

IN THE PUBLIC PROCUREMENT APPEALS AUTHORITY

APPEAL NO. 14 OF 2020-21

BETWEEN

M/S GALILEA LIMITED.....APPELLANT

AND

BANK OF TANZANIA..... RESPONDENT

RULING

CORAM

- | | |
|-------------------------------------|-----------------|
| 1. Hon. Justice (rtd) Souda Mjasiri | - Chairperson |
| 2. Eng. Stephen Makigo | - Member |
| 3. Adv. Rosan Mbwambo | - 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. Chris Kuffar | - Managing Director |
| 2. Mr. Adam Raha | - Technical Director |

FOR THE RESPONDENT

- | | |
|-----------------------|----------------------|
| 1. Mr. Deodath Mushi | - Legal Counsel |
| 2. Mr. Magnus Mlokota | - Procurement Expert |



The Appeal was lodged by **M/s Galilea Limited** (hereinafter referred to as "**the Appellant**") against the **Bank of Tanzania** commonly known by its acronym **BOT** (hereinafter referred to as "**the Respondent**").

The Appeal is in respect of Tender No. PA/082/2019-20/ZNZ/NC/146 for Supply, Installation, Testing and Commissioning of Ventilation Air Conditioning (HVAC) Parts and PXC Controllers at Zanzibar Branch (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 using National Competitive Method through Tanzania National e-Procurement System (TANePS) as 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 and GN. No. 333 of 2016 (hereinafter referred to as "**the Regulations**").

The Respondent through TANePS issued a Tender Invitation on 25th March 2020 whereby qualified tenderers were invited to submit their tenders. The deadline for submission was set for 8th April 2020. Three tenders including that of the Appellant were received on the deadline for opening of tenders. Tenders were publicly opened on 8th April 2020 through TANePS.

Tenders were then subjected to evaluation which was conducted into three stages namely; preliminary, detailed and financial evaluation. During



preliminary evaluation two tenders, including that of the Appellant were disqualified. Specifically, the Appellant was disqualified for failure to quote a price under Item 21 of the Schedule of Requirements. The remaining tender by M/s Avco Biz Limited was subjected to detailed evaluation. After completion of the evaluation process, the Evaluation Committee recommended award of the Tender to M/s Avco Biz Limited at the contract price of Tanzania Shillings One Hundred Thirty Two Million Six Hundred Sixty Seven Thousand Four Hundred (132,667,400.00) Only VAT Inclusive.

The Tender Board at its meeting held on 13th August 2020 approved the award as recommended by the Evaluation Committee.

On 14th August 2020, the Respondent issued the Notice of Intention to award the contract to all tenderers who participated in the Tender process. The Notice informed the tenderers that the Respondent has proposed award of the contract to M/s Avco Biz Limited. The Notice also informed the Appellant that its tender was not successful for the reasons that: -

- i. The Appellant had not indicated a price for Item No. 21 (Immersion temp sensor/Ni 1000, 100mm, range 30 to 130) contrary to the requirement of the Tender Document and without stating the reason for such omission; and
- ii. The Appellant's bid price of TZS 134,611,278.48 was higher compared to the lowest evaluated bidder who had quoted TZS 132,667,400.00 VAT Inclusive.

Dissatisfied with the reasons given for its disqualification, on 18th August 2020, the Appellant applied for administrative review to the Respondent.



On 25th August 2020, the Respondent issued a letter to the Appellant which informed it that the procurement process has been suspended pending determination of the complaints raised. On 19th October 2020, the Respondent issued a decision which dismissed the first ground of the complaint and upheld the second one.

Aggrieved further, on 27th October 2020, the Appellant filed this Appeal to the Appeals Authority.

GROUND OF APPEAL

The grounds of Appeal as stated in the Appellant's Statement of Appeal are summarized as follows: -

1. That, the Appellant disputes its disqualification for the reason that it has not quoted a price for one item in the Bill Of Quantity (BOQ). Its tender price as indicated in Schedule of Price covers all items of the Tender. Thus, failure to quote one item in the BOQ which has seventy four (74) items could not constitute a major deviation.

The Appellant added that, it did not indicate a price under Item 21 as it intended to supply and install it for free. Further that Item 21 (Immersion temp sensor/Ni 1000, 100mm, range 30 to 130) has been priced 15 times in the same BOQ as it is the same under Item 4, 11, 12, 13, 14, 26, 27, 29, 37, 45, 47, 54, 57, 59 and 62 of the BOQ. Therefore, its price is known. Further that the Price Schedule and Form of Tender binds the Appellant to deliver all the items as provided in the Tender Document.



2. That, the Respondent had proposed award of the contract to M/s Avco Biz Ltd at a price of TZS 132,667,400.00 VAT Inclusive which is higher by TZS. 15,872,320.14 compared to the Appellant's quoted price of TZS. 116,795,079.86 VAT Inclusive. The proposed award contravened the principle of value for money and the core objective of the Public Procurement Regulatory Authority (PPRA).
3. Finally, the Appellant prayed for the following orders: -
 - i. The Tender process be reviewed; and
 - ii. Award be done on merit in accordance with the procedures.

REPLY BY THE RESPONDENT

The Respondent's reply to the Appellant's grounds of Appeal is summarized as follows: -

1. That, the Appellant had been disqualified for failure to comply with the requirements of Clauses 10 and 42 of the Bid Data Sheet (BDS) and Clauses 15.2, 15.3 and 32.6 of the Instruction To Tenderers (ITT) which require tenderers to submit a complete and signed price schedule/BOQ. Clause 15.2 clearly states that the tender will be rejected as being substantially non responsive if a price schedule shows items listed but not priced. The Appellant failed to quote a price for Item 21 of the Price Schedule; thus its omission contravened the requirement of the Tender Document, hence its tender was fairly disqualified.



Furthermore, the Respondent disputes the Appellant's allegation that Item 21 would be offered for free as it ought to have complied with the requirements of the Tender Document.

2. That, the Respondent proposed award of the contract to M/s Avco Biz Ltd after it was found to be the lowest evaluated bidder as it complied with the requirements of the Tender Document.

The Respondent added that, the Appellant quoted a lower price compared to the price quoted by the proposed tenderer, however the lower price does not justify award of the Tender. The Appellant ought to have complied with other tender requirements before its tender being subjected to price comparison. The Respondent submitted further that, the lowest evaluated tenderer is determined by assessing its compliance to the eligibility criteria, technical requirements and financial part. In this Tender the Appellant was disqualified for failure to comply with price Schedule, thus its tender was disqualified before price comparison.

3. Finally, the Respondent prayed that the Appeal be dismissed with costs.

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

- 1. Whether the disqualification of the Appellant was justified;
and**
- 2. What reliefs, if any, are the parties entitled to**



Before hearing the Appeal on merit, the Appeals Authority *suo-motu* brought to the attention of the parties that there is a point of law for determination before considering the merits of the Appeal. This is **whether or not the Appeal is properly before the Appeals Authority**. The Point of law was raised by the Appeals Authority after reviewing the record of Appeal and observing that the Appellant lodged this Appeal after a lapse of almost two months from the time it submitted an application for administrative review to the Respondent. The Appeals Authority therefore, invited the parties to address it on the point of law so raised.

SUBMISSIONS BY THE APPELLANT ON THE POINT OF LAW

The Appellant submitted that the Notice of Intention to award the contract dated 14th August 2020 was received by it on 17th August 2020. Being dissatisfied with the reasons for its disqualification contained in the Notice of Intention to award, the Appellant submitted its application for administrative review to the Respondent on 18th August 2020. The Respondent was required to issue a decision within seven (7) working days from the date it received the application for administrative review. However, on 25th August 2020, the Appellant received a letter from the Respondent which informed it that the procurement process has been suspended pending determination of the complaint. Then on 19th October 2020 the Respondent issued a decision which dismissed the first ground of the application for review and upheld the second ground. Dissatisfied with the said decision on 27th October 2020, the Appellant filed this Appeal. Initially the Appellant insisted that its Appeal was submitted within time. It



was filed after receiving the Respondent's decision. However, after Members of the Appeals Authority brought to the attention of the Appellant the requirements under Sections 96(6) and (7) and 97(2)(a) of the Act, the Appellant readily conceded that the Appeal was submitted out of time.

REPLY BY THE RESPONDENT ON THE POINT OF LAW

The counsel for the Respondent submitted that based on the requirements of the law it is clear that the Appeal was submitted out of time. Thus, it prayed that the same should be dismissed.

ANALYSIS BY THE APPEALS AUTHORITY

Sections 96(6) and (7) and 97(2) (a) of the Act provide that an Appeal to this Appeals Authority has to be lodged within seven (7) working days of becoming aware of the circumstances giving rise to the appeal or after the accounting officer failed to issue its decision with respect to the application for administrative review within the stipulated time limit. For purposes of enlightening the parties, the said provisions are reproduced as follows: -

Sec. 96(6) "The accounting officer shall, within seven working days after submission of the complaint or dispute deliver a written decision which shall: -

- (a) state the reasons for the decision; and*
- (b) if the complaint or dispute is upheld in whole or in part indicate the corrective measures to be taken.*



(7) Where the accounting Officer does not issue a decision within the time specified in subsection (6), the tenderer submitting the complaint or dispute to the procuring entity shall be entitled immediately thereafter to institute proceedings under section 97 and upon institution of such proceedings, the competence of the accounting officer to entertain the complaint or dispute shall cease."

(Emphasis provided)

Sec. 97(2) "Where-

(a) the accounting officer does not make a decision within the period specified under this Act;

the tenderer may make a complaint to the Appeals Authority within seven working days from the date of communication of the decision by the accounting officer or upon the expiry of the period within which the accounting officer ought to have made a decision."

(Emphasis Added)

According to the record of this Appeal, the Respondent issued the Notice of Intention to award the contract on 14th August 2020 which was received by

the Appellant on 17th August 2020. The Appellant applied for administrative review on 18th August 2020 challenging its disqualification. On 25th August 2020 the Respondent suspended the procurement process pending determination of the complaint. On 19th October 2020 the Respondent issued the decision which partly dismissed the Appellant's complaint. Aggrieved further on 27th October 2020 the Appellant filed this Appeal to the Appeals Authority.

Taking into consideration the requirements of the law cited hereinabove, the Appeals Authority is of the view that, the Appellant having submitted its application for administrative review to the Respondent on 18th August 2020, the Respondent ought to have issued its decision within seven (7) working days from the said date. Counting from 18th August 2020, the seven (7) working days expired on 27th August 2020. Having not received the Respondent's decision within the stipulated time limit, the Appellant ought to have submitted its Appeal directly to the Appeals Authority within seven (7) working days, that is by 7th September 2020. However, the Appellant lodged its Appeal on 27th October 2020, after forty nine (49) days had lapsed. The Appeals Authority finds that the Appeal has been filed beyond the time limit prescribed by the law.

Given the circumstances, and based on the finding on the point of law, the Appeals Authority would not delve into the merits of the Appeal. The Appeal is hereby dismissed. Each party to bear its own costs.

It is so ordered.

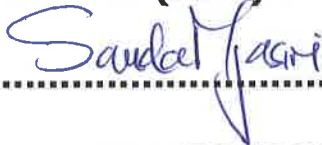


This Ruling is binding and can be enforced in accordance with Section 97(8) of the Act.

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

This Ruling is delivered in the presence of the parties this 19th day of November 2020.

HON. JUSTICE (RTD) SAUDA MJASIRI



.....
CHAIRPERSON

MEMBERS:

1. ENG. STEPHEN MAKIGO.....



2. ADV. ROSAN MBWAMBO.....

