

IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY

APPEAL CASE NO. 18 OF 2016-17

BETWEEN

M/S KADIBON'S INVESTMENT LTD APPELLANT

AND

DODOMA MUNICIPAL CONCIL RESPONDENT

DECISION

CORAM

- | | | |
|---------------------------------------|---|-----------|
| 1. Hon. Vincent, K. D. Lyimo, J.(rtd) | - | Chairman |
| 2. Eng. Francis T. Marmo | - | Member |
| 3. Mrs. Rosemary A. Lulabuka | - | Member |
| 4. Mr. Ole-Mbille Kissioki | - | Secretary |

SECRETARIAT

- | | | |
|---------------------------|---|----------------------|
| 1. Ms. Florida R. Mapunda | - | Senior Legal Officer |
| 2. Ms. Violet S. Limilabo | - | Legal Officer |

FOR THE APPELLANT

- | | | |
|-----------------------|---|----------------------------|
| 1. Mr. Adolf W. Mahay | - | Advocate, TSK Law Chambers |
| 2. Mr. Kastory Mponda | - | Managing Director |
| 3. Mr. Erneus Mponda | - | Secretary |

FOR THE RESPONDENT

Mr. Tumainiel J. Kamunde - head Procurement Management
Unit (HPMU)

This decision was scheduled for delivery today 10th March 2017, and we proceed to deliver it.

The Appeal was lodged by M/S KADIBON'S INVESTMENT LTD (hereinafter referred to as "the Appellant") against the DODOMA MUNICIPAL COUNCIL (hereinafter referred to as "the Respondent").

The Appeal is in respect of Tender No. LGA/020/2016-2017/W/10 For Routine Maintenance of Ipala- Mtumba, Spot Improvement of Hombolo Bwawani – Mkoyo, H/Bwawani – Maseya, H/Bwawani – Zepisa roads 5.0 Km. and Construction of Zepisa & Maseya Box Culverts, Construction of Pipe Culverts (hereinafter referred to as "the Tender").

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

The Respondent advertised the Tender through the Daily News Newspaper dated 2nd September 2016 and the deadline for submission of the Tender was set for 22nd September 2016. A total of eight firms including the Appellant submitted their bid which were subjected to evaluation conducted in three stages namely; preliminary evaluation, detailed evaluation and Post Qualification. At the preliminary evaluation, five

bidders including the Appellant had submitted unregistered Power of Attorney contrary to the provision of the Tender Document and ought to have been disqualified. At the detailed evaluation stage the Appellant's tender was taken on board alongside with M/s Medes Company Ltd and two others who had passed at the Preliminary evaluation stage. In the process the Appellant was required to accept correction of errors made to his tender which he complied with. At the conclusion of the evaluation process, the Evaluation Committee recommended award of the tender to M/s Glaciers Investment Co. Ltd. at a contract price of TZS. 295,427,420.00 VAT Inclusive.

The Tender Board at its meeting held on 16th December 2016, deliberated on the award and approved it as recommended.

On 7th January 2017, the Appellant wrote to the Respondent calling for administrative review complaining on the manner the procurement process has been conducted. His complaints based on the following grounds;

- i) That, his company has not been notified on the intention to award;
- ii) That, the tender was been awarded to the tenderer with the highest price implying there was fraud, embezzlements and misappropriation of Government funds; and

- iii) That, the tender was been awarded outside the bid validity period contrary to the requirement of the law.

The Respondent did not issue a written decision to the administrative review filed, as a result the Appellant filed this Appeal on 1st February 2017, to the Appeals Authority.

SUBMISSIONS BY THE APPELLANT

The Appellant filed three (3) main grounds of Appeal as follows:-

- 1) That, his company has not been notified on the intention to award.

During the hearing the Appellant's counsel submitted that, up to the time of hearing of the Appeal the Appellant had not yet been served with the reason of disqualification of his tender, which amounts to unfair treatment since other tenderers were served with the notice of intention which informed them the reason of their disqualification. Thus the Respondents failure to serve notice of intention to award contravened the law.

- 2) That, the tender was been awarded to the tenderer with the highest price implying there was fraud, embezzlements and misappropriation of Government funds;

In support of this ground, Counsel for the Appellant submitted that, the Appellant quoted the lowest price even after correction of errors made on his tender. However, to the Appellant's surprise the

Respondent awarded the tender to the highest quoted tenderer which is misappropriation of Government funds.

- 3) That, the tender was been awarded outside the bid validity period contrary to the requirement of the law.

Finally, the Appellant prayed for the following orders:

- i) To suspend the procurement process;
- ii) To nullify the award of tender and order the award to be made to the deserved tenderer
- iii) To cancellation of the Respondent's Tender Board
- iv) Costs of the Appeal incurred by the Appellant.

REPLIES BY THE RESPONDENT

In its replies to the Appellant's grounds of Appeal, the Respondent submitted as follows-

That, the Respondent's Tender Board awarded tender to the lowest evaluated tenderer and this does not attract embezzlement and misappropriation of Government money.

That, the Appellant's tender was disqualified at the preliminary evaluation stage due to failure to submit registered Power of Attorney contrary to the requirement of the Tender Document, hence its quoted price was not considered at the next stage of evaluation.

That, the Appellant was served with the notice of intention vide his postal address.

Finally, the Respondent's prayed for dismissal of the Appeal for lack of merits.

ANALYSIS BY THE APPEALS AUTHORITY

The Appeals Authority is of the firm view that, there are three triable issues namely:-

1. Whether the Appellant was unfairly disqualified;
2. Whether the Respondent's failure to issue notice of intention to award the tender was fatal; and
3. What reliefs, if any, are the parties entitled to.

Having framed the issues in disputes the Appeals Authority proceeded to determine them as follows;

1. Whether the Appellant was fairly disqualified

From the submission of the parties and the document submitted to the Appeals Authority, we observe a number of procedural irregularities. It is a fact that at the preliminary evaluation stage the Appellant had submitted a tender which did not contain a registered Power of Attorney contrary to Clause 24 of the Bid Data Sheet. Thus, the Appellant ought to have been disqualified and not to be taken into detailed evaluation stage. The

Appellant and his Counsel did admit that this ground alone was sufficient to disqualify them from the tender process.

Furthermore, the Appeals Authority considered the argument by the Appellant that; the tender was awarded beyond the bid validity period. The Appeals Authority revisited the Tender Document and observed that Clause 17.1 of the ITT modified by Clause 18 of the BDS, the bid validity period was 150 days from the date of tender opening. According to the Evaluation Report the tender was opened on 22nd September 2016. The bid validity of the tender expired on 21st February 2017. The letter of acceptance was issued to the successful tenderer on 11th January 2017 which is within the bid validity period. Thus, the Appellant's contention fails miserably.

Therefore, from the above findings and observation the Appeals Authority concludes the first issue that, the Appellant's was fairly disqualified

2. Whether the Respondent's failure to issue notice of intention to award the tender was fatal.

On the other hand, the Appeals Authority observes that the Respondent failed to do the following;

1. To issue notice of intention to award the tender to the Appellant;
2. To give the Appellant reasons for its disqualification; and
3. To respond to the application for administrative review filed by the Appellant.

In considering whether failure by the Respondent's as afore mentioned was fatal. The Appeals Authority would like to state that, in some cases failure to observe procedural requirement might give rise to respective parties to seek remedies which might attract financial or monetary compensation. And that is where the parties manage to prove the damages suffered. In this case the Appellant has not shown how he had suffered any thing and taking into account that he had been disqualified at the preliminary stage. The Appeals Authority is of the firm view that notwithstanding the Respondent's failure to comply with provisions of the law, the Appellant had not been prejudiced in any manner.

Accordingly, the Appeals Authority concludes the second issue that, the Respondent's failure to issue notice of intention to award the tender to the Appellant was fatal.

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

Having determined the main issues in dispute the Appeals Authority took cognizance of its findings in the two issues above. That, the Appellant was fairly disqualified and that the Respondent's failure to issue notice did not prejudice the Appellant. The Appeals Authority hereby dismiss the Appeal for lack merits and order each party to bear own costs.

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

This Decision is delivered in the absence of the parties who had been dully notified on time and place, this 10th March 2017.

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VINCENT K.D. LYIMO, J. (RTD)
CHAIRMAN

MEMBERS:

1. ENG. FRANCIS T. MARMO

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2. MRS. ROSEMARY A. LULABULA

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