

**IN THE PUBLIC PROCUREMENT APPEALS AUTHORITY  
AT DAR ES SALAAM  
APPEAL CASE NO. 15 OF 2019-20**

**BETWEEN  
M/S WALPHA TOURS AND SAFARIS LIMITED.....APPELLANT**

**AND  
TANZANIA CIVIL AVIATION AUTHORITY.....RESPONDENT**

**DECISION**

**CORAM**

- |                                     |                |
|-------------------------------------|----------------|
| 1. Hon. Justice (rtd) Sauda Mjasiri | - Chairperson  |
| 2. CPA. Fredrick Rumanyika          | - Member       |
| 3. Eng. Stephen Makigo              | - Member       |
| 4. Ms. Florida Mapunda              | - Ag.Secretary |

**SECRETARIAT**

- |                        |                 |
|------------------------|-----------------|
| 1. Ms. Violet Limilabo | - Legal Officer |
|------------------------|-----------------|

**FOR THE APPELLANT**

- |                             |                     |
|-----------------------------|---------------------|
| 1. Mr. Richard E. Kashaija  | - Managing Director |
| 2. Ms. Gladness Z. Selandoi | - Manager           |
| 3. Ms. Juliana S. Kaaya     | - Secretary         |

**FOR THE RESPONDENT**

- |                            |                                    |
|----------------------------|------------------------------------|
| 1. Mr.Vallery L. Chamlungu | - Corporation Secretary            |
| 2. Mr. Yoswam M. Nyongera  | - Procurement Manager              |
| 3. Mr. Patrick J. Vyamana  | - Principal Administrative Officer |
| 4. Mr.Hamisi Mussa         | - Principal Procurement Officer    |
| 5. Mr. Mbura Tenga         | - Senior Human Resource<br>Officer |

The Appeal was lodged by M/s Walpha Tours and Safaris Limited (hereinafter referred to as "**the Appellant**") against Tanzania Civil Aviation Authority commonly known by its acronym TCAA (hereinafter referred to as "**the Respondent**").

The Appeal is in respect of Tender No. AE/028/2019-2020/HQ/NCS/11 - Lot 1 for the Provision of Staff Transport Services for Tanzania Meteorological Authority (TMA), Tanzania Civil Aviation Authority (TCAA) and Tanzania Airports Authority (TAA) at Julius Nyerere International Airport and Ubungo Plaza Office (hereinafter referred to as "**the Tender**").

The Tender was conducted through National Competitive Bidding procedures specified in the Public Procurement Act of 2011 as amended (hereinafter referred to as "**the Act**") and the Public Procurement Regulations, Government Notices No. 446 of 2013 and No.333 of 2016 (hereinafter referred to as "**the Regulations**").

After going through the record of Appeal submitted to the Public Procurement Appeals Authority (hereinafter referred to as "**the Appeals Authority**"), the Appeal may be summarized as follows:-

The Respondent on 26<sup>th</sup> September 2019 through the Daily News newspaper, Tanzania Procurement Journal and the TCAA website invited eligible tenderers to participate in the Tender. The deadline for submission was set for 15<sup>th</sup> October 2019, whereby six tenders were received.

Tenders were then subjected to evaluation which was conducted into three stages namely:- preliminary, financial analysis and post-qualification.



During preliminary evaluation four tenders were disqualified for being non responsive to the requirements of the Tender Document. The remaining two tenders including that of the Appellant were subjected to evaluation of other general conditions, including Buses Conditions relating to ownership and insurance. During that stage the Appellant's tender was found to be non responsive for failure to comply with specified conditions; hence was disqualified.

The remaining tender by M/s Travel Partner Ltd was subjected to financial analysis to determine any arithmetic error. In that process the tender was found with some arithmetic errors which were corrected. Thereafter, the tender was post-qualified and found to be substantially responsive to the requirement of the Tender Document. Thus, it was recommended for award of the Tender at a contract price of TZS. 1,254,474,048.00 VAT Inclusive. The Tender Board at its meeting held on 11, 12 and 13<sup>th</sup> December 2019, approved the award as recommended by the Evaluation Committee.

On 13<sup>th</sup> December 2019, the Respondent issued the Notice of Intention to award the Tender to all tenderers who participated in the Tender, informing them that it intends to award the Tender to M/s Travel Partner Ltd. The Notice also informed the Appellant that its tender was disqualified for the following reasons:-

- It submitted a private comprehensive Insurance instead of a company comprehensive insurance in respect of motor vehicle No. T 375 CQU.

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- It submitted registration cards for buses which were not owned by the Appellant, specifically cards No. T 427 DED, T 487 DDV and T 676 DGF, owned by Gladness Zacharia Selandoi, Njeri Ali Kabe and Ernest Richard Kashaija respectively.
- It submitted registration card No. T 375 CQU which was under the company's name, while the comprehensive insurance cover had the name of Gladness Zacharia Selandoi.

Dissatisfied with the reasons given by the Respondent for its disqualification, on 23<sup>rd</sup> December 2019, the Appellant applied for administrative review to the Respondent. On 24<sup>th</sup> December 2019, the Respondent requested the Appellant to submit relevant documents to substantiate its complaints. On 27<sup>th</sup> December 2019, the Appellant submitted some of the requested documents. On 3<sup>rd</sup> January 2020, the Respondent issued its decision by dismissing the Appellant's complaints. Aggrieved further, on 8<sup>th</sup> January 2020 the Appellant lodged this Appeal.

### **GROUND OF APPEAL**

The Appellant's grounds of Appeal as well as oral submissions during the hearing may be summarised as follows:-

1. That, the Respondent erred in fact for disqualifying the Appellant's tender as it submitted a motor vehicle registration card No. T 375 CQU which was in the Appellant's name, while the insurance cover had the name of Gladness Zacharia Selandoi. According to the Appellant, the said Gladness Zacharia Selandoi transferred the motor vehicle to the

Appellant although the insurance cover remained in her name because the insurer could not issue another cover while there was a subsisting cover. The Appellant added that the new policy cover in the name of the company was to be issued in January 2020.

2. That, the Respondent unfairly disregarded the fact that, Motor vehicles with registration card No. T 487 DDV and T 676 DGF are owned by the Appellant, even after it had submitted documents to the Respondent which indicated that the transfer of the said motor vehicles was still being processed by the Tanzania Revenue Authority (TRA).
3. That the Respondent's tender process was conducted in contravention of the law for failure to conduct inspection of the motor vehicles submitted by all bidders as it was done in the previous tender.
4. That, even the proposed bidder has not complied with the requirement of the Tender Document, since the submitted motor vehicles were not inspected by the Respondent to verify ownership of the said vehicles.
5. Finally, the Appellant prayed for the following orders:-
  - i. To review the Tender process;
  - ii. To quash the Respondent's decision;
  - iii. To award the Tender to the Appellant; and
  - iv. Any other relief the Appeals Authority deems fit to grant.

## **REPLY BY THE RESPONDENT**

The Respondent's reply to the grounds of Appeal as well as oral submissions may be summarised as follows:-

1. That, the Appellant had submitted a comprehensive insurance cover in the name of Gladness Zacharia Selandoi instead of the name of the company contrary to the requirements under Section VII of the Tender Document (Buses Conditions). The motor vehicle registration card was in the name of the Appellant. Gladness Zacharia Selandoi was the original owner of the motor vehicle with Registration No. T 375 CQU but her rights over the property including the insurable interest ceased after she transferred the motor vehicle to the Appellant.

The Respondent added that, it has been a good practice to change motor vehicle insurance upon transfer to a new owner. The name and address on the registration card and insurance documents need to be similar in order to assist a new owner to obtain its rights whenever there is a claim for damages. Thus, failure to do so could result to denial of the claim due lack of insurable interest.

Furthermore, the Appellant's documents indicates that, the Appellant owned the motor vehicle with registration No. T 375 CQU from 13<sup>th</sup> June 2018. However, the submitted insurance Cover Note No. M083950 issued on 9<sup>th</sup> October 2019, was still in the name of Gladness Zacharia Selandoi. According to the Respondent almost more than a year had passed, which would have allowed the Appellant to process

the insurance cover in its own name instead of using the name of the previous owner.

The Respondent also argued that, the Appellant intended to deceive the Respondent by stating that Gladness Zacharia Selandoi was one of the Directors of the company and had contributed the motor vehicle to the company. However according to the search made to Business Registration and Licensing Agency (BRELA), it was established that Gladness Zacharia Selandoi was neither the director nor the shareholder of the Appellant.

2. That, the documents submitted by the Appellant to prove ownership of the motor vehicles with registration No. T 427 DED, T 487 DDV and T 676 DGF indicated that the motor vehicles were not owned by the Appellant. The registration cards were in the names of Gladness Zacharia Selandoi, Njeri Ali Kabe and Ernest Richard Kashaija, respectively. The Respondent's confirmation that, the said motor vehicles were in the process of transfer by the TRA proves that the Appellant did not own the buses at the time of submission of the tender as the process of transfer was incomplete.

The Respondent added that, the Tender was advertised on 26<sup>th</sup> September 2019 and the deadline for submission was on 15<sup>th</sup> October 2019. The Appellant was duty bound to ensure that all the submitted documents were in compliance with the requirement of the Tender Document.

3. That, the tender process was conducted in compliance of the Tender Document and the applicable laws specifically Section 4A of the Act as amended.
4. Finally the Respondent prayed for the following orders:-
  - i. Dismissal of the Appeal for lack of merits;
  - ii. Costs to the tune of TZS. 5,000,000.00; and
  - iii. Any other order as the Appeals Authority deems fit and just to grant.

#### **ANALYSIS BY THE APPEALS AUTHORITY**

The Appeals Authority having gone through the appeal record, Tender proceedings including various documents and the oral submissions by the parties, is of the view that the Appeal is centred on two main issues which were agreed upon by the parties, which are:-

**1. Whether the disqualification of the Appellant's tender was justified; and**

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

Having identified the issues, the Appeals Authority proceeded to resolve them as hereunder:-

**1. Whether the disqualification of the Appellant's tender was justified**



In resolving this issue the Appeals Authority started by revisiting the Tender Document and observed that **Section VII** provide for Activity Schedule which reads as follows:-

## SECTION VII- ACTIVITY SCHEDULE

Other General Conditions

### **a) BUSES CONDITIONS**

- 1. Must be comprehensively insured and authorized to carry passengers as per Government Regulations*
- 2. Buses must be owned by the Service Provider and registration card must be verified by TRA.*
- 3. N/A*

The above quoted conditions indicate that bidders were required to submit comprehensive insurance and registration cards, proving that the buses are owned by the service provider that is the bidder.

The Appeals Authority reviewed the tender submitted by the Appellant and observed that it attached the motor vehicle Registration Card No. T 375 CQU in the name of Walpha Tours and Safaris Ltd (the Appellant) with a comprehensive insurance cover in the name of Gladness Zacharia Selandoi. It also attached Registration Card No. T 427 DED in the name of Gladness Zacharia Selandoi and its insurance cover under the same name. Registration Card No.T 487 DDV was in the name of Njeri Ali Kabe but with comprehensive insurance cover in the name of Walpha Tours and Safaris

Ltd. Registration card No. T 676 DGF was in the name of Ernest Richard Kashaija and the comprehensive insurance cover under the same name.

During the hearing the Appellant was asked by Members of the Appeals Authority whether or not it complied with the above requirements. The Appellant conceded that it had not complied with the two requirements of the Tender Document namely; ownership of the motor vehicles and comprehensive insurance which led to its disqualification.

From the above facts and the Appellant's own concession, the Appeals Authority finds that the Appellant disqualification was justified in accordance with the law. Section 72(1) of the Act and Regulations 203(1) and 204(2)(k) of the Regulations provide as follows:-

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

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

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



*(k) failure to submit major supporting documents required by the tendering documents to determine substantial responsiveness of a tender."*

The Appeals Authority is of the firm view that, the Appellant's conduct contravened the principles of company law, that is, a company is a separate legal entity. The Appellant's conduct was also against the insurance principle as there is a need for the insured party to have an insurable interest on the property insured. Since the Appellant participated in this tender as a limited liability company, it was required to submit registration cards and comprehensive insurance policies in the company's name and not otherwise even if the owners of the motor vehicles are shareholders or directors of the company. The principle was stated in the case of *Salomon v Salomon (1897) A.C 22* whereby Lord Macnaghten observed:-

*"The company is at law a different person altogether from the subscribers to the memorandum, and though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustee of them. Nor are subscribers liable, in any shape or form except to the extent and in a manner provided by the Act"*

In the case of *Macaura v Northern Ins. Co.(1925) AC 619*, it was stated that;

*"M was a holder of nearly all shares of a timber company. He was also a substantial creditor of the company. He insured the*

*Company's timber in his own name. The timber was destroyed by fire. It was held that the insurance company was not liable. A member cannot claim to be owner of the company's property during the existence of the company. A shareholder doesn't even have insurable interest in the property of the Company."*

The Appeals Authority further considered the Appellant's contention that the Respondent contravened the requirement of the law as it did not inspect the Appellant's motor vehicles to ascertain its availability as was done in the previous tenders.

The Appeals Authority is of the view that the Appellant's argument has no basis. Inspection of the motor vehicles falls under post qualification stage which is conducted to a tender that has been determined to be the lowest evaluated prior to the award of the contract pursuant to Sections 3 and 53 of the Act which reads as follows:-

*Sec. 3 "Post-Qualification" means due diligence procedure applied after tenders have been evaluated prior to award of contract to determine whether or not the lowest evaluated tenderer has experience, capability and resources to carry out the contract effectively."*

*Sec. 53(1)"the procuring entity shall, where tenderers have not been pre-qualified, determine whether the tenderer whose tender or proposal has been determined to offer the lowest evaluated tender, in case of procurement or the highest evaluated cost in case of disposal of public assets by tender, has the legal capacity, capability and resources to carry out*

*effectively the contract as offered in the tender before communicating the award decision."*

It is evident that the Appellant's tender was disqualified at the preliminary evaluation stage for failure to comply with the requirements of the Tender Document. This means that the Appellant's tender did not reach the post qualification stage where its vehicles could have undergone the inspection process.

In relation to the Appellant's argument that the tender process ought to have been conducted in the same way it was done in the previous tenders, when vehicles of all bidders were inspected to assess their availability. The short answer to this is that, the appeal before us is in respect of a specific tender document and the guiding principle is the requirements provided under the law. The determination of a tender's responsiveness should not be based on extrinsic factors. This is in accordance with Regulation 206(1) of the Regulations which read as follows:-

*Reg. 206(1) "The procuring entity's determination of a tender's responsiveness shall be based on the contents of the tender itself without recourse to extrinsic evidence."*

The Appellant ought to have prepared its tender based on the requirements provided under the Tender Document instead of relying on what has been the practice in the previous tenders.

The Appeals Authority further considered the Appellant's contention that; the proposed bidder has not complied with the two requirements of the

Tender Document since its vehicles were not inspected. The Appeals Authority finds that, this is a new issue raised at the hearing of the appeal and it was not even included in its Statement of Appeal filed before the Appeals Authority. If the Appellant was dissatisfied with the proposed award to M/s Travel Partners Ltd it ought to have challenged the legality of the same when filing its application for administrative review pursuant to Section 96 of the Act. Therefore the Appeals Authority will not delve on the issue of the legality of award since the same was neither raised during administrative review nor included in the statement of Appeal pursuant to Section 97 of the Act.

Given the above findings, the Appeals Authority concludes the first issue in the affirmative that the disqualification of the Appellant's tender was justified.

## **2. What reliefs if any are the parties entitled to**

Taking cognizance of the findings on the first issue above, the Appeals Authority finds that the Appeal has no merits. The Appeal is hereby dismissed. The Respondent should therefore proceed with the Tender Process. 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 Appellant and the Respondent this 30<sup>th</sup> day of January 2020.

**HON. JUSTICE (RTD) SAUDA MJASIRI**

  
.....  
**CHAIRPERSON**

**MEMBERS:**

**1. CPA. FREDRICK RUMANYIKA**.....  


**2. ENG. STEPHEN MAKIGO**.....  


