

**IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY
APPEAL CASE NO. 02 OF 2015-16**

BETWEEN

M/S SUPREME INTERNATIONAL LIMITED.....APPELLANT

AND

TANZANIA PORTS

AUTHORITY.....RESPONDENT

DECISION

CORAM

- | | | |
|-------------------------------------|---|-----------|
| 1. Hon. Vincent K.D Lyimo, J. (rtd) | - | Chairman |
| 2. Mrs. Rosemary A. Lulabuka | - | Member |
| 3. Mr. Louis P. Accaro | - | Member |
| 4. Eng. Aloys J. Mwamanga | - | Member |
| 5. Mr. Ole-Mbille Kissioki | - | Secretary |

SECRETARIAT

- | | | |
|---------------------------|---|-------------------------|
| 1. Mrs. Toni S. Mbilinyi | - | Principal Legal Officer |
| 2. Ms. Florida R. Mapunda | - | Senior Legal Officer |
| 3. Ms. Violet S. Limilabo | - | Legal Officer |
| 4. Mr. Hamis O. Tika | - | Legal Officer |

FOR THE APPELLANT

1. Mr. Deusdedit Muhanuzi - Managing Director, Supreme International Ltd
2. Mr. Lissah Mponjoli - General Manager
3. Mr. Deogratias Muganda - Director

FOR THE RESPONDENT

1. Mr. Daudence Mwano - Legal Officer,
2. Mr. Vicent R. Stephen - Senior Procurement Officer,
3. Mr. Alex Seneu - Legal Officer

FOR THE OBSERVER

1. Mr. Paul Malima - Managing Director, Kabasa Investment Co. Ltd
2. Mr. Hamis Malima - Branch Manager
3. Mr. Sumayi Saimon - Accountant

This appeal was scheduled for delivery today 21st August, 2015, and we proceed to deliver it.

The appeal at hand was lodged by M/s **SUPREME INTERNATIONAL LIMITED** (hereinafter referred to as "the Appellant") against the **TANZANIA PORTS AUTHORITY** commonly Known by its acronym as TPA (hereinafter referred to as "the Respondent").

The said Appeal is in respect of Tender NO. AE/016/2014-15/MZA/NC/02 for Provision of Security Services at Mwanza, Kigoma and Kyela Ports (hereinafter referred to as "the tender").

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

The Respondent, through the Daily News and Mwananchi newspapers dated 24th February 2015 respectively, invited tenderers to submit bids for the above tender. The deadline for the submission of tenders was on 17th March 2015, whereby eight (8) tenders were received from the following firms:-

1. M/s Supreme International Ltd.
2. M/s Kabasa Investment Co. Ltd.
3. M/s Intercountry Security Guards and Enterprises Ltd.
4. M/s Mochrispo Security Co. Ltd.
5. M/s Rampart Security Service Ltd
6. M/s West Security Guard Ltd
7. M/s Intelligence Security Ltd
8. M/s Kigemu Security Services Ltd

The tenders were then subjected to evaluation which was conducted in three stages namely; preliminary evaluation, detailed evaluation and post qualification. At the preliminary evaluation stage, the tenders were

checked for substantial responsiveness and compliance with the specified eligibility criteria. In that process, five (5) tenders including that of the Appellant were found to be non-responsive for failure to comply with some of the specific requirements stipulated in the Tender Document. The remaining three (3) tenders by M/s Kabasa Investment Co. Ltd, M/s Rampart Security Services Ltd and M/s Kigemu Security Services Ltd respectively were carried forward and subjected to detailed evaluation.

During the detailed evaluation stage, the tenders were checked for prices quoted in respect to armed and unarmed guards before financial comparison. All the three (3) tenders were found to be responsive and qualified because they were within the minimum budget set by the Government Procurement Services Agency, viz TZS 280,000.00 per armed guard and TZS 220,000.00 for each unarmed guard and their respective quoted prices were as indicated in the table herein below:-

S/N	Tenderers Name	Quoted Price in TZS for armed Guard	Quoted Price in TZS for unarmed Guard	Quoted Price per Year in TZS
1.	M/s Kabasa Investment Co. Ltd	280,000.00	220,000.00	316,080,000.00
2.	M/s Rampart Security Services Ltd	220,000.00	180,000.00	256,320,000.00
3.	M/s Kigemu Security Services Ltd	280,000.00	200,000.00	293,760,000.00

After completion of the evaluation process, the Evaluation Committee recommended that, post qualification should be conducted to verify the qualification and competence of the three tenderers regarding patrol vehicles or motor cycles, dogs, good track record and performance.

The Evaluation Committee recommended award of the tender to M/s Kabasa Investment Co. Ltd. at a contract price of TZS 280,000.00 per armed Guard and TZS 220,000.00 per unarmed Guard.

The Respondent's Central Tender Board at its meeting held on 29th May 2015, approved the recommendations of the Evaluation Committee to award the tender to M/s Kabasa Investment Co. Ltd. at a contract price of TZS 280,000.00 per armed Guard and TZS 220,000.00 per unarmed Guard.

On 8th June 2015, the Respondent by its letter Ref. No. MN/4/1/08 informed all tenderers, including the Appellant of its intention to award the tender to M/s Kabasa Investment Co. Ltd. Further, the Respondent gave to the Appellant the reasons for its disqualification from the process, that it had quoted sixty (60) days as the bid validity period instead of one hundred and twenty (120) days specified under Clause 17.1 of the Bid Data Sheet (hereinafter referred to as "BDS").

Dissatisfied, with the Respondent's intention to award the tender to the proposed successful tenderer, the Appellant by its letter Ref. No. SI/PPRA/TPA-TD/2015/01 dated 22nd June 2015 applied for administrative review to the Respondent. The Appellant was challenging

the grounds for its disqualification and at the same time asserting that the proposed successful tenderer does not qualify for award of the tender due to its failure to file Annual Returns to Business Registration Licensing Agency (hereinafter referred to as "BRELA") since its incorporation.

On 25th June 2015, the Respondent by its letter Ref. No. MN/4/1/08 communicated his decision to the Appellant by dismissing the complaint for lack of merits.

Aggrieved by the Respondent's decision, on 13th July 2015, the Appellant appealed to this Appeals Authority.

SUBMISSIONS BY THE APPELLANT

In this appeal the Appellant raised four grounds of appeal which may be summarized as follows:-

- i. That, the Respondent's BDS was inconsistent with the Invitation To Bidder (hereinafter referred to as "ITB"). While the ITB indicated that the validity period was sixty (60) days, the BDS showed that the period was one hundred twenty (120) days. Thus, the Appellant ought not to have been disqualified.

And at the hearing, the Appellant submitted that, he accepted the bid validity Period of 120 days while responding to the Respondent's intention to award. He asserted that the Respondent could have

required them to extend his bid validity period instead of disqualifying its tender.

- ii. That, the tender was opened to eligible, competent, reputable and experienced tenderers with valid trading licence and other legal documents. The Appellant, suo moto conducted an official search from BRELA and established that the proposed successful tenderer had never filed Annual Returns since its establishment. Accordingly, the proposed bidder was not competent to perform the contract and was thus not eligible.
- iii. That, the Appellant was the lowest evaluated tenderer entitled for award of the tender, but the Respondent had opted to award the tender to the tenderer with the highest evaluated price contrary to the principle of value for money.
- iv. That, the evaluation exercise was inordinately delayed unnecessarily inviting unjustifiable extension of time thus defeating the essence and the gist of the law governing the Procurement process in Tanzania.

Finally the Appellant prayed for the following reliefs:

- i. Declaration that the tendering process and an award whereof was tainted with irregularities contrary to the governing provisions of the law and practice;

- ii. Order the tender process to be restarted afresh in compliance with the law; and
- iii. Award of costs incurred by the Appellant in pursuing the appeal.

REPLIES BY THE RESPONDENT

The Respondent's reply in relation to Appellant's grounds of appeal may be summarized as follows:

- i. That, the essence of stating bid validity period in the Tender Document is to secure the Respondent against unserious tenderers and to give sufficient time for tender evaluation up to award of contract. In addition, the purpose of the BDS is to amend the ITB Clauses to fit with the Respondent's requirements as it was indicated in the first paragraph of the BDS that;-

"The following specific data for the goods to be procured **shall** complement, supplement, or amend the provisions in the Instructions to Bidders (ITB). **Whenever there is a conflict, the provisions herein shall prevail over those in ITB**".

Thus tenderers were required to quote 120 days bid validity Period as per Clause 17.1 of the BDS. Further to that, the Appellant had traded and participated in public tendering over a period of years and he had knowledge of normal business practices, otherwise he is playing delaying tactics for the best reasons known to him. Also the

Appellant's argument that, the Respondent could have required him to extend bid validity period is baseless and immaterial.

- ii. That, no tenderers were required to submit filed Annual Returns to BRELA since it was not among the criteria provided in the Tender Document and the same was not used to determine tenderer's responsiveness as per Clause 23 of the ITB. The Respondent asserted that by conducting the said search suo moto, the Appellant embarked on a fishing mission not relevant to the tender process.
- iii. That, the Appellant was disqualified at the preliminary evaluation stage, thus his tender could not have been taken to price comparison to determine the lowest evaluated tenderer.
- iv. That, the evaluation process was conducted within time and in accordance with the law without any extension of time as alleged by the Appellant. He is delaying the tendering process hence defeating justice and the right of the Respondent to receive the services of the tender under appeal which are crucial for the security of its facilities as the Port Operator and as a critical country economic gate way.

In sum, the Respondent submitted that it had complied with the Public Procurement Act No. 7 of 2011 (hereinafter referred to as the "**Act**") and the Public Procurement Regulations GN. No. 446 of 2013

(hereinafter referred to as "GN No. 446 of 2013") in evaluating the tender and awarding the same.

Finally the Respondent prayed for dismissal of the appeal for lack of merits.

ANALYSIS BY THE APPEALS AUTHORITY

In determining this appeal, the Appeals Authority is of the firm view that there are four triable issues namely;

- i. Whether the Appellant was fairly disqualified;**
- ii. Whether the proposed award is being made to eligible tenderer;**
- iii. Whether the proposed award was made to the highest evaluated tenderer; and**
- iv. To what reliefs, if any, are the parties entitled to.**

Having indentified the issues the Appeals Authority proceeded to resolve them as follows:

1. Whether the Appellant was fairly disqualified

In resolving the Appellant's argument, the Appeals Authority considered Appellant's assertion of inconsistency in the Respondent's Tender Document.

The Appeals Authority revisited the Tender Document issued by the Respondent vis-a-vis the Applicable law. In the course of doing so, the Appeals Authority observed that, Clause 11.1 of the ITB quoted or stated that the bid validity period is sixty (60) days while Clause 21 of the BDS states that it is 120 days. The Appeals Authority further observed that, the introductory part of the BDS provided clearly that in event the ITB Clause conflicts with the BDS, the BDS shall prevail. The citation of the said paragraph is as quoted at Page 8 hereinabove.

At the hearing of the Appeal, when the Appellant's attention was drawn to that provision, the Appellant conceded to have wrongly quoted 60 days rather than 120 days. From the above and the Appellants' own admission the Appeals Authority is of the firm view that, 60 days bid validity period provided under Clause 11.1 of the ITB was amended by Clause 21 of the BDS which provides bid validity period of 120 days. Once it is shown that the bid validity period was 120 days, the Appellant's assertion on ground number 4 on unnecessary delays and extension of time does not hold water. Thus, the Appellant's disqualification with regard to the above criterion was in conformity with Regulation 191(1) and (2) of GN. 446 of 2013.

In view of the above, the Appeals Authority's conclusion with regard to the first issue is that, the Appellant was fairly disqualified.

2. Whether the proposed award is being made to an eligible tenderer.

In resolving this issue the Appeals Authority considered the Appellant's contention that, he had conducted official search to BRELA to establish the legal status of all the tenderers who participated in the disputed tender.

The issue at stake being whether, a bidder who has never filed Annual Returns with BRELA automatically lacks capacity or qualification for award of tender. The Appellant managed to show that the proposed successful tenderer - M/s Kabasa Investment Co. Ltd had never filed Annual Returns since its incorporation.

To ascertain the Appellant's contention, the Appeals Authority revisited the Tender Document issued by the Respondent and observed that, none of the provisions of the Tender Document required tenderers to submit evidence to prove that, they had each filed respective Annual Returns to BRELA. The Appeals Authority concurs with the Respondent that such a criterion was alien to the Tender Document contrary to Regulation 206 which require determination of the tender's responsiveness to be based on the content of the tender itself without recourse to extrinsic evidence.

The Appeals Authority further revisited the Companies Act No. 12 of 2012 to ascertain if failure by M/s Kabasa Investment Co. Ltd to file Annual Returns to BRELA would automatically disqualify it from the award of the

tender. The Appeals Authority observed that Section 128 (1) and (3) of the Companies Act require all companies to file Annual Returns and that whoever contravenes such a requirement shall be liable to pay fines and not otherwise. The said section is reproduced hereunder for easy of reference;

“Sec. 128.-(1) Every company shall deliver to the Registrar, successive annual returns each of which is made up to a date not later than the "return date", that is:-
(a) the anniversary of the company's incorporation, or
(b) if the company's last return delivered in accordance with this Chapter was made up to a different date, the anniversary of that date.

(2)N/A

(3) If a company fails to deliver an annual return in accordance with this Chapter within twenty eight days of the return date, **the company and every officer of the company who is in default shall be liable to a fine and, in the case of a continued failure to deliver an annual return, to a default fine...”.**

The Appeals Authority is of the firm view that, the above quoted provisions do not void the company. Therefore, M/s Kabasa Investment Co. Ltd was eligible to participate in the tender process regardless of its failure to deliver Annual Returns to BRELA. Rather it would be required to pay default fine upon delivery of the same.

The Appeals Authority shares concern with the Appellant that the proposed tenderer had never filed Annual Returns since its incorporation. However, the Appeals Authority encourages the procuring entities to award tenders to companies which are fully compliant with our legal regime.

From the above findings the Appeals Authority concludes the second issue that, the proposed award of the tender is being made to an eligible tenderer.

3. Whether the proposed award was made to the highest evaluated tenderer

In ascertaining this issue the Appeals Authority took note of the Appellant's admission during the hearing that, he had raised this ground having an assumption that the bid validity period of 60 days was proper and if it was not the same could be corrected. Hence, upon becoming aware that its tender did not go for detailed evaluation he did not intend to proceed with this ground. Thus the Appeal Authority would not determine it.

4. To what reliefs, if any, are the parties entitled to.

First the Appeals Authority took cognizance of its findings on the first and second issues that is, the Appellant was fairly disqualified and that the proposed award of the tender is being made to eligible tenderer M/s

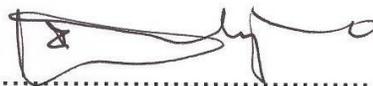
Kabasa Investment Co. Ltd. Based on such findings the Appeals Authority hereby rejects all the prayers by the Appellant and accepts prayer by the Respondent that the appeal be dismissed for lack merits. It is so ordered.

On the basis of the aforesaid conclusions, the Appeals Authority hereby dismisses the Appeal in its entirety.

This decision is binding upon the parties and may be enforced in any court of competent jurisdiction in terms of Section 97 (8) of the Act.

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

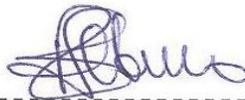
This Decision is delivered in the presence of the Appellant and the Respondent this 21st August, 2015.



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JUDGE (rtd) VINCENT K. D. LYIMO

MEMBERS:

1. MRS. R. A. LULABUKA



2. ENG. A. J. MWAMANGA



3. MR. L. P. ACCARO

