

**IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY**

APPEAL NO. 4 OF 2020-21

BETWEEN

M/S GIN INVESTMENT 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 Limilabo | - Legal Officer |

FOR THE APPELLANT

- | | |
|--------------------------------|--------------------------------------|
| 1. Mr. Nolasco Nolaskus Mpotu | - Advocate, Candor Attorney |
| 2. Mr. Nolaskus Nicholas Mpotu | - Consultant |
| 3. Mr. Henry Mwankemwa | - Manager, Gin Investment
Limited |

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FOR THE RESPONDENT

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

The Appeal was lodged by **M/s Gin Investment Limited** (hereinafter referred to as "**the Appellant**") against the **Ilala Municipal Council** (hereinafter referred to as "**the Respondent**").

The Appeal is in respect of Tender No. LGA/015/IMC/2019-2020/HQ/NC/24 Lot 38 for provision of Revenue Collection for Waste Products at Upanga East and West Ward (*ZABUNI YA KUFANYA USAFI, KUKUSANYA TAKA NGUMU KWENYE MAKAZI YA WATU, MAJENGO YA BIASHARA, MITAA NA OFISI MBALIMBALI, KUZOA TAKA NA KUPIPELEKA KATIKA DAMPO LA PUGU KINYAMWEZI NA KUKUSANYA ADA ZA TAKA KATIKA KATA ZA MJINI KATI (CBD) KATIKA MANISPAA YA ILALA – LOT 38*) (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**").

The Respondent through 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 was set for 14th April 2020. Only four tenderers, the Appellant inclusive, responded to the invitation and the tenders were publicly opened through TANEPS.

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 whereby one tenderer was disqualified at this stage. The remaining three tenders were subjected to detailed evaluation whereby the Appellant's tender was found to be non-responsive for failure to submit detailed analysis of the expected income, expenditure and profit as required under the Statement of Requirement. Thus, the remaining two tenders were subjected to detailed evaluation and thereafter M/s Tirima Enterprises Limited was found to be responsive and was subjected to post qualification. After completion of the process the Evaluation Committee recommended award of the Tender to M/s Tirima Enterprises Limited at a monthly remission of Tanzanian Shillings Six Million Four Hundred Fourteen Thousand and Forty (TZS 6,414,040/=).

The Tender Board at its meeting held on 20th June 2020 approved the award as recommended by the Evaluation Committee.

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On 8th July 2020, the Respondent issued the Notice of Intention to award the Tender to all tenderers who participated in the Tender process. The Notice informed them that the Respondent intended to award the Tender to M/s Tirima Enterprises Limited at a monthly remission of TZS 6,414,040/= . The said notice also informed the Appellant that, it was disqualified for failure to submit analysis of its expected income, expenditure and profit as required under the Statement of Requirement.

Dissatisfied with the reason given for its disqualification, on 16th July 2020, the Appellant applied for administrative review to the Respondent. On 22nd July 2020, the Respondent issued a decision which rejected the Appellant's application for administrative review. Aggrieved further, on 4th August 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 during the hearing are summarized as follows: -

1. That, the Appellant disputes its disqualification for the reason that it failed to attach in the TANePS the Statement of Requirement which shows the breakdown of the intended collection, amount to be remitted to the Respondent on a monthly basis, project costs and profit. The Appellant claimed to have complied with such requirement and insisted that the required breakdown was uploaded in the TANePS.

The Appellant submitted further that, since all the information was submitted electronically by being uploaded into the system, it was



not possible for the Appellant to be allowed to submit its tender if there was missing information. That is to say, the system would have rejected its tender. However, since the TANEPS accepted it, it implies that all the required information was uploaded. The Appellant submitted further that, by being able to submit its tender it complied with Regulations 348 (1) of the Regulations. It added that, after submission of its tender, it received acknowledgement of receipt from the system which was pursuant to Regulations 351 (3) of the Regulations.

2. That, the Appellant denied to have participated in Tender No. LGA/015/IMC/2019-2020/HQ/NC/24 LOT 37, but to its surprise, it received a notice of intention to award from the Respondent dated 8th July 2020 indicating that the award was intended to be made to M/s Kajenjere Trading Co. Ltd. The said notice indicated that the Appellant was disqualified for failure to submit evidence of ownership/hiring of motor vehicles, cleaning materials and certificates of its employees (Supervisor, Accountant and Health Officer) as required under Item 14 of Tender requirement.
3. That, the Appellant doubts the Respondent's conduct in relation to evaluation of the tenders due to the fact that the tender opening records from TANEPS indicates that the read out price of M/s Tirima Enterprises Limited was Tanzanian Shillings Two Billion while the notice of intention to award indicates that the awarded amount is Tanzanian Shillings Eight Hundred Million. The Appellant added that, it is aware that sometimes changes on the quoted price might occur

due to correction of errors. However, in this regard the Appellant doubted if the correction made was in accordance with the law.

4. That, according to the Controller and Auditor General's (CAG) report dated March, 2020 on Performance Audit specifically Monitoring and Enforcement of Public Procurement activities, it was observed that there are some challenges in the implementation of TANePS since the system is not inline with the provisions of the Act. The Appellant added further that, the system was introduced without due consideration of other legal arrangement hence it brought up some challenges.
5. Finally, the Appellant prayed for the following orders: -
 - i. Public Procurement Regulatory Authority (PPRA) Division of Information Systems to provide the Appellant's submitted documents for Lots 38 in order to verify its claims;
 - ii. An order requiring the Respondent to set aside its decision to award the tender to the successful tenderer M/s Tirima Enterprises Limited and reconsider all the bids in accordance with fairness and justice or the Appeals Authority to nullify the decision made by the Respondent where it refused to re-evaluate the Appellant's tender fairly;
 - iii. Respondent to provide strong reasons why it issued the Appellant notice of intention to award the Tender to M/s Kajenjere Trading Co. Ltd for Lot 37 which the Appellant did not participate; and
 - iv. Any other relief that the Appeals Authority deem fit.

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REPLY BY THE RESPONDENT

The Respondent's reply to the Appellant's grounds of Appeal and oral submissions may be summarized as follows: -

1. That, the Appellant was fairly disqualified in Lot 38 as according to Clause 2(i) of the evaluation criteria read together with Item 6 of the Tender requirement tenderers were required to submit a breakdown of the intended collection, amount to be remitted to the Respondent on monthly basis, project costs and profit. The Appellant failed to comply with such requirement, as a result its tender was disqualified at the technical evaluation stage.

In expounding this point the Respondent added that, tenderers were required to upload relevant information on slots provided in the TANePS so as to comply with requirements of the Tender Document. Upon reviewing the Appellant's tender it was observed that in a slot where it was supposed to upload the Statement of Requirement the Appellant uploaded a letter from CRDB bank indicating its financial status and a table showing its annual turnover.

2. That the Appellant participated in Lot 37 and was disqualified for failure to submit evidence on ownership/hiring of motor vehicles, cleaning materials and certificates of its employees (Supervisor, Accountant and Health Officer) as required under Item 14 of Tender requirement.

The Respondent expounded that, in compliance with requirement of Lot 37 the Appellant submitted only three previous performed contracts for proving its previous experience. There were no other

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documents attached in relation to the said Lot. Thus, after completion of evaluation the Appellant was informed reasons for its disqualification as it participated in the said Lot.

Finally, the Respondent prayed for the following orders: -

- i. That, the Appellant's first prayer to be disregarded as it has no merit in this appeal;
- ii. That, this Appeals Authority uphold the decision made by the Respondent since M/s Tirima Enterprises Limited met all the requirement provided in the Tender document;
- iii. That, the Respondent through a letter dated 8th July 2020 issued the Appellant a notice of intention to award the Tender to M/s Kajenjere Trading Co. Ltd for Lot 37. The issuance of the said notice was due to the fact that the Appellant participated in the said Lot by submitting documents to prove its work experience in TANEPS hence was disqualified for failure to submit other relevant documents; and
- iv. That, the cost for this appeal be borne by the Appellant.

ANALYSIS BY THE APPEALS AUTHORITY

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

- 1. Whether the disqualification of the Appellant's tender is justified; and**
- 2. What reliefs if any are the parties entitled to.**

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

1. Whether the disqualification of the Appellant's tender is justified.

In resolving this issue, the Appeals Authority revisited the Evaluation Report obtained from the TANEPS together with other relevant documents submitted by the parties and observed that, the Appellant was disqualified at the detailed evaluation stage for failure to submit a Statement of Requirement which would provide analysis of the expected income, expenditure and profit.

To ascertain the validity of the Appellant's disqualification in this regard, the Appeals Authority revisited Item 6 of Tender requirement, Clause 2 (i) of the detailed evaluation criteria and Item 7.2 of the Form of Tender. The listed provisions state in clear terms that tenderers were required to submit detailed breakdown of what would be expected as an income, amount to be remitted to the Respondent each month, running costs and profit. The mentioned Clause and Items read as follows: -

Masharti ya Maombi ya Zabuni

6 *"Mwombaji anatakiwa kujaza mchanganuo wa mapato na matumizi, kiasi anachotarajia kukusanya na kiasi atakachowasilisha Halmashauri kila mwezi"*

Vigezo vya uchambuzi wa Zabuni

2. Uchambuzi wa kina

- (i) *"Mzabuni atoe/aonyeshe katika mchanganuo wa mapato na matumizi makisio ya makusanyo ya kila mwezi katika kata husika na gharama zake za uendeshaji na fedha atakayowasilisha Halmashauri kwa kila mwezi"*

Fomu ya Maombi ya Zabuni

7.2 *"Makadirio ya makusanyo ya ada ya uzoaji taka kwa mwezi ni Tsh kiasi nitakachowasilisha Halmashauri kila mwezi ni Tsh sawa na asilimia kiasi nitakachobaki nacho kwa ajili ya gharama za uendeshaji na faida ni Tsh Sawa na asilimia"*

The Appeals Authority revisited the Appellant's tender under TANePS and observed that, it had not attached the required Statement of Requirement, instead it attached a letter from CRDB bank which indicates its financial status and a table showing its annual turnover and line of credit. The Appellant was shown all the documents it uploaded in the TANePS and it conceded to have not attached the Statement of Requirement as was required.

The Appeals Authority finds that the Appellant contravened Item 6 of Tender Requirement, Clause 2 (i) of the detailed evaluation criteria and Item 7.2 of the Form of Tender reproduced herein above. The Appeals Authority revisited Section 72 (1) of the Act, Regulations 203 (1), 204 (2) (k) and 206 (2) of the Regulations which provide as follows: -



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

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

Reg. 204 "Material Deviations to commercial terms and conditions, which justify rejection of a tender shall include the following:-

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

Reg. 206 (2) "Where a tender is not responsive to the tender document, it shall be rejected by the procuring entity and may not subsequently be made responsive by correction or withdrawal of the deviation or reservation".

(Emphasis added)

The above quoted provisions require the evaluation criteria to be stipulated in the Tender Document and the same to be applied during the evaluation of tenders. Any tender which fails to comply with requirement set forth in the Tender Document should be rejected.

Given the requirement under the law, the Appeals Authority is of the settled view that the Appellant failed to comply with the Statement of Requirement as was required in this Tender, thus its disqualification was proper in law.



Therefore, the Appeals Authority concludes the first issue in the affirmative, that the disqualification of the Appellant was justified.

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

Given the Appeals Authority's findings hereinabove, that the disqualification of the Appellant was justified, the Appeal is hereby dismissed for lack of merit.

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 28th day of August 2020.

HON. JUSTICE (RTD) SAUDA MJASIRI



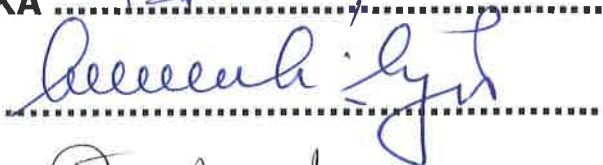
CHAIRPERSON

MEMBERS:

1. CPA. FREDRICK RUMANYIKA



2. MR. RHOBEN NKORI



3. ADV. ROSAN MBWAMBO

