended), (hereinafter referred to as "the Act") and the Public Procurement Regulations, G.N. No. 446 of 2013 (as amended) (hereinafter referred to as "G.N. No. 446 of 2013"). On the deadline for the submission of the Tenders which was set for 21st July 2017, only two (2) tenderers submitted their bids out of seven invited tenderers and their read out prices during the tender opening ceremony were as follows;

Serial No.	Name of Bidder	Amount in TZS (VAT Inclusive)
1.	M/s LP GAS POINT (ORYX MAKONGORO SERVICE STATION)	45,114,000.00
2.	M/s PAMBA ROAD SERVICE STATION	53,928,000.00

The tenders were subjected to evaluation which was conducted in two stages namely; Preliminary and Detailed Evaluation. During the Preliminary Evaluation both tenders were found responsive and subjected to detailed evaluation. In the detailed evaluation tenders were assessed

for their technical and financial capacities; and both were found to be responsive. The tenders were then subjected to correction of arithmetic errors and price comparison whereby M/s LP GAS POINT (ORYX MAKONGORO SERVICE STATION) was ranked the 1st having quoted the lowest evaluated price and it was recommended for award at the contract price of TZS 45,114,000.00 VAT inclusive.

The recommendations of the Evaluation Committee were submitted to the Tender Board at its meeting held on 31st July 2017 and the same were approved.

On 2nd August 2017, the Respondent vide letter with Ref. No. UWASA/MZA/15/VOL.VIII/235 issued a Notice of Intention to Award to both bidders. The said notice informed the Appellant that his tender was not recommended for award of contract as their quoted price was higher compared to the price of M/s LP GAS POINT (ORYX MAKONGORO SERVICE STATION).

Dissatisfied with the said notice, on 3rd August 2017 the Appellant filed an application for administrative review to the Respondent challenging award proposed to the successful tenderer on the grounds that;

- i) The firm is not among the shortlisted fuel suppliers who have been awarded Framework Agreement with Government Procurement Services Agency (GPSA);

- ii) The firm lacked legalized Manufacturer's Authorization; and
- iii) The given discounts were unrealistic in the market of retail sales.

On 7th August 2017, the Respondent issued his decision with respect to the Appellant's application for administrative review whereby the complaint was dismissed for lack of merits. Dissatisfied with the Respondent's decision the Appellant lodged this Appeal on 16th August 2017.

SUBMISSIONS BY THE APPELLANT

The Appellant raised two grounds of Appeal which may be summarized as follows;

That, the proposed successful tenderer, namely; M/s LP GAS POINT (ORYX MAKONGORO SERVICE STATION) is not among the fuel suppliers who were awarded Framework Agreement by GPSA for Mwanza Region in the Financial Year 2017/18. The Appellant contended further that, according to Section 50 of the Act read together with Regulation 131 and 132 of GN. No. 446 of 2013 all procuring entities are required to procure common use items and services from suppliers/service providers who have been awarded Framework Agreement by GPSA. Thus, the Respondent's act of intending to award the Tender to a service provider who is not in the list of shortlisted suppliers/service providers by GPSA contravenes the law.

That, the tender process was marred by elements of unfair competition as some of the Respondent's staff intended to favour M/s LP GAS POINT (ORYX MAKONGORO SERVICE STATION). In substantiating this point the Appellant submitted that, the proposed successful tenderer was not eligible for this Tender as he is not in the list of shortlisted suppliers by GPSA, but yet he was invited to participate in this same Tender.

Finally, the Appellant prayed that the proposed award of the Tender to the successful tenderer be nullified and the Tender be awarded to them.

REPLIES BY THE RESPONDENT

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

That, in conducting this Tender process the Respondent adhered to the requirements of the Act and its Regulation.

That, the Tender under Appeal was conducted through restrictive tendering method and the invited service providers were obtained from the Respondent's previous records. The Respondent decided not to use the list of shortlisted service providers by GPSA because they normally do not respond to the invitation issued by the Respondent. Thus, the Respondent opted to invite tenderers even those who were not shortlisted by GPSA for purposes of enhancing competition.

That, the Respondent disputes the Appellant's argument that there was an element of unfair competition and avers that they did not violate procurement procedures as claimed. They submitted further that in conducting this Tender process they acted in a bonafide manner to its finality.

Therefore, the Respondent prayed for dismissal of the Appeal for lack of merit.

ANALYSIS BY THE APPEALS AUTHORITY

From the above submissions, the Appeals Authority is of the opinion that there are two (2) triable issues to be determined. These are:-

- Whether the award of the tender to the proposed successful tenderer is justified; and
- What reliefs, if any, are parties entitled to

Having identified the issues, we proceed to determine them as hereunder:-

1.0 Whether the award of the tender to the proposed successful tenderer is justified

In resolving this issue the Appeals Authority revisited the documents, parties' written and oral submissions and observed that the Tender under Appeal was conducted through restrictive tendering method. The Appeals Authority is of the firm view that, since the Respondent opted to use restricted tendering method, they were required to comply with

requirements of Regulation 152(1)(a) of GN No. 446 of 2013 which provides as follows;

Reg.152(1) "A procuring entity may restrict the issue of tender documents to a limited number of specified tenderers if;

- (a) the suppliers, contractors or service providers have already been pre-qualified further to Regulation 119 of these Regulations.

The quoted provision entails that, the Respondent was required to invite and issue Tender Documents to service providers who have already been pre-qualified or shortlisted. The Appeals Authority observed that the Tender was indeed conducted through restricted tendering method. The Respondent invited seven tenderers selected randomly from their own previous records.

According to Section 50(1) of the Act, procuring entities are required for purposes of efficiency and reduction of procurement transaction costs to use open Framework Agreements if the need for the subject matter of procurement is expected to arise on a repeated basis, which is common use items. Section 50 of the Act read together with Regulations 131 and 132 of GN. No. 446 of 2013 give guidance on the procurement of common use items. This entails mandatory drawing of short-list from the list of suppliers registered by the GPSA. It is not disputed by either of the parties to the Appeal that the Tender falls under common use items.

Furthermore, the Appeals Authority observed that, much as the Respondent used his own previous records to obtaining the list of tenderers who were invited for this Tender, amongst the two tenderers who responded to the invitation, one tenderer (the Appellant) is among the shortlisted service providers by GPSA and the other (the proposed successful tenderer) is not. It was also observed that, even after completion of the evaluation process the Respondent intended to award the tender to the tenderer who was not in the list of shortlisted service providers by GPSA.

During the hearing the Respondent was asked to explain why they did not invite GPSA's shortlisted service providers to which they replied that in the previous financial years the said GPSA's shortlisted service providers used to be invited and issued with tender documents but disappointingly more often eventually they did not submit their tenders.

From the above facts, the Appeals Authority is of the firm view that, the Respondent being aware that the Tender falls under common use items should have invited only GPSA's shortlisted services providers to participate in this Tender. Thus, the Respondent's act of inviting tenderers from his own source to participate in this Tender contravenes the requirement of Section 50 of the Act read together with Regulations 131 and 132 of GN. No. 446 of 2013 which guides on the procurement of common use items. The Appeals Authority rejects the Respondent's

argument that GPSA's shortlisted service providers normally do not respond to the invitations given as such argument lacks legal justification.

The Appeals Authority observed further that, since this Tender falls under common use items the shortlisted tenderers that deserved to be invited were only those who had been awarded Framework Agreement by GPSA. To the contrary, the Respondent invited tenderers from his own records.

Therefore, the Appeals Authority is of the settled view that, the Respondent's Tender process was marred by irregularities and contravened the law.

Accordingly, the Appeals Authority's conclusion with regard to the first issue is that the award to the proposed successful tenderer is not justified.

2.0 What reliefs, if any, are parties entitled to

Taking cognizance of the findings above, the Appeals Authority finds the Appeal to have merit and therefore quashes the Respondent's decision to award the Tender to the proposed successful tenderer. The Appeals Authority therefore upholds the Appeal and orders the Respondent to re-start the tender process in observance of the law.

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

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 Appellant and the Respondent this 8th September, 2017.


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ENG. FRANCIS I. MARMO
Ag:CHAIRMAN

MEMBERS:

1. MR. LOUIS ACCARO.....

2. ENG. ALOYS MWAMANGA.....