

IN THE PUBLIC PROCUREMENT APPEALS AUTHORITY
CONSOLIDATED APPEAL CASES NO. 2 AND 3 OF 2020-21

BETWEEN

M/S GREEN WASTEPRO LIMITED APPELLANT

AND

ILALA MUNICIPAL COUNCIL RESPONDENT

DECISION

CORAM

- | | |
|-------------------------------------|-----------------|
| 1. Hon. Justice (rtd) Sauda Mjasiri | - Chairperson |
| 2. CPA. Fredrick Rumanyika | - Member |
| 3. Mr. Rhoben Nkori | - Member |
| 4. Adv. Rosan Mbwambo | - Member |
| 5. Ms. Florida Mapunda | - Ag. Secretary |

SECRETARIAT

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

FOR THE APPELLANT

- | | |
|---------------------------|--------------------------------------|
| 1. Mr. Kheri Mbiro | - Advocate, Breakthrough
Attorney |
| 2. Mr. Anthony Mark Shayo | - Chief Executive Officer |



3. Mr. Erick Mark - Assistant Manager
4. Mr. Moses Bhalalusesa - Finance Manager
5. Ms. Arwa Yusufali - Advocate, Breakthrough Attorney
6. Mr. Morrea Ndunguru - Legal Officer, Breakthrough Attorney
7. Mr. Imani Mkocha - Trainee, Breakthrough Attorney

FOR THE RESPONDENT

1. Ms. Florah Luhala - Municipal Solicitor
2. Mr. Vincent L. Odero - Procurement Officer
3. Mr. Paschal Mwaduga - Procurement Officer
4. Mr. Enock J. Fredrick - Procurement Officer
5. Ms. Victoria Mnyambwa - Legal Officer
6. Mr. Yohana Thomas - Procurement Officer

The Appeals were lodged by M/s Green Wastepro Limited (hereinafter referred to as **"the Appellant"**) against the **ILALA MUNICIPAL COUNCIL** (hereinafter referred to as **"the Respondent"**).

The Appeals are in respect of Tender No. LGA/015/IMC/2019-2020/HQ/NC/24 Lots 40 and 41 for provision of Revenue Collection for Waste Products at Kisutu, Kivukoni, Mchafukoge, Gongolamboto Wards (Lot 40) and Kariakoo and Buguruni Wards (Lot 41) respectively (*ZABUNI YA KUFANYA USAFI, KUKUSANYA TAKA NGUMU KWENYE MAKAZI YA WATU, MAJENGO YA BIASHARA, MITAA NA OFISI MBALIMBALI, KUZOA TAKA NA KUZIPELEKA KATIKA DAMPO LA PUGU KINYAMWEZI NA*



KUKUSANYA ADA ZA TAKA KATIKA KATA ZA MJINI KATI (CBD) KATIKA MANISPAA YA ILALA) (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 the Appeals may be summarized as follows: -

The Tender was conducted using National Competitive Method through online system (TANePS) 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 Tanzania National e-Procurement System (TANePS) issued an Invitation to Tender through a letter dated 25th March 2020 whereby qualified tenderers were invited to submit their tenders. The deadline for submission of tenders was set for 14th April 2020. Three tenders were received for each Lot and the Appellant participated on both Lots. Thereafter tenders were opened through TANePS system.

Tenders were then subjected to evaluation, which was conducted into four stages namely, preliminary, technical, detailed and post-qualification. During preliminary evaluation, all tenders were found to be responsive hence subjected to technical evaluation. At this stage, three tenders submitted in respect of Lot 40 were found to have complied with the requirement of the Tender Document, while with regard to Lot 41 the tender by M/s Gin Investment was disqualified for failure to submit



certificates of its employees. The remaining tenders were subjected to detailed evaluation which included correction of arithmetic errors and price comparison. In that process, the tender by M/s Wejisa Company Ltd emerged to be the highest evaluated in respect of Lot 40 while in Lot 41 M/s Kajenjere Trading Company Ltd emerged to be the highest evaluated tenderer. The two tenderers were post qualified and after completion, the Evaluation Committee recommended award of the Tender to M/s Wejisa Company Ltd at a contract price of TZS. 21,567,992/= per month for Lot 40 and M/s Kajenjere Trading Company Ltd at a contract price of TZS. 17,960,500/= per month for Lot 41. The Tender Board at its meeting held on 20th June 2020 approved the recommendations of award.

On 8th July 2020, the Respondent issued Notices 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 Wejisa Company Ltd at a contract price of TZS. 21,567,992/= per month for Lot 40 and M/s Kajenjere Trading Company Ltd TZS. 17,960,500/= per month for Lot 41. The said notices also informed the Appellant that, with respect to Lot 40, its tender was unsuccessful as it had the lowest price of TZS. 16,800,000/= (Sixteen Million eighth hundred thousand only) compared to the price of TZS. 21,567,992/= (Twenty One Million Five Hundred Sixty Seven Thousand Nine Hundred and Ninety Two only) quoted by the proposed bidder M/s Wejisa Company Ltd. For Lot 41 the Appellant had the lowest price of TZS. 13,800,000/= (Thirteen Million Eight Hundred Thousand Only) compared to the price of TZS. 17,960,500/= (Seventeen



Million Nine Hundred Sixty Thousand Five Hundred only) quoted by the proposed bidder M/s Kajenjere Trading Company Ltd.

Dissatisfied with the reasons given for its disqualification, on 13th July 2020, the Appellant applied for administrative review to the Respondent. On 21st July 2020, the Respondent issued a decision by dismissing the Appellant's applications for administrative review. Aggrieved by the Respondent's decisions, on 28th July 2020, the Appellant lodged these Appeals.

GROUND OF APPEAL

The grounds of appeal as stated in the Appellant's Statements of Appeal may be summarized as follows: -

1. With respect to Lots (40 and 41) the Appellant argued that the Respondent contravened the requirement of Regulation 185 of the Regulations by issuing new requirement in the TANePS which was not initially included in the Tender Document and was not approved by the Tender Board. In expounding this point the Appellant submitted that Item 2(c) of the evaluation criteria specifically requires tenderers to submit proof of three years working experience in works of similar nature. However, the Respondent had indicated in the TANePS system that tenderers were required to submit three contracts as proof of experience.

The Appellant submitted further that, the Respondent had introduced the said changes in the TANePS system purposely to favour the



proposed bidder with respect to Lot 40 as it lacks the requisite experience on works of similar nature and magnitude.

2. That, the Respondent erred in law by its failure to clarify and inform tenderers about the changes made to the Tender Document by issuing different requirements in the TANEPS which differed with those provided in the Tender Document contrary to Regulation 350(2) of the Regulations.
3. That, the Respondent had been misguided and prejudiced in making its decision against the Appellant without due consideration of the Appellant's technical and financial strength. Taking into consideration that the Appellant had several years of experience in the field compared with the companies that have been proposed for award of the Tender, the Respondent's acts in this regard contravened Regulation 7 of the Regulations.
4. That, the Respondent had proposed award of the Tender to M/s Wejisa Company Ltd which lacked pre-requisite experience contrary to the requirements set in the Tender Document. The requirements include; financial capacity of the tenderer, expertise, experience in similar works and the amount of money to be deposited to the Respondent.
5. That, the Respondent's failure to provide the Tender submission Form in the TANEPS, led to confusion on the requirements provided in the Tender Document and the TANEPS.



6. That, the Respondent conducted this Tender process with lacked of competitive manner which contravened Regulation 76 of the Regulations.
7. In relation to Lot 41, the Appellant submitted that, the Respondent has been biased and lacked transparency on the criteria that qualified the proposed bidder M/s Kajenjere Trading Company Ltd on the amount to be remitted to the Respondent.
8. Finally, the Appellant prayed for the following orders in respect of Lot 40: -
 - i. Annulment of the decision of the Respondent to award the Tender to M/s Wejisa Company Ltd;
 - ii. An order to award the Tender to the Appellant; or
 - iii. Order the Respondent to re-run the tender process in a lawful manner, after finding in the affirmative prayer (i);
 - iv. Alternatively, and in addition to (i) above, find that the intended awardees/and or the persons with higher scores than the Appellant have no qualifications requisite to warrant and justify the intended award;
 - v. An order under Rule 10(4) of the Public Procurement Appeals Rules of 2014, as amended for the Respondent to produce on the date set for hearing all documents as submitted by the Appellant during the bidding process in order to justify and effectively adjudicate on the grounds set forth; and



- vi. Any other order and remedy this honorable Appeals Authority may deem fit to grant.

In respect of Lot 41 the Appellant prayed for the following orders:-

- i. Annulment of the decision of the Respondent to eliminate the Appellant's bid without any reason provided;
- ii. Order the Respondent to re-run the tender process in a lawful manner, after finding in the affirmative prayer (i);
- iii. Alternatively, and in addition to (i) above, find the intended awardees / and or the persons with higher scores that the Appellant have no qualifications requisite to warrant and justify the intended award;
- iv. An order under Rule 10(4) of the Public Procurement Appeals Rules of 2014, as amended for the Respondent to produce on the date set for hearing all documents as submitted by the Appellant during the bidding process in order to justify and effectively adjudicate on the grounds set forth; and
- v. Any other order and remedy this honorable Appeals Authority may deem fit to grant.

REPLY BY THE RESPONDENT

The Respondent's reply to the grounds of appeals may be summarized as follows: -

1. That, the Tender Document was approved by the Tender Board through Circular Resolution dated 18th February 2020, published in the TANePS



and issued to the bidders. The Respondent added that there were no new criteria uploaded in the TANEPS which differed with the qualifications criteria provided in the Tender Document. Thus, there was no need to clarify.

Furthermore, the Respondent added that Item 9 of the Invitation to Tender required bidders to submit contracts of three years to prove their experience and not three contracts as stated by the Appellant.

2. That, the procurement process was conducted in compliance with the requirement of Section 47 of the Act and Regulation 7 of the Regulations as it adhered to all the procurement principles.

Furthermore, the Respondent argued that it proposed award of the Tenders to M/s Wejisa Company Ltd for Lot 40 and M/s Kajenjere Trading Company Ltd for Lot 41 after being satisfied that the proposed bidders had complied with all the requirements of the Tender Document. The Respondent insisted that its decision was not misguided or prejudiced against the Appellant.

3. That, the Appellant and the proposed bidders M/s Wejisa Company Ltd and M/s Kajenjere Trading Ltd complied with all stages of evaluation despite of minor deviation which were observed and which would not affect the performance of the contract. However, the Appellant had not been proposed for award of the Tender due to the reason that it had a lower price.



4. That, in relation to Lot 40, the Appellant quoted TZS 16,800,000/= compared to the price quoted by M/s Wejisa Company Ltd TZS 21,567,992. In Lot 41 the Appellant quoted TZS. 13,800,000/= compared to the price quoted by M/s Kajenjere Trading Ltd TZS 17, 960,500/=.
5. Regarding the Bid Submission Form, the Respondent argued that the Tender Form was among the criteria stipulated in the Tender Document and it was uploaded in the TANePS. Further to that, the Appellant and all other bidders submitted the Form in the TANePS before the deadline for submission of the Tender.
6. That, the procurement process was conducted with fairness and in a transparent manner using the competitive method in compliance with Regulation 76 of the Regulations.
7. Finally, the Respondent prayed for the following orders in relation to Lot 40: -
 - i. That, this honorable Appeals Authority should uphold the decision made by the Respondent and let the process of awarding the contract to the respective company to proceed;
 - ii. That, this honorable Appeals Authority to maintain the lawful decision made by the Respondent;



- iii. That this honorable Appeals Authority to maintain and bless the intention of the Respondent to award a tender to the highest evaluated bidder;
- iv. That, remedy No. iv is noted;
- v. That, the appeal to be struck out because it has no substance in the face of the law and there is no need of annulment of the decision of the Respondent;
- vi. Any other remedy as the Appeals Authority may deem fit and just to grant thereto.

In relation to Lot 41 the Respondent prayed for the following orders:-

- i. That, this honorable Appeals Authority should uphold the decision made by the Respondent and let the process of awarding the contract to the respective bidder to proceed;
- ii. That, this honorable Appeals Authority to maintain the lawful decision made by the Respondent;
- iii. That, this honorable Appeals Authority to maintain and uphold the decision of the Respondent to award the Tender to M/s Kajenjere Trading Company Ltd who was found as the highest evaluated bidder;
- iv. That, remedy No. (iv) is noted;



v. That, the Respondent herein prays this honorable Appeals Authority to dismiss the whole appeal with costs, and uphold the decision made by the Respondent

ANALYSIS BY THE APPEALS AUTHORITY

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

- 1. Whether the disqualification of the Appellant's tenders is justified;**
- 2. Whether the award of the tenders to the proposed tenderers is justified; and**
- 3. What reliefs, if any, are the parties entitled to.**

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

- 1. Whether the disqualification of the Appellant's tenders is justified;**

In resolving this issue, the Appeals Authority revisited the Evaluation Report as well as other documents submitted before it and observed that, the Appellant was disqualified at the detailed evaluation stage for having quoted a lower price of TZS. 16,800,000/= and TZS 13,800,000/= compared to the price quoted by the proposed bidders M/s Wejisa



Company Ltd of TZS. 21,567,992/= and M/s Kajenjere Trading Company Ltd TZS 17,960,500/= in Lot 40 and Lot 41 respectively.

The Appeals Authority revisited Regulation 203(2) of the Regulations which reads: -

*"Tenders shall be comparable among themselves in order to determine the lowest evaluated cost for procurement of goods, works or services or **highest evaluated price for revenue collection.**"*

(Emphasis added).

The above quoted provision states clearly that for tenders relating to revenue collection award has to be made to the highest evaluated tenders. From the records of Appeals No 2 and 3 of 2020-2021, it is undisputed that award has been proposed to tenderers who had quoted the highest price with respect to Lot 40 and 41. Therefore, the Appeals Authority is of the settled view that the Appellant's disqualification was proper since it has the lowest price compared to the price quoted by the proposed bidders.

With regard to the Appellant's contention that the Bid Form was not uploaded in the TANEPS system, the Appeals Authority is of the view that since this argument relates to incomplete information uploaded in the TANEPS system, the Appellant ought to have challenged it before submission of its tenders pursuant to Section 96 of the Act, that is at the



time when the Appellant became aware of the circumstances giving rise to the complaint.

Therefore, the Appeals Authority's conclusion with regard to the first issue is in the affirmative that the Appellant's disqualification is justified.

2. Whether award of the tenders to the proposed tenderers is Justified

In resolving this issue, the Appeals Authority considered the Appellant's contention that the Respondent contravened the law by inserting in the TANePS system different criteria from the ones specified in the Tender Document. The Appellant expounded its argument by indicating that the Tender Document required tenderers to have three years working experience while TANePS required tenderers to submit three contracts as proof of experience. It added that changes in the TANePS system were made purposely to favour the proposed bidder in Lot 40 M/s Wejisa Company Ltd. The said firm lacked three years working experience as it started operations in December 2017.

In order to ascertain the validity of the Appellant's contention, the Appeals Authority revisited the Tender Document and observed that Item 9 of the Tender Advertisement read together with Item 2(c) of the Evaluation Criteria provide in clear terms that tenderers were required to submit proof of three years working experience in works of similar nature. The said Items read as follows: -

"MASHARTI YA MAOMBI YA ZABUNI



Maombi yote ya Zabuni yazingatie masharti yafuatayo: -

(9) Mwombaji aonyeshe uzoefu wa kazi alionao kwenye zabuni anayoomba usiopungua miaka mitatu yenye ukubwa wa kazi sawa na zabuni anayoomba pamoja na thamani inayolingana na zabuni aliyoomba akiambatanisha vielelezo vya uthibitisho wa kazi alizowahi kufanya."

2 "Uchambuzi wa kina

c) Uthibitisho wa Uzoefu wa kazi zinazofanana na hii (usiopungua miaka 3)."

To substantiate if M/s Wejisa Company Ltd complied with the above quoted provision, the Appeals Authority revisited the tender submitted by it and observed that, as a proof of three years working experience it had attached contract No. TMC/CHR/001/2019 between Charambe Ward and Wejisa Company Ltd (*Mkataba wa kuzoa taka majumbani kwenye nyumba za biashara, viwandani, kwenye taasisi, kuokota wanyama waliogongwa barabarani na uchafu/taka zozote zinazozagaa eneo la kata/mtaa*) a contract entered on 26th March 2019. It also attached contract No. LGA/017/2018-19/HQ/NC/16 Lot 6 between Kinondoni Municipal Council and Wejisa Company Ltd for *Provision of cleaning and collection of solid waste from residential area, commercial buildings, streets and different offices, sweeping streets road, collecting wastes to Pugu Kinyamwezi dumping site and collecting waste collection revenue in the Kinondoni Municipal Wards*, a contract entered on 14th October 2018. The proposed bidder had also attached contract No. 01/2018 between

Temeke Municipal Council and M/s Wejisa Company Ltd (Mkataba wa kuzoa taka majumbani kwenye nyumba za biashara, viwandani, kwenye taasisi, kuokota wanyama waliogongwa barabani na uchafu/taka zozote zinazozagaa eneo la Kata/Mtaa uliopangwa), a contract entered on 16th August 2018. The other contract No. 01/2017 between Temeke Municipal Council and M/s Wejisa Company Ltd was entered on 16th January 2017 on the same subject matter mentioned above.

The Appeals Authority made inquiries on the existence of the three contracts between Temeke Municipal Council and M/s Wejisa Company Ltd through a letter dated 19th August 2020 reference No. PPAA/APPEALS/02/15/2020-2021. In response thereof, Temeke Municipal Council in a letter dated 20th August 2020 reference No. TMC/PMU/P/17/56 confirmed that it had entered into contract No. TMC/TMK/01/2017 with M/s Wejisa Company Ltd with effect from 16th January 2017 to 16th August 2018. It also entered into Contract No. TMC/TMK/01/2019 with effect from 16th August 2018 to 16th August 2019 and contract No. TMC/CHR/001/2019 with effect from 26th March 2019 to 25th March 2020.

From the series of contracts listed above it implies that M/s Wejisa Company Ltd has three years working experience on works of similar nature. However, the Appeals Authority observed that contract No. TMC/TMK/01/2017 signed on 16th January 2017 bears the name of M/s Wejisa Company Ltd while the Company changed its name from M/s Wesaji Company Ltd to Wejisa Company Ltd from 24th January 2018. The Appeals Authority expected that the contract would have been between



Temeke Municipal Council and M/s Wesaji Company Ltd as the change of name occurred on 24th January 2018 after the contract has been signed between the parties. Legally the contract should have been entered under the old name. Therefore, the contract entered under the new name was not valid. Thus, the Respondent ought not to have considered it as proof of experience of M/s Wejisa Company Ltd.

The Appeals Authority reviewed the three remaining contracts submitted by M/s Wejisa Company Ltd which covers the period from 16th August 2018 to 25th March 2020 find that the period covered by the three contracts is only nineteen months and nine days.

From the above analysis, the Appeals Authority is of the settled view that the proposed bidder M/s Wejisa Company Ltd for Lot 40 did not meet the required three years experience.

The Appellant also complain that the proposed bidder M/s Wejisa Company Ltd did not comply with the requirement of financial capability as it did not have Audited Financial Statements required by the Tender Document. The Appeals Authority revisited the Tender Document and observed that bidders were required to attach the Audited Financial Statements for two years that is 2018 and 2019. They were also required to attach Bank statements from 1st January 2019 to 31st December 2019. The Appeals Authority revisited the tender by M/s Wejisa Company Ltd and observed that it attached Audited Financial Statements for the financial year ended 31st December 2019 and Bank statement running from January 2019 to 20th August 2019 only. The Appeals Authority finds that the proposed



bidder M/s Wejisa Company Ltd failed to comply with financial capability requirement.

The Appellant's complaint as regards Lot 41 is that the proposed award to M/s Kajenjere Trading Company Ltd was not proper because corrections made by the Respondent on its quoted price contravened the requirement of the law. In addressing this complaint, the Appeals Authority revisited the Appeal record and observed that, the read out price for M/s Kajenjere Trading Company Ltd was TZS 21,214,470/=. The Evaluation Report indicated that there was a summation error and after it was corrected it changed the price to TZS 17,960,500/=. The changed amount was communicated to M/s Kajenjere Trading Company Ltd and the same was accepted.

The Appeals Authority revisited Regulation 207(2)(a) of the Regulations which read as follows:-

*"A procuring entity shall correct purely arithmetical errors that are **discovered during the examination of tenders and the procuring entity shall give prompt notice of any such correction to a tenderer that submitted the tender**".*

(Emphasis Added)

The above cited provision clearly indicates that correction of errors is allowed and the tenderer whose bid has been corrected must be notified of the correction made. A bidder may accept or reject the correction.



Furthermore, the Appeals Authority considered the Appellant's argument that it was mandatory for M/s Kajenjere Trading Company Ltd to accept the corrected amount within two days as stated in the Respondent's letter dated 13th May 2020. Having reviewed the record of Appeal, the Appeals Authority observed that, much as the letter from the Respondent notifying M/s Kajenjere Trading Company Ltd about the corrections made on its bid was dated 13th May 2020, it was not certain as to when the same was received. Further, M/s Kajenjere's letter accepting the correction was not dated, thus one cannot substantiate that the response was not submitted within the stipulated time. The date which the Appellant relies upon does not indicate when such letter was received. Given from what is stated hereinabove, the Appeals Authority rejects the Appellant's proposition that M/s Kajenjere Trading Company Ltd failed to accept the correction made to its bid.

Therefore, the Appeals Authority finds that the correction of errors which led to the change of the awarded contract price was properly done.

From the above findings and observations, the Appeals Authority concludes the second issue in the negative in respect of Lot 40 and in the affirmative in respect of Lot 41. Thus, the award of the tender to the proposed bidder M/s Wejisa Company Ltd for Lot 40 was not justified. However, with regard to Lot 41 the award to M/s Kajenjere Trading Company Ltd was justified.

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

Taking cognizance of the above findings, the Appeal in respect of Lot 40 is allowed and the Respondent is directed to proceed in accordance with the law. The Appeal in respect of Lot 41 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 24th day of August 2020.

HON. JUSTICE (RTD) SAUDA MJASIRI


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CHAIRPERSON

MEMBERS:

1. CPA. FREDRICK RUMANYIKA 
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2. MR. RHOBEN NKORI 
.....

3. ADV. ROSAN MBWAMBO 
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