

**IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY**

APPEAL NO. 16 OF 2020-21

BETWEEN

M/S COSEKE TANZANIA LIMITED.....APPELLANT

AND

**TANZANIA PETROLEUM DEVELOPMENT
CORPORATION.....RESPONDENT**

DECISION

CORAM

- | | |
|-------------------------------------|-----------------|
| 1. Hon. Justice (rtd) Sauda 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. Elieza Ngowi | - Country Manager |
| 2. Mr. Deogratus Ngongoseke | - Head of Business Department |



FOR THE RESPONDENT

1. Mr. Edwin Riwa - Head of PMU
2. Mr. Isaack James - Procurement Officer

The Appeal was lodged by **M/S COSEKE (TANZANIA) LIMITED** (hereinafter referred to as "**the Appellant**") against the **TANZANIA PETROLEUM DEVELOPMENT CORPORATION** commonly known by its acronym **TPDC** (hereinafter referred to as "**the Respondent**").

The Appeal is in respect of Tender No. PA/031/2019-20/N/37 for Digitization of Document Services (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 per 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 23rd June 2020 the Respondent through TANePS invited qualified bidders to submit tenders. The deadline for submission was set for 8th July 2020, whereby seven (7) tenderers, the Appellant inclusive, responded to the invitation. Due to TANePS malfunctioning on the day



of tender opening (8th July 2020), the tenders were opened on 15th July 2020 through TANePS.

Tenders were then subjected to evaluation which was conducted into three stages namely; preliminary, detailed and post qualification. During preliminary evaluation all seven (7) tenders were found to be responsive, hence subjected to detailed evaluation. At the detailed evaluation stage, six (6) tenders including that of the Appellant were disqualified for being non responsive to the requirement of the Tender Document.

The remaining tender by M/s Data House (T) Limited was subjected to financial examination and thereafter post-qualification. After completion of the evaluation process, the Evaluation Committee recommended award of the Tender to M/s Data House (T) Limited at the contract sum of Tanzanian Shillings Eighty One Million Four Hundred and Twenty Thousand (TZS 81,420,000.00) only VAT Inclusive. The Tender Board through Circular Resolution dated 9th October 2020 approved the award as recommended by the Evaluation Committee.

On 20th November 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 M/s Data House (T) Limited is proposed for the award at the contract price of Tanzanian Shillings Eighty One Million Four Hundred and Twenty Thousand (TZS 81,420,000.00) only VAT Inclusive. The Notice also informed the Appellant that its tender was found to be non-responsive as none of its experts has petroleum practical experience in data management and the



team leader lacked experience in undertaking at least two (2) similar assignments in the past five (5) years as per Item 4 of the Statement of Requirements.

Dissatisfied with the reasons given for its disqualification, on 27th November 2020, the Appellant applied for administrative review to the Respondent. On 1st December 2020, the Respondent issued a decision which dismissed the Appellant's application for administrative review. Aggrieved further, on 7th December 2020, the Appellant lodged this Appeal.

GROUND OF APPEAL

The grounds of appeal as stated in the Appellant's Statement of Appeal and oral submissions may be summarized as follows:-

1. That, the evaluation of tenders was marred with irregularities as the same was not conducted as per the criteria provided in the Tender Document. According to the Appellant, the disputed tender process was conducted through TANePS, thus the Respondent ought to have evaluated the tenders in accordance with Regulation 354 (3) of the Regulations which requires **"Online evaluation of tenders to follow the predefined workflow set-up by the procuring entity to evaluate a specific tender"**. To the contrary, the Respondent used Regulation 203 (1) of the Regulations which was not appropriate in this process.

According to the Appellant the workflow which was set by the Respondent in TANePS had no slot which required bidders to



submit evidence of their expertise on petroleum practical experience in data management. The Appellant conceded that, much as the grounds for its disqualification was the technical requirement provided in the Tender Document, there was no slot in the TANePS where the same could have been uploaded. The Appellant added that, it uploaded to the TANePS several documents including CV's which contained general information. There was no slot which specifically required tenderers to upload CV's which indicate experience in petroleum data management. Therefore, the Appellant was unfairly disqualified.

2. That, the Tender process was improperly conducted, as some procedures including the issuance of the Notice of Intention to award were conducted after the expiry of the tender validity period. The Appellant expounded that, the Tender was floated on 23rd June 2020 and the deadline for submission was 8th July 2020. According to Clause 14 of the Tender Data Sheet (TDS) the tender validity period for the tender was ninety (90) days. Counting from the deadline for submission of tenders, the validity period ended on 6th October 2020. Thus, all subsequent proceedings conducted after 6th October 2020 were done in contravention of Section 71 of the Act.

Furthermore, the Respondent failed to extend the tender validity period as required by the law. It issued a request for extension of tender validity period dated 11th December 2020 when the validity period had already expired. The Appellant added that, it noted from the said request that there was another request for extension



of tender validity period issued on 6th October 2020 but the same was not received by it. The Appellant concluded its argument by indicating that, since there was no extension of the tender validity period, it was not proper for the Respondent to proceed with the tender process after the expiry of the initial period stipulated in the Tender Document.

3. Finally, the Appellant prayed for the following orders: -
 - i. It be declared to have complied with tender requirement, thus be considered for further evaluation;
 - ii. 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 grounds of appeal and oral submissions may be summarized as follows: -

1. That, the evaluation process was conducted through TANePS where the Tender Document was uploaded. According to Clause 4 of the Statement of Requirement (Performance Specifications) tenderers were required to indicate their petroleum practical experience in data management. Further, in the Technical Evaluation Criteria tenderers were required to submit Curriculum Vitae (CV) of the key experts to be involved in the assignment. Having gone through the CVs submitted by the Appellant, none of the experts had petroleum practical experience as required in the tender document, thus the Appellant's tender was fairly disqualified.



2. With regard to the tender validity period the Respondent submitted that, according to Clause 14 of the TDS the tender validity period was 90 days. The tender was floated on 23rd June 2020 and the deadline for submission was 8th July 2020. Counting from the deadline for submission of tenders, the validity period ended on Tuesday, 6th October 2020. The tender validity period was extended through a letter with reference No. FB.292/369/01/F/272 dated 6th October 2020 issued to all tenderers. The said request sought for an extension of validity period to 14th December 2020 and was sent to tenderers through provided email addresses. Specifically, the said request was sent to the Appellant through its email address sales.tz@coseke.com. Thereafter, the Respondent requested for a further extension of the validity period to 28th January 2021 through a letter with reference No. FB.292/369/01/G/141 dated 11th December 2020. The said request was communicated to the tenderers through TANEPS (Manual Notification) and bidder's emails on 14th December, 2020.

3. Finally, the Respondent prayed for the following orders: -

- i. A declaration that, the Appellant should not be considered to the next steps of evaluation as it was fairly disqualified;
- ii. A declaration that the Respondent should proceed with the tender process; and
- iii. Appeal be dismissed.



ANALYSIS BY THE APPEALS AUTHORITY

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

- 1. Whether the Tender was within the tender validity period;**
- 2. Whether the disqualification of the Appellant's tender was justified; and**
- 3. What relief(s), if any, are the parties entitled to**

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

Whether the Tender was within the tender validity period

In order to substantiate the parties' contention in relation to the tender validity period, the Appeals Authority reviewed the Tender Document and observed that Clause 14 of the TDS provides that the tender validity period was ninety (90) days from the deadline for submission of tenders. According to Clause 19 of TDS the deadline for submission of tenders was 8th July 2020.

The record of Appeal indicates that the Respondent issued an invitation to Tender on 23rd June 2020 and the deadline for submission of tenders was set for 8th July 2020 and was not extended. Counting from 8th July 2020 the tender validity period of ninety (90) days expired on 6th October 2020. The Respondent claimed to have issued a request for extension of the validity period through a letter dated 6th October 2020



and the same was sent to all tenderers through provided email addresses.

Having reviewed the letter relied upon by the Respondent that it requested for extension of the validity period, it was observed that though the said letter is dated 6th October 2020, the same was sent to tenderers on 19th October 2020 by the Respondent through the email address of ijames@tpdc.co.tz. During the hearing Members of the Appeals Authority required the Respondent to clarify as to when the request for extension of the validity period was sent to tenderers. In response thereof, the Respondent submitted that, despite the letter being ready on 6th October 2020, the same could not be sent to the tenderers due to TANePS malfunctioning. Therefore, it was sent to tenderers on 19th October 2020. The Appeals Authority observed further that tenderers who responded to such a request, did so through their letters dated 20th to 23rd October 2020.

From the above facts it is crystal clear that the request for extension of the tender validity period and responses thereof were all made after the expiry of the tender validity period stipulated in the Tender Document. That is to say, after the expiry of the tender validity period on 6th October 2020, there was no valid tender in place.

The Appeals Authority finds the Respondent's act of proceeding with the Tender process after the expiry of the tender validity period to have contravened Section 71 of the Act read together with Regulations 191(3) and 232(2) of the Regulations which provide as follows:-



Sec.71 "The procuring entity shall require tenderers to make their tenders and tender securities including tender securing declaration valid for periods specified in the tendering documents, sufficient to enable the procuring entity to complete the comparison and evaluation of the tenders and for the appropriate tender board to review the recommendations and approve the contract or contracts to be awarded whilst the tenders are still valid".

Reg. 191(3) "The period fixed by a procuring entity shall be sufficient to permit evaluation and comparison of tenders, for obtaining all necessary clearances and approvals, and for the notification of the award of contracts and finalise a contract but the period shall not exceed one hundred and twenty days from the final date fixed for submission of tenders".

Reg.232(2) "The award shall be made within the period of tender validity to the tenderer whose tender has been determined to be the lowest evaluated or the highest evaluated, as the case may be, and meets the required financial and managerial capability, legal capacity, experience and resources to carry out the contract effectively".

(Emphasis supplied)

The above quoted provisions clearly stipulate that the tender process has to be completed while the tender validity period is still in place. To the contrary, the Respondent proceeded with the Tender process including approval of award on 9th October 2020 and issuance of the



Notice of Intention to award on 20th November 2020 while the tender validity period had already expired.

The Appeals Authority observed further that, the Respondent's request for extension of the tender validity period was made in contravention of Regulation 191(4) of the Regulations which requires such a request to be done prior to the expiry of the original period of effectiveness of tenders. Regulation 191(4) provides as follows:-

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

Given the above findings that there is no valid tender in place after the expiry of the tender validity period, the Appeals Authority would not delve into the other issues framed.

Therefore, the Appeals Authority hereby allow the Appeal and nullifies the whole Tender process in view of the expiry of the tender validity period.

Each party is to bear its own costs.

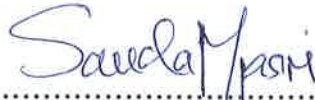
It is so ordered.

This Decision is binding on the Parties and may be executed in terms of Section 97 (8) of the Act.

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



The Decision is delivered in the presence of the Appellant and the Respondent this 24th day of December 2020.



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HON. JUSTICE (rtd) SAUDA MJASIRI
CHAIRPERSON

MEMBERS:

1. MR. RHOBEN NKORI 
2. MS. NDEONIKA MWAIKAMBO 