

**IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY
AT DAR ES SALAAM
APPEAL NO. 17 OF 2017-18**

BETWEEN

M/S PROFESSIONAL CLEANERS LTDAPPELLANT

AND

MUHIMBILI UNIVERSITY OF HEALTH

AND ALLIED SCIENCES.....RESPONDENT

DECISION

CORAM

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| 1. Ms. Monica P. Otaru | - Ag. Chairperson |
| 2. Eng. Francis T. Marmo | - Member |
| 3. Eng. Aloys J. Mwamanga | - Member |
| 4. Mr. Ole-Mbille Kissioki | - Secretary |

SECRETARIAT

- | | |
|------------------------|------------------------|
| 1. Ms. Florida Mapunda | - Senior Legal Officer |
| 2. Ms. Violet Limilabo | - Legal Officer |

FOR THE APPELLANT

- | | |
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| 1. Mr. Josia Samwel | - Advocate, Jodi & Associates Advocates |
| 2. Mr. Dismas Mallya | - Advocate, Jodi & Associates Advocates |
| 3. Mr. Cleopa Yohana | - Advocate, Jodi & Associates Advocates |
| 4. Mr. Abba Augustino | - Operations Manager |

FOR THE RESPONDENT

- | | |
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| 1. Mr. Donatus Nungu | - Legal Officer |
| 2. Ms. Nuru Mkali | - Head of Procurement Management
Unit |

The Appeal was lodged by M/s Professional Cleaners Limited (hereinafter referred to as "the Appellant") against the Muhimbili University of Health and Allied Sciences, commonly known by its acronym MUHAS (hereinafter referred to as "the Respondent"). The Appeal is in respect to Tender No. PA/007/2016-17/NC/01 for the Provision of Cleaning Services for MUHAS Academic Medical Center (MAMC) at Mloganzila (hereinafter referred to as "the Tender").

According to the records submitted by the parties to the Public Procurement Appeals Authority (hereinafter referred to as "the Appeals Authority"), the facts of the Appeal may be summarized as follows:-

The Respondent through the Daily News newspaper dated 24th February 2017 invited tenderers to participate in the Tender. The deadline for submission of tenders was set for 15th March 2017 whereby seven firms, the Appellant inclusive submitted their tenders.

The tenders were subjected to evaluation which was conducted in two stages, namely; Preliminary and Detailed Evaluations. During preliminary evaluation, M/s Mosta Cleaning and Supply Company Ltd was disqualified for failure to submit a copy of GPSA's Framework Agreement. The remaining six tenders were subjected to Detailed Evaluation whereby the Evaluation Committee recommended the award of the Tender to M/s Ako Group Limited at contract price of TZS 114,567,537.88 per month VAT inclusive.

The recommendations of the Evaluation Committee were submitted to the Tender Board at its meeting held on 3rd August 2017, whereby after deliberations it was ordered that negotiations be conducted with the proposed successful tenderer. The negotiations were conducted on 11th August 2017 which led to reduction of price from TZS 114,567,537.88 as read out to TZS 108,993,600.79 VAT inclusive. The outcome of the negotiation was presented to the Tender Board at its meeting held on 17th August 2017 and the award was made to M/s Ako Group Limited at contract price of TZS 108,993,600.79 VAT inclusive per month.

The Respondent issued the Notice of Intention to Award dated 18th August 2017 to all bidders who participated in the Tender. The said notice was received by the Appellant on 28th August 2017 and it informed them that their tender was disqualified for lack of professional personnel who are VETA trained and lack of evidence proving availability of 10 ton vehicle for garbage collection.

Dissatisfied, on 4th September 2017 the Appellant applied for administrative review challenging reasons given for their disqualification and award proposed to the successful tenderer. On 13th September 2017, the Respondent issued a decision which dismissed the Appellant's application stating amongst others that the application was filed out of time and the same could not be entertained. Aggrieved by the Respondent's decision on 19th September 2017, the Appellant lodged this Appeal.

SUBMISSIONS BY THE APPELLANT

The Appellant's grounds of Appeal may be summarized as follows;

1. The Respondent erred in law and facts by holding that the Appellant's Application for review was time barred

In substantiating his argument on this point the Appellant submitted that, his application for administrative review was not time barred since the same was filed within seven working days after the receipt of the Notice of Intention to Award. According to them the said notice was received on 28th August 2017 though the same was dated 18th August 2017. The Public Procurement Act of 2011 as amended (hereinafter referred to as "the Act") requires application for administrative review to be filed within seven working days. The Appellant submitted his application for review on 4th September 2017, that being two days prior to the expiry of the statutory period. He insisted that his application for administrative review was received by the Respondent on 4th September 2017 and a copy of dispatch book was attached to prove the same. The Appellant strongly denied to

have submitted his application for review on 8th September 2017 as contended by the Respondent.

He further argued that, the Respondent's act of dating the Notice of Intention to Award 18th August 2017 and served the same to them ten days later indicates that the procurement process was manifested with distrust circumstances and that the Respondent had an ill motive of not awarding the contract to them.

2. The Respondent failed to deliver its decision on the Appellant's application for review within time limit mandated by the law

In expounding this point the Appellant submitted that, Section 96 (6) of the Act read together with Regulation 106(6) of GN. No. 446 of 2013 requires accounting officers to deliver written decision within seven working days after receipt of a complaint or dispute. The Appellant submitted application for review on 4th September 2017, the seven working days within which the Respondent's Accounting Officer ought to have issued its decision expired on 12th September 2017. The Respondent communicated its decision to the Appellant on 13th September 2017, one day after the expiration of the required statutory period. Thus, the Respondent erred in law in this regard.

3. The Respondent erred in law by awarding the tender beyond the Tender Validity Period

With regard to this point the Appellant expounded that, the Tender process was required to strictly adhere to the Tender Validity Period specified in the Tender Data Sheet (TDS). According to Clause 14 of TDS the Tender Validity Period was 90 days and the same expired on 15th June 2017. The Respondent communicated the Notice of Intention to Award on 28th August 2017 after lapse of two months. The Respondent's act in this regard contravened Regulation 187 (sic) of GN. No 446 of 2013 which requires award of tenders to be made within the Tender Validity Period specified in the Tender Document.

4. The Respondent erred in law for disqualifying the Appellant's tender while the same complied with the requirements of the Tender Document

Expounding on this point the Appellant submitted that, the two reasons given for his disqualification were untrue and unfounded. According to him, he had attached to his tender CV's and certificates proving that his professional personnel have attended VETA and/or VETA accredited training. He argued that, it was not proper for his tender to be disqualified for lacking personnel who had attained VETA training. He contended further that if the said certificates and CV's of his personnel were missing in his tender he presupposes that his tender would have been rejected pursuant to Section 59 of the Act at the very early stage.

He further argued that, in proving his capability with regard to garbage collection, he attached to his tender a motor vehicle registration card proving ownership of a 3.5 ton vehicle. He contended that, much as the Tender Document required tenderers to provide 10 ton motor vehicles; being in the industry for some time, the vehicle with 3.5 ton is also capable of carrying the garbage to the dumping areas and in any case the major task in the contract was cleaning. Thus, his tender ought to have not been disqualified for this reason.

5. The award proposed to the successful tenderer is vitiated with anomalies

Submitting on this point the Appellant contended that the Respondent's proposal for award is vitiated with doubt as they intend to award the contract at TZS 108,993,600.79 while the read out price for the proposed successful tenderer was TZS 114,567,537.88. There were no reasons offered for the substantive changes made on the price of the proposed successful tenderer.

The Appellant further contended that, in this Tender the Respondent failed to take into consideration the need to obtain the best value for money in terms of price. That the Respondent ought to have awarded the Tender to a tenderer who had quoted the lowest price amongst all in order to obtain the best value for money. To the contrary, the Respondent awarded the Tender to a tenderer who had quoted the higher price compared to others who participated in this Tender. Therefore, the Respondent's act in this regard contravened the requirement of Section 4A of the Act.

Finally, the Appellant prayed for the following orders;

- i) A declaration that the Appellant's application for review to the Respondent on 4th September 2017 was not time barred;
- ii) A declaration that the Respondent erred in law by failing to communicate the Appellant of its decision in respect of the Appellant's application for review within time limit prescribed by the law;
- iii) A declaration that the Respondent erred in law by failing to communicate to the Appellant of its intention to award contract to another bidder within time limit prescribed by the law;
- iv) A declaration that the Appellant was wrong at law and in fact by declaring that the Appellant's bid was not successful based on the Respondent's own mistakes and or deliberate omissions;
- v) An order to nullify and reverse the Respondent's decision and subsequently the Respondent be ordered to entertain the Appellant's application for review or order the Respondent to award the contract to the Appellant; and
- vi) Order for payment of costs by the Respondent for this appeal and for the application for review.

REPLY BY THE RESPONDENT

The Respondent's submissions on the grounds of the Appeal may be summarized as follows;

1. On the first ground of Appeal,

They submitted that, the Appellant's application for administrative review was received by them on 8th September 2017. Counting from 28th August 2017 the date which the Appellant claimed to have been served with the Notice of Intention to Award, the seven working days within which the Appellant ought to have filed an application for administrative review expired on 6th September 2017. The Appellant submitted his application for review on 8th September 2017 beyond the statutory stipulated time.

The Respondent strongly denied to have signed the Appellant's dispatch book on 4th September 2017 as proof of his submission for administrative review. They contended that, the name appears on the said dispatch book although it is one of their staff, but the said person is not authorized to receive any document. The Respondent has a proper registry office whereby all incoming documents are received and recorded. The Appellant's application for review was received on 8th September 2017 as stamped and recorded in the registry book. Thus, the Appellant's argument that their application for review was received on 4th September 2017 raises a lot of doubt.

Furthermore, the Respondent disputes the Appellant's claims that the delay in the service of the Notice of Intention to Award indicates ill motive on their side. The Respondent avers that, the Notice of Intention to Award was served not only to the Appellant but also to other bidders after 18th September 2017. That the Appellant delayed to collect the said notice, nevertheless, they had not substantiated how the delay in service of the Notice of Intention to Award had affected the outcome of the Tender in question. The Appellant was fairly disqualified for failure to comply with the requirements of the Tender Document.

2. Regarding the second ground of Appeal

The Respondent submitted that, it is not true that they issued a decision with respect to the Appellant's application for review beyond the stipulated time limit. They argued that, the Appellant's application for review was received in their office on 8th September 2017. Counting from 8th September 2017 the seven working days within which the Respondent was required to issue its decision ended on 18th September 2017. The Respondent issued his decision on 13th September 2017, three days before the expiry date. Therefore, the Respondent delivered its decision within the stipulated time and the Appellant's allegations on this point are unfounded.

3. With regard to the Tender Validity Period

The Respondent submitted that, the delay in completion of the Tender process was caused by the delay in receiving feedback from other clients in which potential bidders were providing services of a similar nature. The Respondent sought references from previous clients of the proposed tenderer and the Appellant as part of the due diligence process conducted pursuant to Regulation 224 of the Public Procurement Regulations (GN. No 446 of 2013 as amended) (hereinafter referred to as GN. No. 446 of 2013). They further argued that, after receipt of the feedback reports sought as a part of due diligence process, the Respondent was unable to convene a Tender Board meeting as most of its members were busy with end of term examinations. Therefore, the delay in finalizing the Tender process was caused by the circumstances beyond the Respondent's control.

4. Regarding the Appellant's disqualification from the Tender process

The Respondent submitted that, the Appellant was disqualified due to lack of VETA trained professional personnel and lack of 10 ton motor vehicle for garbage collection. The Respondent expounded that the Appellant was required to attach to its bid CVs and academic certificates proving that his professional personnel had attained the relevant qualification. The

Appellant failed to comply with such a requirement; as a result his tender was disqualified.

The Respondent further expounded that the Appellant failed to submit motor vehicle registration card proving ownership of a 10 ton motor vehicle for garbage collection. Instead, the Appellant attached a copy of registration card proving ownership of a 3.5 ton motor vehicle; as such their tender was fairly disqualified.

5. With regard to the change of price of the proposed successful tenderer

The Respondent submitted that the difference from the read out price of TZS 114,567,537.88 and the proposed contract price of TZS 108,993,600.79 was a result of negotiations which were conducted pursuant to Regulation 225 (1)(g) of GN No. 446 of 2013.

6. Responding to the Appellant's argument with regard to the observance of value for money

The Respondent submitted that value for money is not obtained only from the low quoted tenders, but tenderers are required to substantially comply with the requirements of the Tender Document in order to be considered for award. A tender is awarded to the tenderer who complies with requirement of the Tender Document and not to the one who quoted the lowest price.

7. Finally, the Respondent prayed for dismissal of the Appeal for lack of merits.

ANALYSIS BY THE APPEALS AUTHORITY

From the above submissions, the Appeals Authority is of the opinion that there are four (4) triable issues to be determined. These are:-

- Whether the Tender is within the Tender Validity Period;

- Whether the Appellant's application for administrative review and the Respondent's decision thereof were made in compliance with the law;
- Whether the disqualification of the Appellant's tender and award proposed to the successful tenderer are proper at law; and
- What reliefs if any are the parties entitled to

Having identified the issues, we proceed to determine them as hereunder:-

1.0 Whether the Tender is within the Tender Validity Period

In resolving this issue we revisited Clause 14 of the TDS which specifies the Tender Validity Period for the Tender. The said provision states as follows:

Clause 14 "The Tender Validity Period shall be 90 days after the deadline for Tender submission specified in the Tender Data Sheet". (Emphasis supplied)

This provision is in line with Section 71(1) of the Act read together with Regulation 191(3) of GN. No. 446 of 2013, as amended, which provide as follows:

Section 71: "The procuring entity shall require tenderers to make their tenders and tender securities including tender securing declaration valid for the 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".

Regulation 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. (Emphasis added)

It is not in dispute that the deadline for submission of tenders was on 15th March 2017. Counting 90 days from the date for submission of tenders, the Tender Validity Period expired on 13th June 2017 without being extended. It is observed that, the evaluation process was completed on 27th April 2017 within the Tender Validity Period; however, the Report was tabled before the Tender Board on 3rd August 2017, almost two months after the expiry of the Tender Validity Period. Then the negotiations were conducted on 11th August 2017; the award was approved on 17th August 2017 and made to the successful tenderer on 30th August 2017. The Appeals Authority finds the Respondent's act in this regard to have contravened the requirement of Section 71(1) of the Act read together with Regulation 191(3) of GN. No. 446 of 2013.

It is our firm view therefore that the Respondent was duty bound to finalize its proceedings and award the contract within the specified time frame. The Respondent's justifications do not hold water as they should have sought for extension of the same under Section 191(4) of the Act which reads:-

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

In this case, no extension of the period was sought, as a result the submission of the Evaluation Report to the Tender Board and other subsequent processes were conducted outside the Tender Validity Period. As the Respondent had proceeded to process the Tender beyond the Tender Validity Period his acts are in contravention of the law. That is to say, all the Respondent's subsequent acts conducted after the expiry of the

Tender Validity Period are a nullity in the eyes of the law. It goes without saying therefore; even the award made to the proposed successful tenderer is null and void.

Accordingly, the Authority's conclusion with regard to the first issue is that the Tender is not within the Tender Validity Period, therefore, there is no Tender. That is to say, it stopped to exist even before the award had been made.

The above determined issue suffices to conclude this Appeal as all other grounds of Appeal have been caused by the Respondent's conduct after the expiry of the Tender Validity Period. Therefore, the Appeals Authority would not proceed to determine other grounds of Appeal as raised by the Appellant as there is no valid Tender for determination.

2.0 What reliefs if any are the parties entitled to

Taking cognizance of the findings above, the Appeals Authority hereby upholds the Appeal and nullifies the award of the Tender to the proposed successful tenderer.

If the Respondent is still interested, they can re-start the Tender process in observance of the law. The Respondent is also ordered to compensate the Appellant a reasonable amount of TZS 1,700,000/- as per following breakdown;


- i) TZS 1,500,000.00 - Legal fees
- ii) TZS 200,000.00 – Appeal filing fees

It is so ordered.

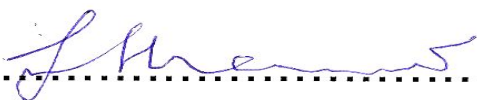
This Decision is binding on the parties and can be enforced in accordance with Section 97(8) of the Act.

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 26th October 2017.


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Ms. MONICA P. OTARU
Ag. CHAIRPERSON

MEMBERS:

1. ENG. FRANCIS MARMO 
2. ENG. ALOYS MWAMANGA 