

**IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY
AT DAR ES SALAAM
APPEAL CASE NO. 46 OF 2018-19**

BETWEEN

**M/S PARAGON INVESTMENT HOLDINGS (PTY)
AND AGANO SAFI (T) PLC LIMITED (JV).....APPELLANT
AND
TANZANIA AIRPORTS AUTHORITY.....RESPONDENT**

DECISION

CORAM

- | | |
|--------------------------------------|----------------|
| 1. Hon. Justice (Rtd), Sauda Mjasiri | - Chairperson |
| 2. Dr. Leonada Mwangike | - Member |
| 3. CPA. Fredrick Rumanyika | - Member |
| 4. Ms. Florida Mapunda | -Ag. Secretary |

SECRETARIAT

- | | |
|---------------------------|-----------------|
| 1. Mr. Hamisi O. Tika | - Legal Officer |
| 2. Ms. Violet S. Limilabo | - Legal Officer |

FOR THE APPELLANT

- | | |
|-------------------------|---|
| 1. Mr. Sisa Namandje | - Legal Representative |
| 2. Mr. Desmond Amunyila | - Chief executive officer,
Paragon Investments |
| 3. Mr. Iyaloo Nangolo | - Director, Agano Safi PLC |
| 4. Mr. Samweli Mhina | - Managing Director,
Agano Safi PLC |



5. Mr. Adrian Mhina - Advocate, Klug Attorneys

FOR THE RESPONDENT

1. Mr. Joachim Maambo - Ag. Legal Secretary

2. Mr. Josephat Msafiri - Procurement Officer

This Appeal was lodged by M/s Paragon Investment Holdings (PTY) Ltd & Agano Safi (T) Public Limited Company (JV) (hereinafter referred to as "**the Appellant**") against the Tanzania Airports Authority commonly known by its acronym, TAA (hereinafter referred to as "**the Respondent**"). The Appeal is in respect of Tender No. AE/027/2017-2018/JNIA/N/02 (Lots 1, 2,3,4,5 and 6) for Lease of Space for Provision of Duty-Free Concession at Julius Nyerere International Airport Terminal III Building (hereinafter referred to as "**the Tender**").

The Tender was conducted through the Restricted Tendering method specified in the Public Procurement Act of 2011 (hereinafter referred to as "**the Act**"), the Public Procurement Regulations, Government Notices No. 446 of 2013 and GN.No.333 of 2016 (hereinafter referred to as "**the Regulations**") and was open to the pre-qualified tenderers.

After going through the record of Appeal submitted to the Public Procurement Appeals Authority (hereinafter referred to as "**the Appeals Authority**"), the Appeal may be summarized as follows:



On 12th March 2019, the Respondent invited the shortlisted tenderers to bid for the Tender. The initial deadline for the submission of tenders was set for 26th March 2019. However, it was later on extended to 2nd April 2019. By the deadline, five (5) firms submitted their bids for Lots 1 and 2; seven (7) firms submitted bids for Lot 3 and four (4) firms submitted their bids for Lots 4, 5 and 6 respectively. The Appellant tendered in all six Lots.

Tenders were then subjected to evaluation which was conducted into three stages namely; Preliminary, Detailed and Price comparison.

Three bids including that of the Appellant were disqualified at the Preliminary evaluation stage for all Lots for failure to comply with the requirements of the Tender Document. Specifically, the Appellant's tenders were disqualified for submitting a Bid Form that did not state the rental charges and concession fees. The remaining bids were then subjected to detailed evaluation and Price comparison. Bids by M/s Dufry AG and M/s Mozan Investment Limited were proposed for award of the Tenders. M/s Dufry AG was proposed for award of the Tender for Lots 1,2,4,5 and 6 at a rental sum of 300 USD VAT Exclusive, plus a Concession Fee of 23% for Lots 1 and 2, 18% for Lots 4 and 5 and 15% for Lot 6 of the annual gross turnover respectively. M/s Mozan Investment Limited was proposed for award of the Tender for Lot 3 at a rental sum of 500 USD and a Concession Fee of 20% of annual gross turnover.

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On 16th May 2019, the Respondent's Tender Board through a Circular Resolution No. 78/2018-19 approved the award recommendations.

On 22nd May 2019, the Respondent issued the Notice of Intention to Award the Tender to all bidders who participated in the Tender process. The Notice informed the Appellant that the Respondent intends to award the Tender to M/s Dufry AG for Lots 1,2,4,5 and 6 and M/s Mozan Investment Limited for Lot 3. The Notice also informed the Appellant that its bid was non-responsive due to submission of the Bid Form that did not state the rental charges and concession fees, contrary to the requirement of Clause 13.1 of the Instruction To Bidders (ITB).

Aggrieved, on 29th May 2019, the Appellant filed its request for administrative review to the Respondent's Accounting Officer challenging its disqualification in all Lots. On 4th June 2019, the Accounting Officer issued its decision in which it dismissed the complaint. Aggrieved further, on 14th June 2019, the Appellant lodged this Appeal.

SUBMISSIONS BY THE APPELLANT

The Appellant's grounds of Appeal as deduced from the Appeal record may be summarized as follows:-

1. That, the Appellant was among the pre-qualified tenderers who were invited to participate in this Tender. It tendered for all six Lots but was unfairly disqualified for submitting a Bid Form which

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did not state rental charges and concession fees. The Appellant expounded its argument by indicating that the rental charges and concession fees were provided for at pg 424 of its Bid which is a replica of Table 1 attached to the Terms of Reference (TOR).

According to the Appellant, it opted to specify its rental charges and concession fees in Table 1 following clarification sought and obtained from the Respondent on 21st March 2019. The Appellant stated that it was directed by the Respondent to use the generic format found at page 424 of its bid using table 1 appearing in the TOR. It stated further that, the rental charges and concession fees that were said to have been missing were stated in the Price Schedules which made reference to page 424 of the Appellant's bid.

2. That, the Respondent was aware of the charges and fees of its tender as the same were read out during the Tender Opening Ceremony for all Lots. The Appellant argued that, it is obvious that the read out rental charges and concession fees were those offered at page 424 of its bid. Therefore, it was improper for the Respondent to disqualify them for failure to specify the charges and fees while the same were specified and read out during the tender opening as per Regulation 196 of GN. No. 446 of 2013.
3. That, the Respondent's Bid Form was incompatible and was not suitable for completing necessary information for multiple Lots. In

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addition, the Respondent did not dispute that the table appearing on page 53 of its bid (Price Schedules) is incompatible and differs from table 1 provided to bidders under TOR/ Scope of work.

4. That, the Appellant conceded that it did not complete the Bid Form as required, but argued that the said omission would not render its tender to be non-responsive. It stated that in order for an omission to be considered that it renders a tender non-responsive the same must be a deviation which has an impact on the substance of the Tender as per Clause 27.2 of the ITB. The Appellant's omission in this regard cannot be termed as material deviation.
5. That, the Respondent's decision to disqualify its bid as well as the decision for administrative review were against the principles of the Public Procurement Act, 2011 and common law namely:-
 - i. Irrational;
 - ii. Unreasonable;
 - iii. Unfair;
 - iv. Excessive and highly technical and based on rigid form over substance; and
 - v. Highly pre-judicial to the Appellant.
6. That, the rental charges and concession fees offered by the Appellant were higher compared to those offered by the proposed

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successful tenderer. Thus, the Respondent's act of disqualifying the Appellant would lead to loss of revenue to the Government.

7. That, the Respondent was aware that the law requires bids to be *substantially responsive* and not strictly responsive. Strict responsiveness of tenders is not a requirement under the law. Thus, as long as its tender specified the rental charges and concession fees it sufficed for it to be substantially responsive.

In expounding its argument on this point the Appellant submitted that, the Respondent when conducting this Tender process ought to have adhered to the principle of value for money. It cited a legal maxim quoted in the case of **All pay Consolidated Investment Holdings (PTY) Ltd Vs Chief Executive Officer, South African Social Security Agency and others**, 2013 SA 557 (SCA) where it was stated in paragraph 21 that:-

"there will be few cases of any moment in which flaws in the process of public procurement cannot be found, particularly where it has been scrutinized intensely with the objective of doing so. A fair process does not demand perfection and every flaw is not fatal".

Finally, the Appellant prayed for the following orders:-

- i) The Respondent be ordered to set aside its decision to disqualify the Appellant,

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- ii) The award proposed to the successful tenderer be set aside and re-consider all bids in accordance with fairness and justice; alternatively,
- iii) The Appeals Authority reverses the Respondent's unlawful decision and substitute its own decision including the setting aside of the Appellant's disqualification and orders for re-evaluation of the tenders afresh but fairly;
- iv) Payment of USD 30,000.00 incurred as total costs and legal fees in handling this Appeal;
- v) Payment of TZS. 300,000.00 being costs for filling this Appeal; and
- vi) Further and/or any alternative relief.

REPLY BY THE RESPONDENT

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

1. That, the Appellant was among the tenderers who participated in this Tender and was disqualified for submitting incomplete Bid Form as it did not state the rental charges and concession fees as was required.
2. That, there was no instruction or clarification issued by the Respondent on 21st March 2019 which allowed the Appellant to quote its price in Table No. 1 attached to the TOR instead of

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the Bid Form. Table No. 1 in the TOR indicates the area, size and minimum rent and concession fees.

3. That, the Bid Form was among the documents which formed part of this tender as listed under Clause 7.1 of the ITB. Clauses 13.1, 14.1 and 14.3 required tenderers to fill their Bid Form as per the instructions given without substitution or alterations. The Appellant was required to provide all the details required in the Bid Form by completing it as per the given instructions. The Appellant failed to comply with the given instructions, thus its tender was regarded to be non-responsive.
4. The fact that the Appellant's rental charges and concession fees were read out during the Tender opening does not imply that the prices were properly quoted. The total price was to be indicated in the Bid Form; however, this was not done. The Respondent added further that, the Appellant misconceived the tender opening and evaluation process. Legally, the tender opening ceremony and the evaluation process are two separate stages in the tender proceedings. In this tender the two processes were conducted separately in terms of Regulations 196, 203 and 206 of the Regulations.
5. That, the quotation documents for all six (6) Lots were issued separately, thus, each Lot was to be quoted separately. The Respondent added further that, there is no provision in the



Tender Document which stipulated that Table No. 1 in the TOR is a substitute of the Bid Form. The Respondent argued that if the Appellant realized that the Bid Form contained in the Tender Document was not sufficient for this Tender, it ought to have sought for clarification pursuant to Clause 8 of the ITB. The Appellant had not sought for any clarification, thus it ought to have complied with requirements of the Bid Form as provided.

6. That, the disqualification of the Appellant's bid as well as the Respondent's decision issued with respect to the application for administrative review was in compliance with the applicable procurement laws and not as averred by the Appellant.
7. That, all bids were checked for substantial responsiveness in terms of Regulation 204(1) of the Regulations. The Appellant's bid had Material Deviation and was rejected in terms of Regulations 204(2) (k) and 210(c) of the Regulations. The Act allows procuring entities to waive minor informality if the same will not unfairly affect the rights of other bidders. In this Tender the Appellant's anomaly could have not been waived, as such a waiver would amount to making a non-responsive bid responsive. Failure to comply with Bid Form requirement is not a minor informality; rather it's a major deviation. Thus, the Appellant's bid was fairly disqualified.

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8. That, the Appellant alleged to have quoted the highest price, thus ought to have been awarded the Tender despite the slight anomaly noted. The Respondent argued that, the determination of the highest evaluated bidder was done in compliance with Clause 32.1 of the ITB issued to bidders and Regulations 203 to 206 of the Regulations. In order for a tender to be responsive it is required to comply with the criteria provided in the Tender Document. Price was not the only determining factor.

Finally, the Respondent prayed for the following:-

- i. Dismissal of the Appeal on its entirety;
- ii. Decision made by it be maintained and it be allowed to proceed with award and contract execution;
- iii. Costs; and
- iv. Any other order the Appeals Authority may deem fit to grant.

ANALYSIS BY THE APPEALS AUTHORITY

The Appeals Authority, having gone through the tender proceedings including various documents submitted by the parties and the oral submissions during the hearing, is of the view that the Appeal is centred on two main issues which were agreed upon by the parties. The said issues are stated as follows:-

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1.0 Whether the disqualification of the Appellant's bid was justified; and

2.0 What relief(s) if any, are the parties entitled to?

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

1.0 Whether the disqualification of the Appellant's bid was justified

In resolving this issue the Appeals Authority revisited the documents submitted and observed that, the Appellant was disqualified for submitting an incomplete Bid Form, which did not state rental charges and concession fees. In order to substantiate the validity of the Appellant's disqualification the Appeals Authority revisited Clause 7.1 of the ITB which itemized the main documents for this Tender. The said clause listed amongst others; Instruction to Tenderers, Bid Data Sheet, General Conditions of Contract, Special Conditions of Contract, Terms of References, Bid Form and Price Schedules.

Since the Appellant's disqualification was in relation to the submission of an incomplete Bid Form, the Appeals Authority revisited Clause 13.1 of the ITB which guides on how the Bid Form should be completed. The said Clause provides as follows:-

"The tenderer shall fill in the Bid Form furnished in the documents. The Bid Form must be completed without any

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*alterations to its format and **no substitute shall be accepted***'. (Emphasis supplied)

From the wording of the above quoted provision it is crystal clear that tenderers were mandatorily required to complete the Bid Form attached to the Tender Document without any alterations or substitutions.

Furthermore, the Appeals Authority revisited Clause 14.1 of the ITB and observed that tenderers were required to quote their prices in the Bid Form and Price Schedules. It was observed further that while Clause 14.2 of the ITB guides on how Price Schedules should be filled, Clause 14.3 of the ITB specifically indicates that the total price of the bid should be stated in the Bid Form. For purposes of clarity Clause 14.3 is reproduced hereunder:-

"The price to be quoted in the Bid Form in accordance with ITB Sub-Clause 13.1 shall be the total price of the bid".

From the above cited clauses it is apparent that tenderers were mandatorily required to attach to their tenders Bid Form filled pursuant to the requirement of Clauses 13.1 and 14.3 of the ITB. In order to substantiate if the Appellant complied with such requirement, the Appeals Authority revisited the Appellant's tender and observed that the same was attached with a Bid Form that was provided in the Tender Document. However, the Bid Form did not

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state the total sum of concession fee and rental charges as required. Further, the Bid Form did not state the name of the procuring entity and the asset to be leased.

The Appeals Authority considered the Appellant's argument that, the rental charges and concession fees were specified in the Price Schedules and the same were read out during the Tender Opening and observed that, despite the fact that the prices were read out during the Tender opening this does not imply that the Appellant had complied with the requirement of the Bid Form. According to Clauses 14.1, 14.2 and 14.3 of the ITB tenderers were mandatorily required to quote their prices in both the Bid Form and Price Schedules. The Bid Form was to show the total sum of the bid price while the Price Schedules was to show prices for each space intended to be leased. Furthermore, Clause 13.1 of the ITB did not allow any alterations or substitution of the Bid Form. That is to say, the Bid Form and the Price Schedules, were both required to be completed separately, and one could not replace the other.

The Appeals Authority observed further that, during the hearing of the Appeal the Appellant conceded that it did not specify the rental charges and concession fees in the Bid Form. However, it advanced the argument that such an omission was not fatal so as to render its disqualification. The Appeals Authority finds the Appellant's argument in this regard to have no basis as according to Clause 27.1 of the ITB a tender would be regarded as substantially responsive if it complies



with the requirements of the Tender Document. The requirement of Clause 27.1 of the ITB is amplified under Regulation 202(4) and (5) of GN. No. 446 of 2013 which states as follows:-

202(4) *"Prior to the detailed evaluation of the tenders, the tender evaluation committee shall carry out a preliminary examination of the tenders to determine whether or not-*

a) each tender is substantially responsive to the requirements of the tender documents;

b) N/A

202(5) *for purposes of this regulation, a tender is considered to be substantially responsive if it conforms to all the terms, conditions and specifications of the tender document without material deviation or reservations".* (Emphasis supplied)

According to Clause 27.2(b) of the ITB material deviation or reservation is one that:-

"...is inconsistent with the Tender Document..."

It is undisputed that according to Clause 7.1 of the ITB, a Bid Form is among the documents which forms part of this Tender. Further to that, Clause 2.1 of the General Conditions of Contract (GCC) specified clearly that a Bid Form is one of the crucial documents in a contract. Based on the requirement of the law and the Tender Document, the Appeals Authority is of the settled view that the Appellant was

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mandatorily required to comply with the requirement of the Bid Form as specified in the Tender Document. Thus, its failure to do so led its tender to be non responsive.

The Appellant also relied on the case of **All pay Consolidated Investment Holdings (PTY) Ltd** (supra). The Appeals Authority is of the firm view that, the decision of the cited case does not favor the Appellant given the fact that the Appellant's flaw was fatal as there was non-compliance to the tender requirement.

The Appeals Authority therefore finds the Respondent's act of disqualifying the Appellant's tender for submitting an incomplete Bid Form to be proper and in accordance with Regulation 206(2) of GN. No.446 of 2013 which provides as follows:-

"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".

Furthermore, the Appeals Authority rejects the Appellant's argument that its failure to comply with requirement of Bid Form could have been waived, since such a waiver would contravene Regulation 206(2) supra.

The Appeals Authority considered the Appellant's argument that the Bid Form was not compatible with Tender requirements and observed

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that, if that was so, the Appellant was duty bound to seek for clarification pursuant to Clause 8 of the ITB.

The Appeals Authority observed further that, the Appellant submitted one bid with respect to Lot 2 and claimed that it tendered for all six Lots. Tenderers were required to tender for each Lot separately. To the contrary, the Appellant submitted one bid. The Appeals Authority is of the view that, the Appellant's argument that the Bid Form was not compatible with Tender requirements had no basis as tenderers were required to complete Bid form for each lot separately, which the Appellant failed to do.

From the above analysis, the Appeals Authority's conclusion with regard to the first issue is that the disqualification of the Appellant was justified. Thus, the issue is answered in the affirmative.

2.0 What reliefs, if any, are the parties entitled to

Given our findings on the first issue that the Appellant was fairly disqualified, we hereby dismiss the Appeal and make no order as to costs.

Order accordingly.

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.

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This Decision is delivered in the presence of the parties this 10th July 2019.


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HON. JUSTICE (rtd) SAUDA MJASIRI
CHAIRPERSON

MEMBERS:

1. DR. LEONADA MWAGIKE 
2. CPA. FREDRICK RUMANYIKA 