

**IN THE  
PUBLIC PROCUREMENT APPEALS AUTHORITY  
AT DAR ES SALAAM**

**APPEAL CASE NO. 47 OF 2018-19**

**BETWEEN**

**M/S ALVIC BUILDERS (T) LTD.....APPELLANT**

**AND**

**MOROGORO MUNICIPAL COUNCIL.....RESPONDENT**

**DECISION**

**CORAM**

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

**SECRETARIAT**

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

**FOR THE APPELLANT**

- |                      |                            |
|----------------------|----------------------------|
| 1. Mr. Kissamo Elias | -Advocate, Makoa Attorneys |
| 2. Eng. Alex Kilala  | - Managing Director        |



## FOR THE RESPONDENT

1. Mr. Elkarim Samwel Tyeah - Legal Officer
2. Mr. Joshua Lushanjala - Supplies Officer
3. Arch. Peter Matinde - Consultant for the Project

This Appeal was lodged by M/s Alvic Builders (T) Ltd (hereinafter referred to as "**the Appellant**") against Morogoro Municipal Council (hereinafter referred to as "**the Respondent**"). The Appeal is in respect of Tender No. LGA/079/2017-2018/W/07 for Supplying and Fixing of Steel Portal Frame Complete with Steel Roof Structure, Covering and Associated Fittings for the Proposed Construction of Morogoro Central Market on Plot No. 180 Block "S" along Madaraka and Uhuru Road in Morogoro Municipality (hereinafter referred to as "**the Tender**").

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

The Respondent through the email dated 13<sup>th</sup> May 2019 issued Technical Specifications to three bidders and required them to price and submit quotations. The deadline for the submission was set for 15<sup>th</sup> May 2019. All three bidders responded by submitting quotations on the time set. It is on record however, that on 23<sup>rd</sup> May 2019, the Respondent opened the submitted quotations in the absence of the bidders and subjected them to evaluation. In that process the Evaluation Committee based its examination of each Quotation on unidentified criteria. Two quotations were



disqualified, including that of the Appellant. The Appellant's quotation was disqualified for three major reasons namely; having a shorter validity period of seven days; non inclusions of terms and conditions of the Quotation which included assumptions, deviations and exclusions; and quoting its bid price in United States Dollars (USD) instead of Tanzania Shillings (TZS). Ultimately, the Quotation by M/s Nandhra Engineering & Construction Company Ltd was proposed for award at a contract price of TZS. 1,497,042,223.00 VAT Inclusive.

The Respondent's Tender Board through a Circular Resolution No.MMC/S.20/2018-2019 dated 23<sup>rd</sup> May 2019, approved the award recommendation.

On 28<sup>th</sup> May 2019, the Respondent issued the Notice of Intention to award the Tender to all bidders who participated in the Tender. The Notice informed the Appellant that the Respondent intended to award the Tender to M/s Nandhra Engineering & Construction Company Ltd. It also informed the Appellant that its quotation was not successful due to quoting shorter validity period, failure to include terms and conditions which included assumptions, deviations and exclusions and quoting a price in USD instead of TZS.

Dissatisfied, on 4<sup>th</sup> June 2019, the Appellant applied for administrative review to the Respondent's Accounting Officer. On 10<sup>th</sup> June 2019, the Accounting Officer issued its decision dismissing the complaint. Aggrieved further, on 17<sup>th</sup> June 2019, the Appellant lodged this Appeal.



During the hearing of this Appeal the following issues were agreed by the parties and approved by the Appeals Authority:-

- 1. Whether there exists a valid Tender in the absence of the Tender Document;**
- 2. Whether disqualification of the Appellant's tender was justified; and**
- 3. What reliefs, if any, are parties entitled to**

#### **SUBMISSIONS BY THE APPELLANT**

Addressing on the issue of the validity of the Tender, the learned counsel for the Appellant submitted that in his view there was a valid Tender for consideration. He submitted that a valid tender constitutes a body of documents including the Invitation to Tender. In this Tender, there was an Invitation to tender from the Respondent to the Appellant through its official e-mail. The Invitation was annexed with the drawings and specifications. According to him these drawings together with the attached specifications collectively formed the Tender Document. He submitted further that according to the information he had from the Appellant, the Invitation letter was also communicated to other Tenderers for bidding, which made this bid competitive under restricted tendering procedures specified under Regulation 152(4) of the Regulations. He rested his submission by arguing that in his view, the Respondent had issued the Tender Document and that there existed a valid tender for consideration.



In relation to the second issue, the Appellant's counsel submitted as follows:-

1. That, the decision by Respondent's Accounting Officer dated 10<sup>th</sup> June 2019, grossly violated Regulation 106(7) of the Regulations. It was vague and did not conform to the requirements of the law for failure to address fully the grounds for review submitted to it.
2. That, since the Respondent did not issue evaluation criteria, the only factor for determination was the quoted prices, taking into account that the works required a lump sum quotation and that no Bill of Quantities was issued.
3. That, the Appellant did not contravene any criteria regarding the Tender validity of its quotation. The Quotation Document was silent on the matter. It was improper for the Respondent to use the criterion submitted by the Appellant to be the basis for evaluation.
4. That, regardless of the fact that section 13 of its quotation was missing, the Appellant's quotation complied with the drawings and technical specifications issued by the Respondent, and the same were clear. In addition, it was not bound to issue such deviations or alterations. Had the Respondent deemed it necessary for the Appellant's bid to contain it; it would have sought for clarification on the matter since the project was 'design and build'. Thus, it contravened nothing in this Tender process.
5. That, it offered its price in TZS and not in USD as alleged by the Respondent. Though the price table contained words "all prices are in



USD" its quoted price was in TZS. The Respondent could have equally sought for clarification on this matter taking into account that it was a clerical error and that such clarification could not have affected any bidder or the substance of its bid. Furthermore, prices are always looked at, in words and figures and not the fore words to the price schedule.

6. That, the Respondent's failure to respond to the issues raised in the application for administrative review contravened the principle of transparency, economic procurement and occasioned injustice to the Appellant. It also violated principles of natural justice enshrined under the Constitution of the United Republic of Tanzania. Thus, everything done by the Respondent was a nullity in the eyes of the law.
7. That, the Respondent failed to adhere to the requirement of the law in relation to the need to obtain value for money, fairness and equality of opportunity to all tenderers.
8. The Appellant's counsel submitted that, this Tender was conducted under Restricted Tendering method as clearly stated by the Respondent in its Statement of reply. Thus, the threshold limit provided under the 7<sup>th</sup> Schedule to the Regulations does not apply in this Tender.

Finally on the third issue, the Appellant prayed for the following orders:-

- i. To prohibit the Respondent from proceeding with the Tender process;



- ii. The Appeals Authority to revise the unlawful decision of the Respondent and declare that the Appellant's quotation was the only successful quotation based on submitted design parameters and price offered;
- iii. To annul the unlawful decision by the Respondent made on 10<sup>th</sup> June 2019;
- iv. The Respondent to compensate the Appellant costs of this Appeal as per the following breakdown:-
  - (a) Appeal filing fees TZS. 300,000/-
  - (b) Advocates fees 6,000,000/- and
- v. Any other order the Appeals Authority deems necessary to grant.

### **REPLY BY THE RESPONDENT**

In relation to issue number one on the validity of the Tender, the Respondent submitted that, the Tender under dispute was called through an Invitation for Quotation to three bidders. Having reviewed the Seventh (VII) Schedule to the Regulations, he observed that the limit within which a procuring entity is to issue a quotation to bidders is TZS. 200,000,000/- (Two hundred Million). The prices by the bidders in this Tender exceeded the threshold for Quotations. Therefore, the Respondent ought to have advertised this Tender competitively and not by issuing a quotation as was the case in this Tender. He conceded that since the law is clear on this matter, there is no valid Tender.



With regard to the second issue, the Respondent opted not to address the Appeals Authority on the said issue given its concession that there was no valid tender. The Respondent concluded that as the quotation provided did not meet the threshold under the 7<sup>th</sup> Schedule to the Regulations, the whole process was a nullity.

On the third issue, the Respondent prayed for nullification of the Tender proceedings and be allowed to re-tender.

On the question of costs, the Respondent prayed that each party in this Appeal to bear its own costs.

### **ANALYSIS BY THE APPEALS AUTHORITY**

In relation to the first issue, the Appeals Authority observed that, there was no Tender Document or Quotation Document issued by the Respondent to bidders as a basis for Tender determination or evaluation. The Appeals Authority observed further that what was availed to bidders were drawings and Technical Specifications of works to be performed, which were used by bidders as the basis of their quotations.

The Appeals Authority revisited Section 70 of the Act read together with Regulations 183(1), 184 (1), (3) and (5) of the Regulations and observed that the law requires procuring entities to use appropriate solicitation documents when soliciting tenders from the bidders. That *where the relevant standard documents are not issued, the procuring entity shall use the standard document acceptable to the Authority.* The law provides further that the tender document to be issued shall set forth clearly the criteria to be used in determining tenderers' responsiveness:-



Sec. 70 (1) "The procuring entity shall use the **appropriate standard model tender documents specified in the Regulations for the procurement in question.**

(2) *The tender documents shall be worded so as to permit and encourage competition and such documents shall set forth clearly and precisely all the information necessary for a prospective tenderer to prepare tender for goods, services and works to be provided".*

Reg.183 (1) " *The procuring entity shall, immediately after the first publication of the tender notice, **issue the solicitation documents to all tenderers who have responded to the tender notice in accordance with the procedures and requirements specified in the invitation to tender**".*

Reg. 184(3) "A *procuring entity shall use the **appropriate standard tender documents issued by the Authority to address specific issues of a project in accordance with the guidelines issued by the Authority.***"

The Appeals Authority revisited the Tender records and observed that the Respondent did not issue the Tender Document to the bidders, which could set out the criteria for determination of the tenderers responsiveness. The bidders were availed only drawings and Technical specifications of the works to be executed. The Appeals Authority is of the settled view that the Invitation to tender, drawings and Technical specifications issued cannot



be termed as the Tender Document as contended by the counsel for the Appellant. We are of the view that Regulation 184(1) (a) to (x) provides clearly what is to be contained in the Tender Document. The issued items, that is drawings and Technical specifications conforms only to Regulation 184(1) (c) to the exclusion of others. It is the Appeals Authority's firm view that it was impossible for the Respondent to evaluate the so called tenders in the absence of the Tender Document for lack of explicit criteria as provided by the law.

The above notwithstanding, the Appeals Authority observed that the Respondent invited three bidders using a quotation method instead of inviting a competitive tender in compliance with the law. The value of this Tender was beyond the limit for a quotation, to wit; TZS. 200,000,000/-, provided under the Seventh Schedule to the Regulations.

The Appeals Authority considered the Appellant's submissions that the Tender in question was conducted through the Restrictive tendering procedures specified under Regulation 152(4) of the Regulations. However, this proposition is not correct given that the Invitation to submit Quotation addressed to the Appellant on 08<sup>th</sup> May 2019, did not make reference to such a procurement method. The letter from the Respondent to the Appellant stated that:-

***"Sub: Quotation for Supplying and Fixing Steel Portal Frame Complete with Steel Roof Structure and covering and Associated Fittings***



...please refer to your **priced quotation** for supplying and Fixing Steel Portal Frame Complete with Steel Roof Structure and covering and Associated Fittings.

The evaluation committee went through to examine **your quotation** and failed to proceed due to fact that, the specifications was not clear and precise.

...you are **requested to re-submit the price quotation** in accordance with the attached drawings and Technical specifications...”

From the wording of the above letter, the counsel’s argument is not correct. The Appeals Authority observed that the term *restricted tendering method* has only been used by the Respondent in its statement of reply while responding to the grounds of Appeal by the Appellant. There is no other reference to that method in the tender proceedings.

The Appeals Authority revisited Regulation 152 of the Regulations relied by the Appellant and observed that the use of the restricted tendering procedure has to be justified and records of such justification are to be prescribed in the tender proceedings. No record was made available in the Respondent’s records for this Tender. Bidders were also not pre-qualified before being invited to bid. The Appeals Authority is of the considered view that the Respondent made reference to the *restrictive tendering procedure* contrary to the requirements under the law. The Appeals Authority finds



that what is contained in the Respondent's Statement of Reply cannot override the invitation to Tender and the law.

The Appeals Authority observed that the whole Tender process was marred by serious irregularities. Accordingly, the Appeals Authority's conclusion with regard to the first issue is that there existed no valid Tender for consideration in the absence of the Tender Document. The Appeals Authority hereby nullifies the Tender proceedings for contravening the law. It follows that all subsequent proceedings by the parties, from the invitation to Tender up to the proposed award were a nullity.

Based on our findings and conclusion above, the Appeals Authority shall not delve on issue number two.

The Appeal is hereby dismissed and the Respondent is ordered to prepare the appropriate Tender Document and re-tender in accordance with the law.

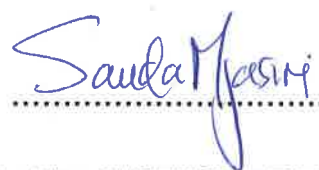
It is so ordered.

Each party to bear its own costs.

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 the Respondent this 22<sup>nd</sup> day of July 2019.



**HON. JUSTICE (RTD) SAUDA MJASIRI**

**CHAIRPERSON**

**MEMBERS:**

**1. CPA. FREDRICK RUMANYIKA** 

**2. ADV. ROSAN MBWAMBO** 