

IN THE PUBLIC PROCUREMENT APPEALS AUTHORITY

APPEAL CASE NO. 5 OF 2020-21

BETWEEN

M/S PERIS GENERAL SUPPLY..... APPELLANT

AND

TANZANIA REVENUE AUTHORITY..... RESPONDENT

DECISION

CORAM

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

SECRETARIAT

- | | |
|------------------------|------------------------|
| 1. Ms. Agnes Sayi | - Senior Legal Officer |
| 2. Ms. Violet Limilabo | - Legal Officer |

FOR THE APPELLANT

- | | |
|--------------------------|--------------------------|
| 1. Mr. Esaba Koeleth | - Procurement Consultant |
| 2. Ms. Maririta Kivunge | - Managing Director |
| 3. Mr. Henry Wasili | - Sales Manager |
| 4. Ms. Jaquiline Florian | - Accountant |

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FOR THE RESPONDENT

1. Mr. Colman Makoi - Legal Counsel
2. Mr. Onesmo B. France - Ag. Deputy Director for Procurement and Logistics
3. Ms. Salome Chambai - Legal Counsel
4. Ms. Josephine Haule - Principal Procurement Officer

The Appeal was lodged by **M/s Peris General Supply** (hereinafter referred to as "**the Appellant**") against the Tanzania Revenue Authority commonly known by its acronym TRA (hereinafter referred to as "**the Respondent**").

The Appeal is in respect of Tender No. AE/023/2019-20/HQ/G/17 for the Supply of Photocopy Papers and Ball Pens (hereinafter referred to as "**the tender**").

The Tender was conducted using National Competitive Method through Tanzania National e-Procurement System (TANePS) specified under 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**").

On 30th March 2020 the Respondent through TANePS issued a tender advert inviting eligible tenderers to submit their tenders. The deadline for

submission of tenders was set for 17th April 2020 whereby five (5) tenders were received and opened through TANEPS.

Tenders were then subjected to evaluation, which was conducted into three stages namely, preliminary, technical and financial evaluation. During preliminary evaluation three (3) tenders were disqualified for being non-responsive to the requirements of the Tender Document. The remaining two (2) tenders were subjected to technical evaluation. At this stage, the Appellant's tender was disqualified for failure to comply with the technical specifications. The remaining tender by M/s Diego Company Ltd was subjected to financial evaluation and thereafter the Evaluation Committee recommended it for award of the Tender which had two parts, Firstly; supply of photocopy papers for Dar es Salaam, Zanzibar and upcountry offices at a Unit price of TZS 11,664.00 and TZS 12,280.00 respectively. Secondly, supply of ball pens at a unit price of TZS 312.70 for all TRA offices across the country. All prices were VAT inclusive. The Tender Board through Circular Resolution TRA/DDPL/GC/CR No.128/2019/2020 approved the award as recommended by the Evaluation Committee.

On 22nd 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 intends to award the tender to M/s Diego Company Ltd. The Notice also informed the Appellant that its tender was disqualified for omitting the word "embroided with TRA name" in the technical specifications' compliance sheet.

Dissatisfied with the reason for its disqualification, on 28th July 2020, the Appellant applied for administrative review to the Respondent. On 4th August 2020, the Respondent issued the decision by dismissing the Appellant's application for administrative review.

Aggrieved further, on 6th August 2020, the Appellant filed this Appeal to the Appeals Authority.

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 omitted the word "embroided with TRA name" on the attached technical specification compliance sheet for ball pens. In justifying that its disqualification was improper the Appellant indicated that the word "embroided" means to decorate a cloth by sewing patterns on it with thread. Since the ball pens are made by plastic material the same could not be embroidered.

The Appellant added that, the Respondent had contravened Regulation 205 of the Regulations by using an unrealistic word namely; "embroided" for a plastic material. The Respondent ought to have used a specific term which would show that the ball pens were to have the TRA name.

The Appellant expounded its argument by indicating that, it noted the technical specification's shortfall after the time for seeking clarification



had already lapsed as the last date to do so was 10th April 2020. Thus, it could not have sought for clarification. The Appellant added that, seeking clarification is optional, thus failure to do so would not prejudice a tenderer.

The Appellant submitted that the Respondent was obliged under Section 70(2) of the Act to prepare and issue a Tender Document that provides complete and full information to bidders. To the contrary, the Respondent failed to comply with such responsibility as it issued the Tender Document with an unrealistic word.

2. That, tenderers were required to state in the technical compliance sheet if they comply or not comply with the specifications issued in the Tender Document. The Appellant indicated that it complied with the provided specifications.

The Appellant added that, it had stated on its Form of Tender that the pens to be supplied were in conformity with the minimum specifications issued by the Respondent. It contended further that, the Form of Tender is among the component of the contract; hence disregarding it contravenes the law and nullifies the meaning or essence of it. Thus, the Appellant insisted that it understood and complied with the minimum specifications.

3. That, Regulation 207(1) of the Regulations requires procuring entities to seek clarification from tenderers in case of unclear or contradictory information contained in their tenders. In this Tender the Respondent failed to comply with such requirement of the law.

4. That, Clause 11.2 of the Instructions To Tenderers (ITT) provide a chance to the Respondent to clear doubts regarding compliance to technical specifications by requiring bidders to submit samples. However, the Respondent under Clause 12 of the Bid Data Sheet (BDS) requires only a successful bidder to submit sample of one (1) ream paper and one (1) box of ball pens for TRA approval prior to signing the contract. In the event that the samples are not accepted, the tenderer would be disqualified and the second ranked tenderer would be invited to submit the samples for approval. The Appellant challenges such a requirement as it contravenes Regulation 194(1) (a) (b) and (c) of the Regulations which require samples to be submitted as part of the Tender on or before the closing time for the submission of tenders.

The Appellant finalised its submissions by indicating that, based on the requirement of Clause 12 of the BDS, the Tender process was still in progress, thus it has been disqualified prematurely before the successful bidder has been found.

5. Finally, the Appellant prayed for the following orders: -
- i. The Appellant be considered to have complied with the specifications and be subjected to the next step of financial comparison;
 - ii. In the alternative but without prejudice to 5(i) above, nullification of the entire tender process and order for retendering;

- iii. Compensation of costs incurred in this tender process amounting to TZS 5,030,000;
- iv. General damages; and
- v. Any other relief that the Appeal Authority may deem fit and just to grant.

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 one of the tenderers who participated in this tender and was disqualified for omitting the words "embroided with TRA name" in the technical compliance sheet. If the word embroidered with TRA name was unclear, the Appellant ought to have sought for clarification pursuant to Clause 8 of the ITT. The Appellant failed to utilize such an opportunity at its own disadvantage. Other tenderers who participated in the same tender sought for clarifications on all unclear matters and the same were clarified. None of the tenderers who sought for clarification, inquired about the term "embroided with TRA name", this implies that the specification was clear. Thus, the Appellant's act of not seeking clarification implies that, it understood the tender requirements and was ready to comply without any reservation.

The Respondent added that, tenderers were required to comply with the requirements of the Tender Document as evaluation of tenders was



conducted in accordance with the terms and conditions stated therein. In the disputed Tender the evaluation of tenders was conducted pursuant to the requirements provided in the Tender Document as well as Section 72(1) of the Act read together with Regulation 203(1) of the Regulations.

2. That, the Appellant claimed to have complied with all the requirements provided in the Tender Document; however, it omitted the words "embroided with TRA name" which was a mandatory feature provided in the technical specifications.
3. That, the Appellant compromised with the minimum specifications provided in the Tender Document, thus its declaration that it complied with the entire tender requirement is null and void. The Respondent submitted further, that a Form of Tender is not a summary of the whole tender rather it is amongst the documents contained in the Tender Document as stipulated under Clause 7 of the ITT.
4. That, the Respondent had not contravened Regulation 194 of the Regulations as alleged by the Appellant. The Appellant's tender was disqualified at the technical evaluation stage due to failure to include the words "embroided with TRA name". Then it was impossible for it to submit samples at any subsequent stage, since it could have been in contravention of Regulation 206(2) of the Regulations.

With regard to the Appellant's submission that samples were requested from the successful tenderer only. The Respondent submitted that, it decided to allow the successful bidder to submit samples since the

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goods to be supplied needed to be embroidered with TRA name and logo. Therefore it could have been costly for all bidders to submit samples while they were not assured if they would be successful bidders.

5. Finally, the Respondent prayed for the dismissal of the appeal with costs.

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. These are: -

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

Having framed the issues, the Appeals Authority proceeded to resolve them as follows: -

1. Whether the Appellant's disqualification is justified

In resolving this issue, the Appeals Authority revisited the Evaluation Report and observed that the Appellant was disqualified at the technical evaluation stage for omitting the word "embroidered with TRA name" in its technical compliance sheet.

To ascertain if the Appellant's disqualification on such ground was proper, the Appeals Authority revisited the Tender Document and observed that Section VII provides for Technical Specifications compliance sheet which was to be complied with by tenderers when submitting their tenders. Item

2 of the Technical Specification contained a requirement that, ball pens (Black, Blue and Red) were to be embroidered with TRA name and tenderers were required to state "comply or not comply".

The Appeals Authority reviewed the tender submitted by the Appellant and observed that under the Technical Specification for ball pens, the Appellant indicated that "Ball Pens (Black, Blue and Red)" – "comply." The Appellant omitted the words "embroided with TRA name" as provided in the Technical Specifications. Thus, it goes without saying that it failed to comply with the requirements of the Technical Specifications.

The Appeals Authority considered the Appellant's contention that it declared in the Form of Tender that it will comply with minimum tender requirements, thus it ought not to have been disqualified. The Appeals Authority reviewed the Appellant's Form of Tender and observed that under Item (b) it had indicated to supply in conformity with the Tender Document the following supplies and related services under the framework contract arrangement; photocopy papers and ball pens with water mark and logo respectively. However, it had not indicated in the said Form of Tender that it would supply ball pens with the word "embroided with TRA name" as indicated in the technical specifications.

During the hearing and in its Statement of Appeal the Appellant insisted that the word "embroided" was inappropriate and unrealistic as it could not be applicable to plastic material, thus complying with such a requirement would contravene Regulation 205(d) of the Regulations. Having considered the Appellant's argument in this regard, the Appeals Authority is of the

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view that, if the Appellant observed that the word "embroided" was not appropriate for plastic material, then it ought to have sought for clarification pursuant to Clause 8.1 and 8.2 of the ITT which is in *parimateria* with Regulation 13(1) (a) of the Regulations as amended. To the contrary, the Appellant did not do so claiming that the time for seeking clarification had already lapsed when it noted the said anomaly in the technical specifications.

The Appeals Authority revisited the documents submitted and finds that the Tender was advertised on 30th March 2020 and the deadline for submission was 17th April 2020. The Appeals Authority requested the Public Procurement Regulatory Authority (PPRA) to avail it with the Government Exchequer Receipt of the Appellant so as to substantiate when payment for the Tender Document was made. In response thereof, PPRA indicated that the Appellant had paid for the Tender Document on 2nd April 2020 and was issued with Receipt No. 920093000067969. Therefore, the Appeals Authority rejects the Appellant's argument that it could not have sought for clarification as there was insufficient time to do so. According to Clause 8.1 of the ITT, tenderers were allowed to seek for clarification not later than seven days (7) days prior to the deadline for submission of tenders. Since the Appellant paid for the Tender Document on 2nd April 2020 it had almost seven days (7) before the lapse of time allowed for seeking clarification. The Appeals Authority finds that there was sufficient time if the Appellant intended to do so. Thus, the Appellant's act of not seeking clarification implies that it was ready to comply with tender requirements as provided.

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Regarding the Appellant's contention that, the Respondent contravened Regulations 194 (a), (b) and (c) of the Regulations for its act of requiring only the successful bidder to submit samples, the Appeals Authority is of the view that, the Appellant could have sought for clarification or apply for administrative review if it felt that such a requirement contravened the law.

The Appeals Authority finds the Respondent's act of disqualifying the Appellant's tender to be proper and in accordance with Regulations 203 (1) and 206 (2) of the Regulations which provide as follows: -

Reg. 203 (1) "*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. 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 tenders to be evaluated in accordance with the criteria provided in the Tender Document and any tender which fails to comply with the stipulated criteria should be rejected.

Based on the above findings, the Appeals Authority is of the settled view that the Appellant failed to comply with the technical specification as

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provided in the Tender Document, thus its disqualification was justified. The Appeals Authority concludes the first issue in the affirmative.

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

Given the Appeals Authority's findings hereinabove, that the Appellant's disqualification is justified, the Appeal is hereby dismissed.

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 Appellant and the Respondent this 4th day of September 2020.

HON. JUSTICE (RTD) SAUDA MJASIRI



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CHAIRPERSON

MEMBERS:

1. CPA. FREDRICK RUMANYIKA 

2. DR. LEONADA MWAGIKE 