

IN THE PUBLIC PROCUREMENT APPEALS AUTHORITY

APPEAL CASE NO. 32 OF 2020-21

BETWEEN

M/S S.E.C (EAST AFRICAN) COMPANY LIMITED..... APPELLANT

AND

MBEYA REGIONAL COMMISSIONER'S OFFICE RESPONDENT

DECISION

CORAM

- | | |
|----------------------------|-----------------|
| 1. Adv. Rosan Mbwambo | - Ag. Chairman |
| 2. CPA. Fredrick Rumanyika | - Member |
| 3. Mr. Rhoben Nkori | - Member |
| 4. Ms. Florida Mapunda | - Ag. Secretary |

SECRETARIAT

- | | |
|------------------------|------------------------|
| 1. Ms. Agnes Sayi | - Senior Legal Officer |
| 2. Ms. Violet Limilabo | - Senior Legal Officer |

FOR THE APPELLANT

- | | |
|-----------------------------|---|
| 1. Mr. Ntuli W. Mwankusye | - Marketing Director |
| 2. Mr. Kamal Abdul | - Advocate, Msumi & Associates
Advocates |
| 3. Mr. Joseph Mrosso | - Lift Specialist |
| 4. Mr. Cilmerson Labastilla | - Lift Specialist |

FOR THE RESPONDENT

1. Mr. Francis Rogers Massawe - Senior State Attorney
2. Ms. Alice E. Mtulo - Senior State Attorney
3. Mr. Stanley Kalokola - State Attorney
4. Ms. Lilian Kalokora - Supplies Officer
5. Ms. Angelica Wavenza - Supplies Officer

Before this Public Procurement Appeals Authority (hereinafter referred to as "**the Appeals Authority**") is an appeal preferred by **M/s S.E.C. (East African) Company Limited** (hereinafter referred to as "**the Appellant**") against **Mbeya Regional Commissioner's Office** (hereinafter referred to as "**the Respondent**"). This Appeal is in respect of Tender No. RAS. 007/2018/2019/G/023 for Supply and Installation of Lift Shaft for Mbeya Regional Commissioner's Block (hereinafter referred to as "**the Tender**"). The Tender was conducted using Quotation Tendering Method specified under the Public Procurement Act, No. 7 of 2011 as amended (hereinafter referred to as "**the Act**") and the Public Procurement Regulations, GN. No. 446 of 2013 as amended by GN. No. 333 of 2016 (hereinafter referred to as "**the Regulations**").

On 19th January 2021, the Respondent invited tenderers to submit their quotations for Supply and Installation of Lift Shaft in its office. The deadline for submission was set for 2nd February 2021. Two (2) tenderers, the Appellant inclusive submitted their respective quotations which were publicly opened on 2nd February 2021.

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A preliminary and post qualification evaluation of the Tender was conducted. After completion of the evaluation process, the Evaluation Committee recommended award of the Tender to M/s Derm Elevators Co. Ltd at a contract price of Tanzanian Shillings One Hundred Seventy Four Million Seven Hundred Twenty Two Thousand One Hundred Ninety Nine **(TZS 174, 722,199.00)** only. The Tender Board at its meeting held on 20th April 2021 approved the award as recommended by the Evaluation Committee.

On 29th May 2021, the Respondent issued a Notice of Intention to award the Tender to all tenderers. It was indicated in the notice that the Respondent has proposed award of the Tender to M/s Derm Elevators Co. Ltd. The Notice also informed the Appellant that, its tender was disqualified for non – attachment of bank statement and failure to include servicing costs for repairs and placement of parts on the lift and on the landing entrance as per the requirements in the Quotation Document.

Dissatisfied with the Tender results, the Appellant filed an application for administrative review on 4th June 2021. The Appellant challenged the proposed award on the ground that the award was issued after expiry of the bid validity period. On 9th June 2021, the Respondent issued its decision dismissing the Appellant's application for administrative review. The reason for the decision was that the Bid Validity Period was extended through a request for extension letter issued on 19th March 2021 to all tenderers and therefore, the Tender was still valid when the award was

proposed. Aggrieved further, the Appellant filed this Appeal on 16th June 2021.

GROUND OF APPEAL

The grounds of appeal as set out in the Appellant's Statement of Appeal and as propounded in the Appellant's submissions during the hearing may be summarized as follows: -

1. That, the Bid Validity Period for the Tender was 45 days from the deadline for submission of proposals which was 2nd February 2021. By calculation, the Bid Validity Period expired on 19th March 2021. There was no request for extension of the Bid Validity Period. The Respondent proceeded with the Tender process even after expiry of the initially stipulated Tender Validity Period.
2. That, the Respondent through a letter dated 29th May 2021 informed the Appellant that it intends to award the Tender to M/s Derm Elevators Co. Ltd. According to the Appellant the said intention to award was invalid as it was made after expiry of the Bid Validity Period. Upon receipt of the notice of intention to award, the Appellant submitted an application for administrative review challenging the award proposal. In response thereof, the Respondent claimed to have requested tenderers to extend Bid Validity Period through a letter dated 19th March 2021 with Ref. No. CFA. 29/265/01D. The Appellant denied having received such a request from the Respondent.



3. That, the Appellant doubted authenticity of the letter purported to have requested extension of the Bid Validity Period since the letter addressed to the Appellant indicated that the Bid Validity period was to be extended for ninety (90) days while the letter addressed to M/s Derm Elevators Co. Ltd indicated that the extension of the Bid Validity Period sought was for forty five (45) days.
4. The Appellant also doubted the mode of communication used in sending the request for extension of the Tender validity period. According to the Appellant, the Respondent's mode of communication has always been through physical collection of letters from the Respondent's office. Ordinarily the Respondent would call the Appellant to collect the letters from its office. This was the case when the notice of intention to award was issued and when the Respondent made its decision on the application for administrative review. Surprisingly, the Respondent claimed to have posted a letter which requested for extension of the Bid Validity Period through the ordinary post procedure. The Respondent's act of changing the mode of communication raises doubts if at all the request for extension of the Bid Validity period was communicated to all tenderers.
5. That, according to the Respondent's statement of reply evaluation of tenders was conducted from 12th January to 14th January 2021. The Appellant failed to comprehend how such an evaluation was conducted before deadline for submission of quotations. Furthermore, the Respondent issued clarification regarding technical specifications of the

lifts on 10th March 2021 while the deadline for submission of tenders lapsed on 2nd February 2021 and the quotations were already evaluated. The Appellant suspects that M/s Derm Elevators Co. Ltd was accorded time to include the amended technical specifications requirement on its quotation while it was denied such a right. In that regard it is obvious that the Tender process did not adhere to the requirement of fairness and equal treatment of tenderers, the Appellant contended.

6. Finally, the Appellant prayed for the following orders: -
- i. Fair treatment to all tenderers;
 - ii. Cancellation of the Tender process; and
 - iii. The Respondent to show evidence of the letter requesting extension of bid validity period.

REPLY BY THE RESPONDENT

The Respondent's reply to the Appellant's grounds of Appeal as well as oral submissions during the hearing are summarized as follows: -

1. That, the Respondent advertised the tender on 19th January 2021 and the deadline for submission of quotation was on 2nd February 2021. The Bid Validity Period for the Tender was 45 days from the deadline for submission of quotation. The Respondent requested tenderers to extend Bid Validity Period for 90 days through a letter dated 19th March 2021 prior to the expiry of the original validity period pursuant to Regulation 191 (4) of the Regulations. All tenderers including the Appellant were



notified about the request for extension of the Bid Validity Period. The letters were sent to the tenderers via ordinary post. M/s Derm Elevators Co. Ltd accepted the request; thus, at the time of award the Tender was still valid. A letter from M/s Derm Elevators Co. Ltd accepting the request and an extract from the said register book showing that the request letter was posted have been shared following the Appeals Authority directions.

2. That, with regard to the argument that number of days sought for extension of the Bid Validity Period was different, that is 90 days for the Appellant and 45 days for M/s Derm Elevators Co. Ltd, the Respondent submitted that it was just a typing error. Tenderers were required to extend their Bid Validity period for 90 days.
3. On the dates of evaluation of quotation the Respondent submitted that, evaluation was conducted from 12th March 2021 and not from 12th-14th January 2021 as it was indicated in the statement of reply. The Respondent added that, evaluation was conducted in observance of the law and the requirements of the Quotation Document.
4. Finally, the Respondent prayed for the following orders: -
 - i. Dismissal of the Appeal with costs; and
 - ii. That the Respondent should be allowed to proceed with the procurement process.



ANALYSIS BY THE APPEALS AUTHORITY

During the hearing the following issues were framed: -

- 1. Whether the proposed award was made within the Bid Validity Period; and**
- 2. What reliefs, if any, are the parties entitled to.**

In determining the first issue, the Appeals Authority revisited the Appeal record and observed that, Item 6 of the Instructions To Tenderers (ITT) specified the Bid Validity period for this Tender to be forty five (45) days from the date of submission and opening. The quotations were opened on 2nd February 2021. Counting from that date the Bid Validity period lapsed on 19th March 2021.

The record of appeal indicates further that, the Respondent through a letter dated 19th March 2021 requested tenderers to extend the Bid Validity period. According to the Respondent the said letters were sent to the tenderers via their ordinary postal addresses on the same date, 19th March 2021.

During the hearing, the Respondent was asked to clarify whether the request for extension was received by the tenderers and acceptances thereof were provided. In response, the Respondent submitted that since the letters were posted to the tenderers' respective postal addresses it believed that the same were received. According to the Respondent M/s Derm Elevators Co. Ltd accepted the request for extension through a letter

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dated 23rd March 2021 received by the Respondent on 26th March 2021. There was no response from the Appellant.

The Request for extension of tender validity period and acceptance or refusal thereof are governed by Regulations 191 (4) & (5) and 192 (1) & (2) of the Regulations which provide as follows: -

Reg. 191(4) "In exceptional circumstances, prior to the expiry of the original period of the effectiveness of tenders, a procuring entity may request tenderers to extend the period for an additional specified period of time."

*(5) "A tenderer may refuse the request under sub-regulation (3) without forfeiting its tender security and **the effectiveness of its tender shall be terminated upon expiry of the un-extended period of effectiveness.**"*

*Reg. 192(1) "Tenderers **who agree to an extension of the period of effectiveness of their tenders shall extend or seek an extension of the period of effectiveness of their tender securities to cover the extended period of the effectiveness of their tenders**"*

- (2) ***"A tenderer whose tender security is not extended or, who has not provided a new tender security shall be considered to have refused the request to extend the period of effectiveness of its tender."***

(Emphasis made)

The wording of the Regulation 191 (4) of the Regulations indicates that in exceptional circumstances a procuring entity may request tenderers to extend the Bid Validity period prior to the expiry of the original period of effectiveness of tenders for an additional specified period. The tenderers may accept or refuse the request. A tenderer that refuses the request, its tender must be terminated upon expiry of un-extended period under Regulation 191 (5) of the Regulations.

Where tenderers accept the request, Regulation 192 (1) of the Regulations requires such tenderers to extend or seek an extension of the period of effectiveness of their tender securities or provide new tender securities to cover the extended period. A tenderer whose tender security is not extended or who has not provided a new tender security is considered to have refused the request under Regulation 192 (2) of the Regulations.

Having related the facts of this Appeal to the above quoted provisions the Appeals Authority observed that, the Respondent had requested tenderers to extend their Bid Validity period through its letter dated 19th March 2021.



The 19th day of March 2021 was apparently the expiry date of the initial stipulated Bid validity period.

According to Regulation 191(4) of the Regulations, it is crystal clear that the request for extension of the Bid Validity period has to be made prior to the expiry of the initially stipulated period of effectiveness of the tender. The Appeals Authority is of the view that the request for extension was made prior to the expiry of the period of effectiveness. The Appeals Authority is of the further view that, Regulation 191(5) of the Regulations requires a tenderer who refuses to extend the bid validity period its tender is to be terminated upon expiry of the un-extended period of effectiveness.

In the instance case the acceptance of the request to extend the tender validity period was to be made by 19th March 2021. Apparently, when the initial stipulated Bid Validity period expired on 19th March 2021 there was no acceptance of the request from either of the tenderers. That means, effectiveness of the Tenders ceased on 19th March 2021.

The Appeals Authority also observes that, it appears that the Appellant never received the request for extension of the bid validity period while M/s Derm Elevators Co. Ltd received it. M/s Derm Elevators Co. Ltd accepted the request through a letter dated 23rd March 2021 received by the Respondent on 26th March 2021 well after expiry of the original tender validity period. According to Regulation 191(4) and (5) of the Regulations, request for extension of the Bid Validity period and acceptance thereof, has to be made prior to the expiry of the stipulated period of effectiveness of



the tender. Therefore, the Respondent's act of proceeding with the Tender process after expiry of the Bid validity period on 19th March 2021 was not proper in the eyes of the law.

Nevertheless, the 23rd March 2021 letter from M/s Derm Elevators Co. Ltd does not indicate that its bid security was also extended as required by Regulation 192 (1) of the Regulations. In the absence of evidence from the Respondent that M/s Derm Elevators Co. Ltd extended its tender security or provided a new tender security covering the extended period prior to the expiry of the tender validity period, the Appeals Authority finds that pursuant to the provision of Regulation 192(2) of the Regulations M/s Derm Elevators Co. Ltd failed to comply with the request for extension.

The Appeals Authority noted with dismay the Respondent's act of using the mode of service for dispatching letters requesting extension of the Bid Validity period which does not provide evidence of proof of service. The Respondent claimed to have sent the said letters through ordinary post service. However, it had no means of proving that the letters were received. The Appeals Authority observed further that, the Respondent when issuing the notice of intention to award required tenderers (the Appellant specifically) to collect their letters physically at its office. The Appeals Authority failed to comprehend why the Respondent failed to use the same mode of service when issuing the request for extension of the Bid Validity period. The Appeals Authority is of the view that, since the Respondent was aware that it had issued the request for extension of the Bid Validity period on the last day of its expiry, it was duty bound to ensure



that the said requests were received and the responses thereof were provided before the expiry of the said period. The mode of service used by the Respondent was not suitable under the circumstances. As a result none of the tenderers responded within time.

The Appeals Authority observed further from the documents availed by the Respondent that the Appellant was requested to extend the Bid Validity period for 90 days and M/s Derm Elevators Co. Ltd for 45 days. The Respondent claimed that the difference in days was a typographical error as the correct numbers of days were 90 days. However, the Appeals Authority noted that there was no correction made in that regard. As a result M/s Derm Elevators Co. Ltd confirmed the extension for 45 days instead of 90 days. The Appeals Authority finds the Respondent's act in this regard to have contravened Section 4A (3)(b) of the Act which requires fairness of treatment to all tenderers during procurement process.

Therefore, from the above findings, the Appeals Authority concludes the first issue in a negative that the proposed award was not made within the Bid Validity period.

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

Given the Appeals Authority's findings hereinabove, the Appeal is hereby allowed. The Appeals Authority nullifies the tender process.

Since the Appellant did not ask for costs the Appeals Authority orders each party to bear its own costs.

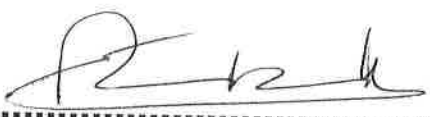
It is so ordered.

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 parties this 19th day of July 2021.

ADV. ROSAN MBWAMBO



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Ag. CHAIRMAN

MEMBERS:

1. CPA. FREDRICK RUMANYIKA.....

2. MR. RHOBEN NKORI.....