

**IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY
AT DAR ES SALAAM
APPEAL CASE NO. 48 OF 2018-19**

BETWEEN

M/S BHATIA TR. CO. LLC.....APPELLANT

AND

TANZANIA AIRPORTS AUTHORITY.....1ST RESPONDENT

M/S DUFREY AG.....2ND RESPONDENT

DECISION

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

SECRETARIAT

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

FOR THE APPELLANT

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| 1. Mr. Vijay Lalla | - Operation Director |
| 2. Mr. Ndanu Kikwasi | - Advocate, Law Associates Advocates |

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| 3. Mr. Victor Kikwasi | - Advocate, Law Associates Advocates |
| 4. Mr. Omar Kizenga | - General Manager |
| 5. Ms. Ngombile Ngwenga | - Company Secretary |
| 6. Mr. John James | - Advocate, Law Associates Advocates |

FOR THE RESPONDENT

- | | |
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| 1. Mr. Joachim Maambo | - Ag. Legal Secretary |
| 2. Mr. Josephat M. Msafiri | - Procurement Officer |

This Appeal was lodged by M/s Bhatia TR. CO. LLC (hereinafter referred to as "**the Appellant**") against Tanzania Airports Authority commonly known by its acronym, TAA (hereinafter referred to as "**the 1st Respondent**") and M/s Dufry AG (hereinafter referred to as "**the 2nd 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 Restricted Bidding procedures specified in the Public Procurement Regulations, Government Notices No. 446 of 2013 and GN.No.333 of 2016 (hereinafter referred to as "**the Regulations**").

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 pre-qualified tenderers to bid for the Tender. The initial deadline for the submission of tenders was set for 26th March 2019. However, it was later extended to 2nd April 2019. By the deadline, five (5) firms submitted bids for Lots 1 and 2, seven (7) firms submitted bids for Lot 3 and four (4) firms submitted 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.

During preliminary evaluation three bids were disqualified for failure to comply with the requirements of the Tender Document. The remaining bids were then subjected to the detailed evaluation. During that evaluation process two tenders including that of the Appellant were disqualified. Specifically, the Appellant's tenders were disqualified for failure to comply with the requirements of the Terms Of Reference (TOR). The remaining tenders were subjected to price comparison. After completion of the evaluation process, the Evaluation Committee recommended award of the Tenders to M/s Dufry AG and M/s Mozan Investment Limited. M/s Dufry AG was proposed to be awarded 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 & 2, 18% for Lots 4 & 5 and 15% for Lot 6 of the of annual gross turn over 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 turn over.

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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 intended to award the Tender with respect to Lots 1,2,4,5 and 6 to M/s Dufry AG while M/s Mozan Investment Limited was proposed to be awarded Lot 3. The Notice also informed the Appellant that its bid was non-responsive due to failure to submit information subject to detailed evaluation contrary to the requirements of the TOR.

Dissatisfied, on 27th May 2019, the Appellant filed its request for administrative review to the Respondent's Accounting Officer challenging its disqualification in all Lots. On 7th June 2019, the Respondent's Accounting Officer issued its decision in which it dismissed the complaint and maintained its award position. Aggrieved further, on 18th June 2019, the Appellant lodged this Appeal.

SUBMISSIONS BY THE APPELLANT

The Appellant's grounds of Appeal as well as written and oral submissions during the hearing of the Appeal may be summarized as follows:-

1. That, the Appellant disputes its disqualification for failure to comply with the requirements stipulated in the TOR.

In support of this ground the Appellant contended that, it complied with the requirements of Clauses 7.1 of the Instructions To Bidders

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(ITB) which mentioned the documents that forms part of this Tender. Amongst the mentioned document is the TOR and the Appellant claimed to have complied with its requirements. The Appellant also claimed to have complied with Clause 11.1 of the ITB which also provided for documents constituting the bid; amongst them were: - Bid Form, documents establishing eligibility of the tenderers, Bid Deposit, Power of Attorney and other documents stated in the Bid Data Sheet (BDS). Thus, apart from documents stated under Clause 11.1 modified by Clause 9 of the BDS no more documents were required to be submitted by tenderers.

The Appellant insisted that all information and documents to demonstrate its eligibility were submitted during pre-qualification process in compliance with Section 51 of the Act and Regulations 116(1)(3), 119(3), 120(1)(d) 121(1) (2) and 148 of the Regulations. Having demonstrated the same at the pre-qualification process, the Appellant was not required under the Act and its Regulations to demonstrate again unless requested by the 1st Respondent pursuant to Regulation 218(1)(2) of the Regulations. Tenderers were not required to provide more information in the bid, instead they were required to declare and confirm that the *originally submitted pre-qualification information remains essentially correct as of the date of submissions*, which the Appellant did.

It emphasised that, information provided in the TOR was not supposed to be used in evaluating the tenders, since Clauses 27-33 of the ITB stipulated the evaluation criteria which does not include the TOR.

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Thus, the 1st Respondent was required to confirm that the requirements under Clauses 11 and 12 of the ITB have been complied with.

In addition, the information provided in the TOR was similar to that contained in the pre-qualification document. During pre-qualification submitted bids were evaluated pursuant to Regulations 116(5), 119(3), and 120(1)(d) of the Regulations. Thus, during this Tender process the 1st Respondent was required to verify information submitted at the pre-qualification stage through post qualification pursuant to Regulation 124 of the Regulations.

It also stated that, failure to comply with requirements of the TOR did not contravene any law or instructions to bidders that would result to its disqualification from the tender process. The 1st Respondent was required to seek clarification from them. In support of its argument, it made reference to the case of ***AllPay Consolidated Investment Holdings (PTY) Ltd and Others V. Chief Executive Officer, South African Social Security Agency, and Others 2013 (4) SCA p. 557*** which states that:-

"...An act is not 'irregular' for purposes of the law simply because one chooses to call it that. An irregularity that leads to invalidity is one that is in conflict with the law. It is because it is in conflict with the law that it is not able to produce a legally valid result."

The Appellant insisted that even though the ITB and the BDS outlined the contents of the bid but out of courtesy it responded to the

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requirements of the TOR by submitting a statement of compliance to its bid.

2. That, it was impracticable and impossible to comply with the requirements of the TOR while the time given for submission of the quotation was only three working days. The Appellant added further that it was premature to indicate compliance with requirements of the TOR while the 1st Respondent had not shown them the location of the space to be leased as required under Clause 6 of the ITB.
3. That, the TOR is provided under Clause 2.1 of the General Conditions of Contract (GCC) as one of the documents forming part of the contract. Therefore information stated therein ought to have been complied by operators in the execution of contract and not tenderers at the tendering stage.
4. That, it had the highest quoted price in all Lots in terms of rent and concession fees compared to the price quoted by the 2nd Respondent. However, the 1st Respondent intends to award all five lots to the 2nd Respondent an act that contravened Sections 63 and 64 of the Act.
5. That, the 1st Respondent's act of intending to award five Lots to the 2nd Respondent is unfair to other tenderers and injurious to the business competition and contravened the procurement principles in terms of value for money. In support of its argument the Appellant cited Sections 47, 63 and 64(1) of the Act. It emphasized that, its disqualification from the Tender process was not justified since it complied with all the requirement of the Tender Document.

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Finally, the Appellant prayed for the following orders which are reproduced as under:-

- i. Annul and set aside the 1st Respondent's decision to disqualify the Appellant's tender;
- ii. Prohibit the Respondent from proceeding the award of the tender to any other bidder than the Appellant;
- iii. Revise the impugned act and substitute for it its own decision by awarding the contract to the Appellant;
- iv. Awarding the Appellant and other qualified tenderers equal number of lots as the Appeals Authority deems fit;
- v. Any other reliefs the Appeals Authority may deem fit and appropriate in the circumstances including but not limited; and
- vi. Costs of this Appeal and administrative review at USD 15,000

REPLY BY THE 1ST RESPONDENT

The 1st Respondent's reply to the grounds of Appeal as well as oral and written submissions during the hearing of the Appeal may be summarized as follows:-

1. That, pre-qualification and tendering are two distinct stages of the tender process. The purpose of pre-qualification is to shortlist capable tenderers for the tendering stage pursuant to Regulation 119(1)(c) of the Regulations. A tenderer who qualifies at pre-qualification process is invited to participate at the tendering stage.

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Thus, the Appellant having been pre-qualified and invited to tender was required to comply with the requirements of the Tender Document instead of relying on what was submitted at the pre-qualification stage since these are two distinct processes. In support of this argument, the 1st Respondent referred to Section 3 of the Act on the meaning of the words Tender and TOR.

The 1st Respondent submitted further that the Appellant was disqualified for failure to submit documents stated under Item 3.0 of the TOR which included; concept and fit out, marketing plan, pricing policy, management, personnel and financial recording system. It added that the disqualification of the Appellant was based on Regulations 203, 204(2)(k), 205 and 206 of the Regulations.

2. That, the information establishing eligibility of the tenderer was not provided in the Bid Form, rather in the form of qualification and documents establishing eligibility. Apart from the information provided under Clause 11 and 12 of the ITB bidders were required to comply with specific information provided in the TOR.
3. That, the time for opening of the tender was extended from 26th March 2019 up to 2nd April 2019. The Appellant submitted its bids on the deadline for submission, thus it is not true that the Appellant had three working days only to prepare its bids. Furthermore, there was no measurement provided for the space to be leased due to uncompleted contract of designing new terminal III. However



tenderers were instructed to quote a price per one square meter and were fairly and equally evaluated.

4. That, the award of the tender to the highest tenderer does not depend on the results of a quoted price during the tender opening ceremony. It depends on the highest or lowest evaluated price after conducting evaluation. The Respondent referred to Section 3 of the Act on the meaning of highest evaluated price.
5. That the cited case of **AllPay Consolidated Investment Holdings (PTY) Ltd** (supra) is not applicable in the circumstances of the present case since there is a specific law that governs procurement process and provides how the same should be handled.
6. That, the tender process was conducted in compliance of the Act and its Regulations taking into consideration the principle of value for money in collecting Government revenues. It also disputed the applicability of Sections 47 and 63 of the Act since the same have been repealed.

Finally the 1st Respondent prayed for the following orders:-

- i. Dismissal of the Appeal for lack of merits;
- ii. The Respondent's decision be maintained and be allowed to proceed with the Tender process;
- iii. To issue any other order the Appeals Authority deems fit and just to grant.

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REPLY BY THE 2ND RESPONDENT

The 2nd Respondent's reply to the grounds of Appeal may be summarized as follows:-

1. That, it has been an International travel retailer operating around 2,000 duty free and duty paid shops in airports, cruise lines, sea ports railway stations and central tourist areas globally. It employs a number of people operating over sixty four (64) countries worldwide.
2. That, it has no complaints or comments about the Tender process as it believes that it was handled freely and fairly by the 1st Respondent.
3. That, it abides to the decision made by the 1st Respondent.

ANALYSIS BY THE APPEALS AUTHORITY

The Appeals Authority having gone through the appeal record, tender proceedings including various documents, the oral and written submissions by the parties, is of the view that the Appeal is centred on three main issues calling for determination. These are:-

- 1. Whether the disqualification of the Appellant was justified**
- 2. Whether the award of the tenders to the 2nd Respondent was proper in law; and**
- 3. What reliefs, if any, are the parties entitled to**

Having identified the issues in dispute, the Appeals Authority proceeded to resolve them as hereunder:-



1. Whether the disqualification of the Appellant was justified

In resolving this issue the Appeals Authority revisited the Evaluation Report and observed that the Appellant's bids were disqualified at the detailed evaluation stage for failure to submit documents contrary to the requirements of the TOR. Specifically, the Appellant was disqualified for the failure to submit documents in relation to Operation, Brand and Product lines, Marketing plan, Pricing policy, Qualification of key personnel and Financial capability.

In order to establish that the Appellant's disqualification was justified, the Appeals Authority revisited the Tender Document and observed that, Clause 7.1 of the ITB provided for documents constituting the tender and the TOR was amongst them. It was observed further that the TOR was provided under Section VI of the Tender Document and tenderers were required to comply with the requirements stipulated therein.

The Appeals Authority revisited the Appellant's bids in all six Lots and observed that it had not attached any information or documents to indicate its compliance with the requirements stated in the TOR. During the hearing, the Appellant was asked by Members of the Appeals Authority whether it complied with the TOR. The Appellant conceded that it had not attached any documents or information as required in the TOR since all the documents which show its eligibility and capability were submitted during the pre-qualification process. It added that during the tendering process it confirmed that the information submitted during the pre-qualification

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process remained valid, since the Tender requirements were the same as those contained in the pre-qualification documents. The Appellant also conceded that pre-qualification and tendering are two distinct processes.

Having considered the Appellant's arguments, the Appeals Authority is of the view that, the Appellant failed to distinguish that pre-qualification and tendering are two distinct processes. Much as it conceded that the two processes are different, but did not deem it necessary to comply with the TOR. The Appeals Authority finds that according to Section 3 of the Act, pre-qualification is a formal procedure which requires tenderers to show at the minimum their eligibility and capabilities to perform the intended project. Regulation 123(4) of the Regulations indicates that the end results of the pre-qualification process is to shortlist the pre-qualified tenderers and invite them to bid. Once a tenderer is invited to bid and submits its bid, its responsiveness would be determined on the contents of the submitted bid as required under Regulation 206(1)(2) of the Regulations which provides as follows:-

"Reg.206(1)The procuring entity's determination of a tender's responsiveness shall be based on the contents of the tender itself without recourse to extrinsic evidence.

(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."

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From the above quoted provision, it is crystal clear that, the responsiveness of the Appellant's tender was to be determined as per its contents. Thus, the argument that its responsiveness was to be determined based on the information submitted during pre-qualification cannot hold.

Therefore the Appellant failed to comply with the requirements stipulated in the TOR and as a result its tender was disqualified. According to Section 3 of the Act, the TOR is an important part of the Tender Document whereby its objectives, goals and scope of services for the intended projects are provided.

Regulation 204 provides in clear terms that a tender can be found to be non responsive if it fails to comply with commercial terms and conditions provided in the Tender Document. In this Tender the Appellant's bids were rejected for failure to submit important information and major supporting documents in order to substantiate its responsiveness to the Tender requirements as stipulated in the TOR. The Appeals Authority finds the Respondent's act of disqualifying the Appellant's tenders to be proper in line with Regulation 204 (2)(k) and 205(a) of the Regulations which states as follows:-

"Reg. 204(2) Material deviations to commercial terms and conditions which justify rejection of a tender shall include the following:-

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

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"Reg.205 All tenders shall be checked for substantial responsiveness to the technical requirements of the tendering documents and non-conformity to technical requirements, which are justifiable grounds for rejection of a tender including the following:-

(a) failure to tender for the required scope of work as instructed in the tendering documents and where failure to do so has been indicated as unacceptable."

The Appeals Authority observed that there was no basis for the Appellant's argument that there was no sufficient time for preparation of the bids. According to the records, the Appellant purchased the Tender Document on 13th March 2019 and submitted the same on 2nd April 2019. The Appellant had at least twenty one (21) days for preparation.

In relation to the complaint that tenderers were not shown the area to be leased, the Appeals Authority observed that, there was no requirement for a site visit in this Tender. According to Regulation 189(1) of the Regulations; pre-bid meeting or site visit could be conducted where necessary to provide specific project information. If the Appellant felt that the site visit was important and that the time for preparation of the bid was not sufficient it could have sought for clarification or requested for extension of time from the 1st Respondent pursuant to Clause 8 of the ITB.

On the Appellant's argument that the 1st Respondent should have sought clarification from the Appellant on the required information provided in the

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TOR before disqualifying its tender, the short answer to that is, it is not a mandatory requirement for a procuring entity to seek clarification from a tenderer. This is in accordance with Regulation 207(1) of the Regulations, which gives the option to a procuring entity to seek clarification as long as it does not aim at making an unresponsive tender responsive.

The Appeals Authority further considered the Appellant's contention that in the *Form of Qualification Information* it confirmed that the information submitted at the pre-qualification stage remained the same from the date of submission. The Appeals Authority revisited the Appellant's bid, specifically the said Form and observed that it provide amongst others information relating to eligibility of tenderers which need to be submitted with the form. The Appellant was not disqualified for failure to attach information relating to eligibility of tenderers rather for its failure to attach documents in relation to scope of works provided in the TOR which indeed were not submitted. Therefore, its argument has no legal basis.

Furthermore, the Appeals Authority rejects the Appellant's contention that the TOR is provided under Clause 2.1 of the GCC as one of the documents forming the contract meaning that information provided therein ought to have been complied with by operators during execution of the contract. According to Clause 7.1 of the ITB, TOR is an important document for this Tender. The Appellant ought to have complied with the TOR requirements at the time of submission of tenders.

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The Appellant also relied on the case of Allpay Consolidated Investment Holdings (PTY) Ltd (supra). The Appeals Authority is of the firm view that, the circumstances of the above case are different.

Given the circumstances, the Appeals Authority therefore concludes the first issue in the affirmative that is; the disqualification of the Appellant was justified.

2. Whether the award of the tenders to the 2nd Respondent was proper in law

In resolving this issue the Appeals Authority considered the Appellant's contention that it has quoted a higher price in all Lots compared to that of the 2nd Respondent and that the 1st Respondent intends to award all five Lots to the 2nd Respondent in contravention of Sections 47, 63 and 64(1) of the Act.

The Appeals Authority revisited Clauses 31 and 32.1 of the ITB and observed that price determination is conducted in respect of substantially responsive tenders which have complied with all the requirements of the Tender Document. Since the Appellant's tender was non responsive for failure to comply with requirements of the TOR it cannot claim that its price was the highest. According to Regulation 212 of the Regulations; a successful tender is one that has been evaluated and found to have complied with all the Tender requirements and has submitted the lowest or the highest price. Thus, the Appellant's arguments in this regard are unfounded.

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Accordingly, our conclusion regarding this issue is that the award to the 2nd Respondent was proper given the circumstances.

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

Taking cognizance of our findings in the first and the second issues, 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.

This Decision is delivered in the presence of the Appellant and the 1st Respondent and in the absence of the 2nd Respondent this 12th July 2019

HON. JUSTICE (RTD) SAUDA MJASIRI


.....
CHAIRPERSON

MEMBERS:

1. CPA. FREDRICK RUMANYIKA.....

2. DR. LEONADA MWAGIKE.....