

IN THE  
PUBLIC PROCUREMENT APPEALS AUTHORITY  
AT DAR ES SALAAM

APPEAL CASE NO. 39 OF 2017-18

BETWEEN

M/S AFRIHOST INVESTMENT LIMITED..... APPELLANT

AND

KASULU TOWN COUNCIL..... RESPONDENT

DECISION

CORAM

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

SECRETARIAT

- |                           |                        |
|---------------------------|------------------------|
| 1. Ms. Florida Mapunda    | - Senior Legal Officer |
| 2. Ms. Violet S. Limilabo | - Legal Officer        |
| 3. Mr. Hamisi O. Tika     | - Legal Officer        |

FOR THE APPELLANT

- |                          |                     |
|--------------------------|---------------------|
| 1. Mr. David D. Naingola | - Managing Director |
| 2. Mr. Selemani Mbaga    | - Director          |
| 3. Mr. Frank Mejooli     | - Director          |

FOR THE RESPONDENT

- |                      |             |
|----------------------|-------------|
| Mr. Felix R. Mkiryia | - Head, PMU |
|----------------------|-------------|

This Appeal was lodged by M/s Afrihost Investment Limited (hereinafter referred to as "the Appellant") against Kasulu Town Council (hereinafter referred to as "the Respondent"), in respect of Tender No.

LGA/168/HQ/2017-2018/WSDP/W/12/L/01 for Construction of Water Infrastructure at Muganza Water Project (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 facts of the Appeal may be summarized as follows:-

The Respondent advertised the Tender through Daily News newspaper issued on 24<sup>th</sup> March 2018. The deadline for submission was set for 6<sup>th</sup> April 2018; whereby four tenders were submitted.

The tenders were subjected to evaluation which was conducted in three stages namely; Preliminary, Detailed and Post qualification evaluation. During Preliminary evaluation one tender was disqualified. The remaining three tenders were subjected to detailed evaluation, whereby they were checked for arithmetic errors. In that process all tenders were found with errors which were corrected. The tenderers were then informed about such correction. The tender with lowest evaluated price was subjected to Post qualification evaluation. Finally the Tender Board approved the award of the Tender to M/s Jambocon Engineering Ltd at a contract price of TZS.1, 758,360,891.00 (VAT exclusive).

On 30<sup>th</sup> May 2018, the Respondent issued Notices of Intention to Award the Tender to all tenderers. Through the Notice, the Appellant was informed that his tender was disqualified for the following reasons;

- The cost for construction is higher compared to others; and
- the submitted program of work is contrary to Clause 1.2 of the Instructions To Bidder (ITB).

Dissatisfied, on 1<sup>st</sup> May 2018, the Appellant applied for administrative review, challenging his disqualification and the proposed award to the successful tenderer. On 3<sup>th</sup> May 2018 the Respondent invited the Appellant to deliberate on the complaints raised. On 7<sup>th</sup> May 2018, the Respondent

affirmed his position of disqualifying the Appellant, thus on 14<sup>th</sup> May 2018, the Appellant filed this Appeal.

### SUBMISSIONS BY THE APPELLANT

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

1. That their disqualification from the Tender was not proper in law. In support of this ground the Appellant argued that the Respondent served them with the letter of correction of errors rather late, indicating that the Respondent intended the proposed bidder to win the Tender. They argued further that although the letter is dated 14<sup>th</sup> April 2018, it was served upon them on 27<sup>th</sup> April 2018. The letter required them to respond by 16<sup>th</sup> April 2018 which had already passed. Thus, they believe that the information was given to them just as a formality although they responded on the same date.
2. The Appellant also disputes disqualification on the ground that his program of works was contrary to Clause 1.2 of the Tender Document. In support of this the Appellant submitted that they analyzed the actual scope of work and concluded that eight months were not enough to complete the project. Thus, they prepared a realistic program based on resources to be allocated. They further submitted that, as there was no completion date provided, they were free to determine their schedule as they felt appropriate; claiming that Clause 1.1 of the Special Conditions of Contract (SCC) only provided for intended completion date to be stated in the letter of acceptance.

Further, as Clauses 13 of the SCC and 29.1 of the General Conditions of Contract (GCC) provide that program of works is reviewable; it should have been reviewed rather than disqualifying them.

3. That, the award intended to be made to M/s Jambocon Engineering Ltd is not proper. In support of this ground the Appellant submitted

that, the figure quoted by the proposed successful bidder as read out at the opening ceremony, and the proposed award price, are very different. They argued that at the tender opening the read out price was TZS.1,435,622,107/=but the awarded price is TZS. 2,144,342,550/=. As the difference is almost 90% of the quoted price, they claimed that it intended to hide within a small figure with a purpose of taking advantage during evaluation process. Thus alerting them of some dubious arrangement between the proposed successful bidder and the Respondent; which is not acceptable.

4. That, the Notice of Intention to award sent to the Appellant was not signed by the Accounting Officer contrary to the requirement of the law, hence it was null and void.
5. That, the Appellant's bid price was without VAT as per the requirement of the Tender Document and since water projects are not charged VAT. Nevertheless, the evaluation process was done including VAT.

Finally the Appellant prayed for the following orders: -

- i. Evaluation to be reviewed as it violated the norms and has gross negligence especially bid amount of M/s Jambocon Engineering Ltd; and
- ii. Revoke the decision to award to M/s Jambocon Engineering Ltd and consider the award to be made to them.

#### REPLY BY THE RESPONDENT

The Respondent's reply to the grounds of the Appeal may be summarized as follows;-

1. In response to the first ground, the Respondent admitted the delay in the service of the letter and that he apologized for it. They however

argued that despite the delay, the Appellant's response was considered in the evaluation process.

2. Regarding the program of works, the Respondent submitted that the Appellant indicated 19 months instead of 8 months provided in the Tender Document. Arguing that as they went contrary to the Tender Document, their disqualification complied with Regulation 204(2)(e) of the Public Procurement Regulations GN. No.446 of 2013, as amended (hereinafter referred to as "G.N. No. 446 of 2013").
3. On awarding the Tender to the proposed tenderer at a price higher than what was quoted, the Respondent claimed that, the evaluation of the Tender complied with the requirements of the Tender Document and the law. Thus, the errors found in the tender by proposed successful tenderer were properly corrected and there was no any arrangement between them and the said tenderer.

The Respondent further argued that the Appellant was not considered for award of the contract because their quoted price was higher compared to that of M/s Jambocon Engineering Ltd after correcting errors on all tenders.

4. On the ground that the Notice of Intention to award was not signed by the accounting officer, the Respondent admitted this but explained that this anomaly was corrected by sending a duly signed Notice immediately thereafter, thereby not prejudicing any of the tenderers.
5. With regard to VAT, the Respondent admitted that, water projects do not attract VAT. However, as all tenderers quoted prices VAT inclusive except for the Appellant, VAT was loaded to the Appellant's tender for purposes of evaluation.

Finally, the Respondent prayed for the following orders that:-

- i. There is no need to review evaluation; and
- ii. The decision to award the tender to M/s Jambocon Engineering Ltd is proper.

## ANALYSIS BY THE APPEALS AUTHORITY

The Appeals Authority having gone through the Tender proceedings including various documents submitted and the oral submissions by the parties, is of the view that the Appeal is based on three main issues, namely:-

- 1.0 Whether the Appellant's disqualification is justified,
- 2.0 Whether the award to the proposed successful tenderer is proper in law; and
- 3.0 What reliefs, if any, are the parties entitled to.

Having identified the issues we proceeded to determine them as follows:-

### 1.0 Whether the Appellant's disqualification is justified

To ascertain the validity of the grounds for the Appellant's disqualification, we began with the reason of program of work not complying with the required provisions of Clause 1.2 of the ITB and Clause 1 of the Tender Data Sheet (TDS) the same read as follows:-

ITB 1.2 "The successful tenderer will be expected to complete the works within the period stated in the TDS from the start date specified in the TDS." (Emphasis added)

TDS 1 "The successful Tender (sic) is expected to complete the works within 8 months." (Emphasis added)

The above clearly entail that tenderers were required to quote eight months for completion of works.

The Appellant conceded to have quoted 19 months contrary to the above requirement. They however tried to justify their non-compliance by arguing that, according to the nature of the intended works, 8 months were not realistic. They also insisted that, the program of works is not fixed but is

subject to review; which should have been done instead of disqualifying them.

We have considered submissions by both parties and scrutinized the Tender Document together with the Evaluation Report. We are satisfied that the tender evaluation was conducted based on the terms and conditions as set in the Tender Document pursuant to Regulation 203 of G.N. No. 446 of 2013, which requires evaluation of tenders to be consistent with the terms and conditions of the Tender Document.

The Appellant's claim that the program of works is subject to review and disqualification should not have been based on it, is misconceived as the same should have been in accordance to the Tender Document in the first place. Otherwise, the Appellant should have sought for clarification from the Respondent pursuant to Clause 8.1 of the ITB and Regulation 13 of G.N. No. 446 of 2013 prior to submission of the tender, instead of creating their own criterion. Thus, by remaining silent, the Appellant was bound to comply with the requirements of the Tender Document.

Accordingly, the Appeals Authority finds that, the Appellant's failure to quote 8 months specified in the Tender Document were properly dealt with under Clause 27.8(e) of the ITB which is in *pari materia* with Regulation 204(2)(e) of G.N. No. 446 of 2013. The said provision provides amongst others, that inability to meet work schedule is one of material deviations that justify rejection of a tender.

Regarding the Appellant's disqualification based on higher costs of construction compared to the proposed successful tenderer; the Appeals Authority revisited the Evaluation Report and observed that the Appellant's read out price was TZS. 2,308,025,250.00 (VAT exclusive). We observed further that three tenders including that of the Appellant were evaluated at the detailed evaluation stage and all of them were found to have arithmetic errors. After correction of errors, the proposed successful tenderer was ranked the first with TZS. 2,144,342,550/= (VAT inclusive) and the

Appellant's tender was wrongly ranked the second at TZS. 2,326,882,250/= (VAT exclusive) while in actual fact they were the third if all tenders were compared VAT exclusive.

Having satisfied ourselves that correction of errors on the Appellant's tender was properly done, we are of the settled view that indeed their tender was the third lowest and thus their disqualification is justified.

We also considered the Appellant's contention that the letter of correction of errors was served on them late, and the Respondent's admission of the same. We observed that the letter dated 14<sup>th</sup> April 2018 was served on 27<sup>th</sup> April 2018 and the Appellant responded to it on the same day.

Regulation 207(2)(a) of GN. No. 446 of 2013 provides clearly that a procuring entity is mandatorily required to give prompt notice to tenderers whose tender has been corrected. The said provision does not provide for specific time within which a procuring entity has to notify tenderers about correction of errors. As the process went on smoothly and the Appellant's response was considered, we find that the Appellant's right has not been prejudiced in any way whatsoever.

On the other hand, had the Appellant thought that their rights were prejudiced they ought to have challenged the Respondent's conduct in that regard in the administrative review, pursuant to Section 96 of the Act.

Regarding the Appellant's contention that the Notice of Intention was not signed by the Accounting Officer contrary to the requirement of the law, the Appeals Authority observes that the Respondent's act contravened Section 60(6) of the Act, which requires the Accounting Officer to duly notify tenderers about the intention to award and such notice is to be signed by himself. Again, we find that this anomaly did not prejudice the Appellant in any way, since they received the proper letter and were accorded the right to be heard as they submitted their complaints pursuant to Sections 60(3) and 96 of the Act.



Therefore, the first issue is concluded in the affirmative, that the Appellant's disqualification is justified.

## 2.0 Whether the award to the proposed successful tenderer is proper in law

In resolving this issue the Appeals Authority considered the Appellant's contention that, the Tender has been awarded to M/s Jambocon Engineering Ltd at a higher price compared to the read out price.

To ascertain the Appellant's contention, we revisited the documents availed and observed that at the Detailed Evaluation stage, evaluators corrected errors that existed in all three tenders. All errors were purely arithmetical which increased the amount from TZS.1, 435,622,107/= (VAT inclusive) to TZS. 2,144,342,550/= (VAT inclusive).

The Appeals Authority revisited Clause 29.1 of the ITB and Regulation 207(2)(a) of GN. No. 446 of 2013, which read as follows:

ITB 29.1 "Tenders determined to be substantially responsive will be checked for any arithmetic errors. Errors will be corrected as follows:-

- (a) if there is a discrepancy between unit prices and the total price that is obtained by multiplying the unit price and quantity, the unit price shall prevail, and the total price shall be corrected, unless in the opinion of the PE there is an obvious misplacement of the decimal point in the unit price, in which the total price as quoted shall govern and the unit price shall be corrected." (Emphasis added)

Reg. 207(2) "notwithstanding regulation 202(5)-

- (a) a procuring entity shall correct purely arithmetic 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 provide that wherever there is a discrepancy between unit prices and the totals arising from multiplication of unit prices and the quantity then the unit price prevails and the total has to be corrected.

The law is silent as to the limit amount or percentage acceptable for correction of errors from the quoted price. Thus no law has been contravened on this aspect.

On the Appellant's claim that there was intention to hide within a small figure with a purpose of taking advantage during evaluation process, alerting them of some dubious arrangement between the proposed successful bidder and the Respondent which according to them is immoral. We have failed to establish the substance as the Appellant could not show any provision of the law contravened.

From the above findings, the second issue is also answered in the affirmative that, the award to the proposed successful tenderer is proper in law.

### 3.0 What reliefs, if any, are the parties entitled to

Taking cognizance of the findings above, the Appeal is dismissed for lack of merits. The Respondent is to proceed with the tender process as planned.

Each party to bear 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 absence of the Respondent today, 6<sup>th</sup> July 2018.

*M. Otaru*  
.....  
**Ms. MONICA P. OTARU**  
**Ag. CHAIRPERSON**

**MEMBERS:**

- 1. **ENG. FRANCIS MARMO** ..... *F Marmo*
- 2. **MR. LOUIS ACCARO** ..... *L Accaro*