

**IN THE PUBLIC PROCUREMENT APPEALS AUTHORITY**

**APPEAL CASE NO. 8 OF 2020-21**

**BETWEEN**

**M/S GIN INVESTMENT LIMITED..... APPELLANT**

**AND**

**ILALA MUNICIPAL COUNCIL ..... RESPONDENT**

**RULING**

**CORAM**

- |                                     |                 |
|-------------------------------------|-----------------|
| 1. Hon. Justice (rtd) Souda Mjasiri | - Chairperson   |
| 2. Adv. Rosan Mbwambo               | - Member        |
| 3. Ms. Ndeonika Mwaikambo           | - 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. Nolasco Nolasikus Mpota  | - Advocate- Candor Attorney   |
| 2. Mr. Henry Mwankemwa          | - Manager- Gin Investment Ltd |
| 3. Mr. Nolasikus Nicholas Mpota | - Consultant                  |



## FOR THE RESPONDENT

1. Ms. Victoria M. Mnyambwa - Legal Officer
2. Mr. Vincent L. Odero - Procurement Officer
3. Ms. Zainab A. Mkupassi - 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 for provision of Revenue Collection for Waste Products at Jangwani and Kiwalani Wards Lot 43 (*ZABUNI YA KUFANYA USAFI, KUKUSANYA TAKA NGUMU KWENYE MAKAZI YA WATU, MAJENGO YA BIASHARA, MITAA NA OFISI MBALIMBALI, KUZOA TAKA NA KUZIPELEKA KATIKA DAMPO LA PUGU KINYAMWEZI NA KUKUSANYA ADA ZA TAKA KATIKA KATA ZA MJINI KATI (CBD) KATIKA MANISPAA YA ILALA*) (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 the Appeal may be summarized as follows: -

The Tender was conducted using National Competitive Tendering 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**").

The Respondent through TANEPS issued an Invitation to Tender through a letter dated 25<sup>th</sup> March 2020 whereby qualified tenderers were invited to submit their tenders. The deadline for submission of tenders was set for 14<sup>th</sup> April 2020. Two (2) tenders including that of the Appellant were received in respect of Lot 43. Thereafter tenders were opened through TANEPS system.

Tenders were then subjected to evaluation, which was conducted into four stages namely, preliminary, technical, detailed and post-qualification. During preliminary and technical evaluation, all tenders were found to be responsive, hence were subjected to the detailed evaluation. In that stage, the Appellant's tender was disqualified for failure to submit detailed analysis of the expected income, expenditure and profit as required under the Statement of Requirement. The remaining tender by M/s Sateki Trading Ltd was found to be responsive and was thereafter post-qualified. After completion, the Evaluation Committee recommended award of the Tender to M/s Sateki Trading Ltd at a monthly remission of Tanzanian Shillings Six Million Six Hundred Sixty Five Thousand Six Hundred and Thirty Two (6,665,632/=) equal to 8.6% per month for a period of three years. The Tender Board at its meeting held on 20<sup>th</sup> June 2020 approved the award as recommended by the Evaluation Committee.

On 8<sup>th</sup> July 2020, the Respondent issued the Notice of Intention to award the Tender to all tenderers who participated in the Tender process. The

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Notice informed the tenderers that award has been proposed to M/s Sateki Trading Ltd at a monthly remission of TZS 6,665,632/= . The Notice also informed the Appellant that its tender was found to be non-responsive for failure to provide detailed analysis of the expected income, expenditure and profit as was required under the Statement of Requirement.

Dissatisfied with the reason given for its disqualification, on 5<sup>th</sup> August 2020, the Appellant applied for administrative review to the Respondent. On 12<sup>th</sup> August 2020, the Respondent issued a decision which dismissed the Appellant's application for administrative review.

On 11<sup>th</sup> August 2020, the Respondent requested the Appellant and the proposed bidder, M/s Sateki Trading Ltd to extend the bid validity period for a further sixty (60) days for the reason that the Tender process was suspended due to the complaint raised in Lot 43. M/s Sateki Trading Ltd accepted the extension of the bid validity as requested on 12<sup>th</sup> August 2020. The Appellant also accepted the request for extension by a letter dated 14<sup>th</sup> August 2020. In the same letter the Appellant raised its concern that the extension requested contravened the law. On 26<sup>th</sup> August 2020, the Appellant filed this appeal to the Appeals Authority.

### **APPELLANT'S STATEMENT OF APPEAL**

The Appellant's grounds of Appeal may be summarized as follows: -

1. That, the Appellant disputes the intended award of the Tender (Lot 43) to M/s Sateki Trading Ltd for the reason that the Tender validity period had expired on 12<sup>th</sup> August 2020. The Appellant submitted that, the



tender validity period for this tender was 120 days from 14<sup>th</sup> April 2020. The Respondent extended the validity period of sixty (60) days which would make a total of one hundred and eight (180) days. According to the Appellant such extension contravenes Regulation 191(3) of the Regulations which requires a tender validity period not to exceed one hundred and twenty (120) days.

The Appellant added that, at the time it received the notice of intention to award, the Tender had already expired.

2. That, the Eighth Schedule to the Regulations indicates time for tender processing that need to be included in the Tender Document. Regulation 187(1) of the Regulations specifies that tenders for provision of services should not exceed 45 days and for works should not exceed 90 days. However, all tenders should not exceed one hundred and twenty (120) days. The Appellant concurred that under special circumstances the validity period may be extended especially on international tenders. The Appellant was of the view that the extension ought not to have been made in this tender as it was a national competitive tender and the specified 120 days was sufficient.
3. That, the proposed tenderer M/s Sateki Trading Ltd does not possess three years working experience for works of similar nature and volume as stipulated under Clause 9 of the Tender Document.



4. Finally, the Appellant prayed for the following orders: -

- i. Nullification of the proposed award of tender to M/s Sateki Trading Ltd;
- ii. Nullification of Lots 37, 38, 41 and 43 as its bid validity period had expired before the same has been extended, the Tender process be re-started afresh;
- iii. Work experience possessed by M/s Sateki Trading Ltd be verified; and
- iv. Compensation of costs incurred in processing this appeal at the tune of TZS 3,000,000/= and TZS 300,000 being filing fees of this Appeal.

#### **REPLY BY THE RESPONDENT**

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

1. That, the Respondent disputes the Appellant's allegation that the Tender had already expired as the extension of the bid validity period was requested prior to expiry of the initial validity period pursuant to Regulation 191(4) of the Regulations in respect of all Lots 37, 38, 41 and 43, respectively.
2. That, the initial tender validity period of one hundred and twenty (120) days ought to have been sufficient to finalize the tender process. However due to the complaints and subsequent appeals which arose after the notice of intention to award was issued, the Respondent was



required to suspend the Tender process. As a result, the Respondent had to extend the bid validity period to allow determination of complaints/appeals before finalization of the Tender process. Thus, the bid validity period was extended for a further sixty (60) days.

3. That, the Respondent disputes the Appellant's allegation in relation to Regulations 187 read together with the Eighth Schedule to the Regulations. The Respondent contended that, the said provisions provide guidance on the minimum time allowed for preparation of tenders and not the bid validity period.
4. That, the Respondent issued the Notice of Intention to award the Tender in respect of Lot 43 to M/s Sateki Trading Ltd after being satisfied that the said tenderer had complied with the requirements of the Tender Document. M/s Sateki Trading Ltd had submitted documents which substantiated that it has two years working experience in works of a similar nature and volume. It had also attached an on going contract with Ukonga Ward.

The Respondent stated further that, the Appellant had been disqualified for its failure to attach detailed analysis of the expected income, expenditure and profit as required under the Statement of Requirement. Thus, it was difficult for the Respondent to evaluate its tender. The Appellant did not dispute the reason for its disqualification which contravened Item 6 of the Tender Document.



5. Finally, the Respondent prayed for the following orders: -

- i. That, this Appeals Authority uphold the decision made by the Respondent to award the Tender to M/s Sateki Trading Ltd since the Tender is still within the bid validity period;
- ii. That, the Appeals Authority should dismiss the Appellant's prayer that all Lots 37, 38, 41 and 43 need to be nullified, since it is contrary to the procurement process, as the appeal has no legal basis and it intends to disturb the procurement process. All bidders who participated had extended the validity period of the Tender.
- iii. The Respondent had attached documents submitted by M/s Sateki Trading Ltd as uploaded in the TANePS; and
- iv. Compensation of costs incurred by the Appellant should be borne by the Appellant.

At the hearing of the Appeal, the Respondent raised a Preliminary Objection (PO) on a point of law that, the Appeal has been filed prematurely contrary to Regulations 106 (10) and 107 (1) (a), (b) and (c) of the Regulations and is not properly before the Appeals Authority. Before proceeding with the main Appeal, the Appeals Authority deemed it proper to first determine the PO raised. In so doing, the Appeals Authority allowed parties to make submissions on the PO.

#### **SUBMISSIONS BY THE RESPONDENT ON THE PO**

The Respondent commenced its submissions by indicating that the Appellant's Appeal contravened the requirement of Regulations 106(10) of





the Regulations. The Respondent submitted that the Notice of Intention to award was issued on 8<sup>th</sup> July 2020 and was received by the Appellant on 27<sup>th</sup> July 2020. The Appellant applied for administrative review on 5<sup>th</sup> August 2020 challenging the reason given for its disqualification. The Respondent issued its decision on 12<sup>th</sup> August 2020 whereby it rejected the Appellant's application for review. The Respondent submitted further that if the Appellant was dissatisfied with its decision, it ought to have lodged an appeal pursuant to Regulation 107 (1) (a), (b) and (c) of the Regulations to this Appeals Authority.

The Appeal lodged by the Appellant is based on new issues which were not submitted to the Respondent in the application for administrative review dated 5<sup>th</sup> August 2020. In this Appeal the Appellant is challenging the extension of bid validity period requested by the Respondent on 11<sup>th</sup> August 2020. It also challenges the award proposed to M/s Sateki Trading Ltd for the reason that the firm lacks the requisite experience. Both grounds of Appeal were new and had not been submitted to the Respondent by way of administrative review. Therefore, the Respondent prayed for dismissal of the Appeal as the same has been filed prematurely before this Appeals Authority.

### **REPLY BY THE APPELLANT ON THE PO**

The Appellant conceded to the PO raised by the Respondent and was in agreement that the appeal has been filed prematurely. The issues raised in the Appellant's Statement of Appeal were not raised in the Appellant's application for review. The Appellant brought to the attention of the



Appeals Authority that Regulation 107(1) (b) of the Regulations relied upon by the Respondent has been deleted and Paragraph (c) has been renamed as Paragraph (b).

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

In determining the PO raised, the main issue for consideration is ***whether or not the appeal is properly before this Appeals Authority.***

In resolving this issue the Appeals Authority took cognizance of the fact that the Appellant conceded that the Appeal has been pre-maturely lodged before the Appeals Authority. Despite the Appellant's admission, the Appeals Authority deemed it proper to look at the requirement under the law in filing an appeal. In so doing the Appeals Authority revisited Section 95(1) of the Act and Regulations 104, 105, 106(9) and 107(1) (a) and (b) of the Regulations as amended. The provisions read as follows: -

*Section 95 (1) "Any tenderer who claims to have suffered or that may suffer any loss or injury as a result of a breach of duty imposed on a procuring entity by this Act may seek a review in accordance with sections 96 and 97."*

*Regulation 104 "A tenderer who claims to have suffered or who may suffer any loss or injury as a result of breach of a duty imposed on a procuring entity or an approving authority by the Act or these Regulations may apply for a review in accordance with sections 95 of the Act."*



*Regulation 106 (9) "Where the complainant is not satisfied with the decision of the accounting officer or, where the accounting officer does not issue a decision within the specified time, the complainant shall submit his complaint or appeal to the Appeals Authority within seven working days from the date of communication of the decision by the accounting officer or from such date the decision ought to be issued."*

*Regulation 107 (1) "Complaints or disputes which-*

*(a) are not settled within the specified period under regulation 106(6);*

*(b) arise after the procurement contract has entered into force pursuant to section 60(11) of the Act,*

*shall be referred to the Appeals Authority within seven working days from the date when the tenderer received the decision of the accounting officer or, in case no decision is rendered after expiry of the time stipulated under regulation 106(5) or when the tenderer becomes aware or ought to have become aware of the circumstances giving rise to the complaint or dispute pursuant to section 97(3) of the Act."*

The above quoted provisions entail that a tenderer who claims to have suffered or that may suffer any loss or injury as a result of breach of a duty imposed to a procuring entity may submit a complaint to the accounting



officer within seven working days of becoming aware of the circumstances giving rise to a complaint. If the accounting officer fails to issue a decision within the stipulated time or if a tenderer is dissatisfied with the decision of the accounting officer it may submit an appeal to the Appeals Authority pursuant to Section 97 of the Act read together with Regulation 107 of the Regulations.

It is evident from the record of appeal, that the Respondent issued the Notice of Intention to award the Tender on 8<sup>th</sup> July 2020. The said notice was received by the Appellant on 27<sup>th</sup> July 2020. The Appellant applied for administrative review on 5<sup>th</sup> August 2020 challenging its disqualification on the ground that it failed to comply with the Statement of Requirement. In the application for administrative review the Appellant did not raise any issue relating to the experience of M/s Sateki Trading Ltd.

Furthermore, the Respondent issued the request for extension of the bid validity period on 11<sup>th</sup> August 2020. The Appellant accepted the request. However, it raised concern on the legality of the extension of the bid validity period. The Appellant did not apply for administrative review on its concern in relation to extension of the bid validity period as required under the law.

Given the above facts and the requirement of the law, it is obvious that the Appeal has been filed prematurely as the Appellant ought to have sought for administrative review on the said issues before lodging this Appeal.



In view of the above, the Appeals Authority agrees with the Respondent that the Appeal was filed prematurely, and thus it is not properly before us. Consequently, we hereby uphold the PO and dismiss the appeal. Each party is to bear its own costs.

It is so ordered.

The Right of Judicial Review as per Section 101 of the Act is explained to the Parties.

This Ruling is delivered in the presence of the Appellant and the Respondent this 15<sup>th</sup> day of September 2020.

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



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**CHAIRPERSON**

**MEMBERS:**

**1. ADV. ROSAN MBWAMBO**.....

**2. MS. NDEONIKA MWAIKAMBO**.....