

**IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY**

APPEAL NO. 13 OF 2020-21

BETWEEN

M/S EXXELO INNOVEGIC COMPANY LTD APPELLANT

AND

**SUMBAWANGA URBAN WATER SUPPLY AND
SANITATION AUTHORITY..... RESPONDENT**

DECISION

CORAM

- | | |
|-------------------------------------|-----------------|
| 1. Hon. Justice (rtd) Souda Mjasiri | - Chairperson |
| 2. Mr. Rhoben Nkori | - Member |
| 3. Ms. Ndeonika Mwaikambo | - Member |
| 4. Ms. Florida Mapunda | - Ag. Secretary |

SECRETARIAT

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

FOR THE APPELLANT

- | | |
|---------------------------|--------------------------|
| 1. Mr. Derick G. Mtashaga | - Managing Director |
| 2. Mr. Benedicto Mahela | - Procurement Consultant |



FOR THE RESPONDENT

1. Eng. Gibon Nzowa - Managing Director
2. Mr. Edwin C. Hyera - Legal Officer
3. Mr. Elius A. Mkumbwa - Head of Procurement Management Unit (HPMU)
4. Mr. Hudson Muena - Information and Communication Technology Officer

The Appeal was lodged by **M/S EXXELO INNOVEGIC COMPANY LTD** (hereinafter referred to as "**the Appellant**") against the **SUMBAWANGA URBAN WATER SUPPLY AND SANITATION AUTHORITY** commonly known by its acronym **SUWASA** (hereinafter referred to as "**the Respondent**").

The Appeal is in respect of Tender No. AE/045/2020/2021/G/21 for Supply, Installation and Commissioning Electrical Driven Surface Pump for Kirando Water Supply in Nkasi District–Rukwa Region (hereinafter referred to as "**the Tender**").

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

The Tender was conducted competitively through Tanzania National e-Procurement System (TANePS) as specified in 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 and GN. No. 333 of 2016 (hereinafter referred to as "**the Regulations**").



On 29th July 2020 the Respondent through TANEPS invited qualified tenderers to submit their tenders. Nine tenderers, the Appellant inclusive, responded to the invitation. The submitted tenders were publicly opened on 14th August 2020 through TANEPS.

Tenders were then subjected to evaluation which was conducted into two stages namely; preliminary and detailed. During preliminary evaluation six (6) tenders including that of the Appellant were disqualified. Specifically, the Appellant's tender was disqualified for failure to submit a valid business license; instead it submitted business license for hardware. The remaining three (3) tenders were found to be responsive hence subjected to detailed evaluation. After completion of the evaluation process, the Evaluation Committee recommended award of the Tender to M/s Trans Africa Water Systems Ltd at the contract price of One Hundred Sixty Nine Million Five Hundred Twenty Nine Thousand Four Hundred Twenty Shillings (TZS 169,529,420.00) Only VAT Inclusive. The Tender Board at its meeting held on 10th September 2020 approved the award as recommended by the Evaluation Committee.

On 10th September 2020, the Respondent issued the Notice of Intention to award the Tender to all tenderers who participated in the Tender process. The Notice informed the tenderers that award has been proposed to M/s Trans Africa Water Systems Ltd for the contract price of One Hundred Sixty Nine Million Five Hundred Twenty Nine Thousand Four Hundred Twenty Shillings (TZS 169,529,420.00) Only VAT Inclusive. The Notice also informed the Appellant that its tender was found to be non-responsive for failure to submit a valid business license; instead it submitted business license for hardware. The Appellant



claimed to have received the Notice of Intention to award on 9th October 2020 through TANEPS.

Dissatisfied with the reason given for its disqualification, on 15th October 2020, the Appellant applied for administrative review to the Respondent pursuant to Section 96 (1) and (4) of the Act. On 19th October 2020 the Respondent rejected the Appellant's application for administrative review for being filed out of time. Aggrieved further, on 26th October 2020, the Appellant lodged this Appeal.

SUBMISSIONS BY THE APPELLANT

The grounds of Appeal as stated in the Appellant's Statement of Appeal as well as oral submissions during the hearing are summarized as follows: -

1. That, the Appellant disputes the Respondent's allegation that the application for review was submitted out of time. The Appellant submitted that it received the Notice of Intention to award the contract on 9th October 2020 through TANEPS. It submitted its application for review on 15th October 2020 within the time limit prescribed by the law. Thus, it is not true that its application was out of time.

The Appellant notified the Respondent that it had not received the Respondent's notification sent by normal communication other than that sent through TANEPS. The Appellant added that, since all correspondences with regard to this Tender were done through TANEPS, it was expected that any kind of notification should have been sent through TANEPS.



2. That, the Respondent did not state the type of Business License required for this Tender. Furthermore, Clauses 30 and 31 of the Tender Data Sheet (BDS) and Clauses 11 and 13 (b) of the Instructions to Tenderers (ITB) did not state that a Business License was a criterion for its evaluation. The Appellant made reference to Appeal Case No. 6 of 2015-16 between **M/s Fire Brand Technologies and Eastern Africa Statistical Training Centre**. The Appellant submitted that where there is discrepancy between the ITT and the BDS then the BDS should prevail.

In addition to that, the Appellant stated that the Respondent failed to comply with Section 74 (5) of the Act read together with Regulation 203 (1) of the Regulations.

3. That, the Respondent's decision had no basis and was unfairly made against the Appellant. It intended to stop the Appellant from winning this tender. The Appellant had the lowest quoted price of TZS 33,984,000/= VAT Inclusive compared with the price of TZS 169,529,420.00 VAT Inclusive quoted by M/s Trans Africa Water Systems Ltd. However, the Respondent had proposed award of the contract to the highest quoted bidder which did not have economic advantage and value for money.

4. Finally, the Appellant prayed for the following orders: -

- i. The reasons for disqualification of the Appellant's bid by the Respondent be declared null and void;
- ii. The Notice of Intention to award this tender be declared null and void and if the tender has been awarded then the award be cancelled;



- iii. The evaluation process of this tender be repeated by an Independent Evaluation Committee basing on the criteria provided for in the bidding documents and be awarded to the lowest evaluated tenderer;
- iv. Compensation of the total cost of Tanzanian Shillings Five Million (TZS 5,000,000/=) Only which includes intention to appeal fees, appeal fees, representation fees and transport charges; and
- v. Any other reliefs this Honourable Authority may deem just and fit to grant the Appellant.

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 Appellant had been disqualified from the Tender process for failure to submit a valid business license instead it submitted a business license for hardware.
2. That, the Appellant's application for review was not considered by the Respondent, since it was submitted after the expiry of the time limit stipulated under Regulation 105 of the Regulations.

The Respondent contended that, the Notice of Intention to award with Ref. No. SUWASA/B.30/1.VOL.II/60 dated 10th September 2020 was sent to the Appellant on the same day via its official email address namely, exxeloinogico@gmail.com. The Appellant was required to submit its complaint if any within seven working days from the date it received the Notice of Intention to award. To the contrary, the Appellant submitted its application for administrative



review on 15th October 2020 a letter with Ref. No. LTR/EICL/2020/02 after a lapse of twenty (20) days contrary to Regulation 105 of the Regulations. In addition to that, the Appellant did not disclose in its application for administrative review as to when it received the Notice of Intention to award. As a result, the Respondent rejected the Appellant's application for administrative review for being filed out of time.

3. Further, the Respondent added that on 18th August 2020 to 9th September 2020 there were technical faults on the TANePS, hence the Respondent on 10th September 2020 sent via email to all bidders the Notice of intention to award and the Appellant was one of them. The Notice of Intention to award was sent via the official email of the Appellant and no failure notice was received by the Respondent.
4. That, according to the specifications of the pumps, engineers' estimates and the prevailing market price as asked from different manufacturers, the Appellant quoted price of TZS 33, 984,000.00 VAT Inclusive was unreasonably low and not competitive.
5. Finally, the Respondent prayed for dismissal of the Appeal in its entirety for lack of merit with costs.

ANALYSIS BY THE APPEALS AUTHORITY

During the hearing the parties agreed on the following issues which were approved by the Members of the Appeals Authority: -

- 1.0 Whether the Appellant's application for administrative review was submitted within the time prescribed by the law;**
- 2.0 Whether the disqualification of the Appellant's tender is justified; and**



3.0 What reliefs if any are the parties entitled to.

The Appeals Authority proceeded to resolve the above mentioned issues as follows: -

1. Whether the Appellant's application for administrative review was submitted within the time prescribed by the law.

In analyzing this issue, the Appeals Authority went through the documents submitted and observed that the Respondent through a letter with Ref. No. SUWASA/B.30/1.VOL.II/60 dated 10th September 2020 issued the Notice of Intention to award the Tender to all tenderers who participated in the Tender process. The Respondent claimed to have sent the said Notice to all tenderers on 10th September 2020 through their official email addresses as TANEPS was not working. Specifically, the said Notice was sent to the Appellant using the following email address, exxeloilogico@gmail.com.

The Appellant claimed to have received the said Notice on 9th October 2020 through TANEPS. It denied receiving any email from the Respondent prior to that date regarding the subject matter. After receipt of the Notice of Intention to award and being dissatisfied, the Appellant lodged an application for administrative review to the Respondent on 15th October 2020. The Respondent on 19th October 2020 rejected the application for administrative review for being filed out of time.

In order to establish as to when the Appellant received the Notice of Intention to award, we reviewed the email address which the Respondent claimed to have sent the Notice of Intention to award to the Appellant that is, exxeloilogico@gmail.com.



The Appeals Authority reviewed the Appellant's Tender and observed that the official email address indicated was exxeloinovvegicol@gmail.com. Having compared the email used by the Respondent and the one contained in the Appellant's Tender, we observed that the two email addresses were different. The email address used by the Respondent missed some letters; thus, it is obvious that the Notice of Intention to award sent on 10th September 2020 was not delivered to the Appellant.

Under the circumstances, the Appeals Authority is of the settled view that, the Appellant received the Notice of Intention to award on 9th October 2020 when it was sent through TANEPS. Counting from 9th October 2020, the seven working days for filing an application for administrative review was to lapse on 21st October 2020. The Appellant filed an application for administrative review on 15th October 2020; thus, within the prescribed time as per Section 96 (1) and (4) of the Act and Regulation 105 of the Regulations. For purposes of clarity Section 96 (4) of the Act is reproduced as follows: -

Section 96 (4) "*The accounting officer shall not entertain a complaint or dispute unless it is **submitted within seven working days from the date the tenderer submitting it became aware of the circumstances giving rise to the complaint or dispute or when that tenderer should have become aware of those circumstances, whichever is earlier***".

(Emphasis provided)



The Appeals Authority considered the Respondent's argument that it could not have sent the Notice of Intention to award through TANePS as the system was not working from 18th August 2020 to 9th September 2020. According to the Guideline issued by the Public Procurement Regulatory Authority (PPRA), TANePS was not working from 18th August to 23rd August 2020 due to unscheduled maintenance. Further, the Notice of Intention to award was issued on 10th September 2020 when TANePS was already working, thus the Respondent ought to have sent the Notice of Intention to award through TANePS.

Given the circumstances, it is evident that the Appellant became aware of the circumstances giving rise to the complaint on 9th October 2020 when it received the Respondent's Notice of Intention to award hence it submitted its complaint within the prescribed time under Section 96 (4) of the Act.

From the above findings the Appeals Authority concludes the first issue in the affirmative that, the Appellant filed its application for review within the time prescribed by the law.

2. Whether the disqualification of the Appellant's tender is justified.

In analyzing this issue, the Appeals Authority revisited the Evaluation Report obtained from the TANePS system together with other relevant documents submitted by the parties. In the course of so doing it was observed that, the Appellant was disqualified at the preliminary evaluation stage for failure to submit a valid business license; instead it submitted business license for *hardware*.

To ascertain if the ground for disqualification of the Appellant was valid, the Appeals Authority reviewed the Tender Document and observed that the requirement to submit a relevant business license was clearly stated under Clause 3.6 of the ITT and was also a requirement indicated in TANePS. Clause 3.6 of the ITT reads: -

Clause 3.6 "***National Tenderers shall satisfy all relevant licensing and /or registration requirements with appropriate statutory bodies in Tanzania..***"

(Emphasis provided)

From the above quoted provision it is evident that tenderers were required to submit a relevant business license. During the hearing the Appellant was asked by the Members of the Appeals Authority to explain if it complied with the above requirement. The Appellant responded that the above requirement was not among the evaluation criteria provided for in the Tender Document; hence, it could not have been used to disqualify its tender. The Appellant added that, the Procurement Management Unit (PMU) uploaded the criteria for submission of business license in the TANePS while the same was not approved by the Tender Board.

The Appellant was further required to clarify to the Members of the Appeals Authority that if a Business License was not among the documents required for this Tender, why it uploaded a business license for hardware. In response thereof, the Appellant stated that it uploaded the business license as an additional document which could not be used as the criterion to disqualify its tender.



The Appeals Authority finds that the Appellant's argument has no basis since the requirement to submit a business license was provided in the Tender Document. The Tender document should be considered as a whole. The Appeals Authority is of the view that, if the Appellant felt that a business license was not a requirement in the Tender Document, it should have sought for clarification from the Respondent pursuant to Clause 8.1 of the Tender Document read together with Regulation 13 of the Regulations. However, it did not do so and proceeded to submit a business license for *hardware* which does not relate to and is totally different from the business for Supply, Installation and Commissioning of Electrical Driven Surface Pumps. The nature of the license provided removed the Appellant from the eligibility criterion.

The Appeals Authority is of the settled view that the Respondent's act of disqualifying the Appellant complied with Regulations 202 (4) (a) and (5), 204 (2) (b) of the Regulations and Section 72 (1) of the Act read together with Regulation 203 (1) of the Regulations, which provide as follows: -

Reg. 202(4) *"Prior to the detailed evaluation of tenders, the tender evaluation committee shall carry out a preliminary examination of the tenders to determine whether or not –*

(a) Each tender is substantially responsive to the requirements of the tender documents;

(5) For the purpose of this regulation, a tender is considered to be substantially responsive if it conforms to all the terms, conditions and



specifications of the tender document without material deviation or reservations."

Reg. 204(2) "Material deviations to commercial terms and conditions, which justify rejection of a tender shall include the following:

(b) failure to satisfy eligibility requirements."

Sec. 72(1) "The basis for tender evaluation and selection of the successful tenderer shall be clearly specified in the tender document."

Reg. 203(1) "The tender evaluation shall be consistent with terms and conditions prescribed in the tender documents and such evaluation shall be carried out using the criteria explicitly stated in the tender documents."

The Appeals Authority revisited the **Fire Brand** case (supra) relied upon by the Appellant and is of the view that the circumstances of that Appeal are different.

With regard to the Appellant's contention that the Respondent had awarded the contract to M/s Trans Africa Water Systems Ltd at the contract price of TZS 169,529,420.00 VAT Inclusive while the Appellant had the lowest quoted price of TZS 33,984,000/= VAT Inclusive. The Appeals Authority is of the view that the Appellant was disqualified at the preliminary evaluation stage, thus its price could not be compared with that of the proposed bidder since the Appellant did not reach the detailed evaluation stage.



Given the circumstances, the Appeals Authority concludes the second issue in the affirmative that the disqualification of the Appellant was justified.

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

Taking cognisance of the Appeals Authority's findings hereinabove, the Appeal partially succeeds to the extent stated in the first issue. However, given our findings on the second issue, the Appeal is hereby dismissed. Each party is 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 13th day of November 2020.

HON. JUSTICE (RTD) SAUDA MJASIRI


.....
CHAIRPERSON

MEMBERS:

1. MR. RHOBEN NKORI.....


2. MS. NDEONIKA MWAIKAMBO