

**IN THE PUBLIC PROCUREMENT APPEALS AUTHORITY**

**AT DAR ES SALAAM**

**APPEAL CASE NO. 13 OF 2019-2020**

**BETWEEN**

**M/S AFRIMAX TECHNOLOGIES**

**LIMITED.....APPELLANT**

**AND**

**NATIONAL ENVIRONMENT**

**MANAGEMENT COUNCIL .....RESPONDENT**

**DECISION**

**CORAM**

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

**SECRETARIAT**

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

**FOR THE APPELLANT**

- |                        |                                |
|------------------------|--------------------------------|
| 1. Mr. Lewis Saliza    | - Managing Director            |
| 2. Mr. George Sang'udi | - Purity Attorney & Associates |

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## THE RESPONDENT

1. Mr. Sadiki Sangawe - Manager Procurement Management Unit
2. Mr. Benard Kongola - Ag. Director of Legal Service
3. Mr. Prosper Munisi - Procurement Officer
4. Mr. Benson Barayambala - IT Senior Officer

This Appeal was lodged by M/s Afrimax Technologies Limited (hereinafter referred to as "**the Appellant**") against the National Environment Management Council commonly known by its acronym NEMC (hereinafter referred to as "**the Respondent**"). The Appeal is in respect of Quotation No. PA/029/2019-20/HQ/G/03 for Supply, Installation and Commissioning of Local Area Network (hereinafter referred to as "**the Tender**").

The Tender was conducted through Competitive Quotation method specified under the Public Procurement Regulations GN. 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 background of the Appeal may be summarized as follows:

The Respondent on 29<sup>th</sup> August 2019 issued a Quotation Document to seven (7) eligible tenderers. The deadline for submission was set for 6<sup>th</sup> September 2019 whereby seven quotations, including that of the Appellant were received and opened publicly.

The received quotations were then subjected to evaluation which was conducted into two stages namely; Preliminary and Detailed evaluation. During Preliminary Evaluation all seven quotations were found to be responsive, hence were subjected to Detailed Evaluation. During Detailed Evaluation five quotations, including that of the Appellant were found to be non-responsive for failure to comply with a Schedule of Requirements, hence were disqualified. The remaining two quotations were subjected to arithmetic check and price comparison. During that process neither of the two quotations was found with arithmetic error, hence were ranked. M/s Invention Technologies Co. Ltd emerged to be the first ranked and was therefore recommended for award of contract at Tanzanian Shillings Forty Six Millions Fifty Six Thousand Five Hundred Ninety Seven and Eighty Two cents only (TZS 46,056,597.82) VAT Inclusive. The recommendations of the Evaluation Committee were submitted to the Tender Board and the same were approved through Circular Resolution dated 25<sup>th</sup> September 2019.

The Respondent through a letter dated 4<sup>th</sup> October 2019 issued the Notice of Intention to award to all tenderers who participated in the Tender. The Appellant claimed to have received the said notice on 21<sup>st</sup> October 2019. The notice informed the Appellant that its quotation was disqualified for failing to comply with five items listed on the Schedule of Requirements.

Dissatisfied with the given reasons on 22<sup>nd</sup> October 2019, the Appellant wrote an application for administrative review to the Respondent's Accounting Officer. The Respondent on 23<sup>rd</sup> October 2019 issued its decision rejecting the application. Aggrieved further, on 30<sup>th</sup> October 2019, the Appellant lodged this Appeal.

## GROUND OF APPEAL

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

1. That, the Respondent erred in law and procedure for disqualifying the Appellant's quotation as it was the lowest amongst all. The Appellant added that its Quotation was the lowest evaluated; hence it ought to have been awarded the contract.
2. That, the Appellant's quotation complied with all the Quotation requirements, thus the Respondent's act of disqualifying it on the ground that it failed to state the make offered for supply was not proper. According to the appellant, the issue of specifying the make to be supplied could not be assessed during the tender process; instead, the same could be assessed during contract execution. Therefore, the Respondent's act of disqualifying the Appellant's tender at this earlier stage was premature.
3. That, the Respondent erred in law and procedure when it refused to award the contract to the Appellant on the ground of failure to state whether all supplied passive network materials were from ISO Standard OEM make only. This is because its quotation was accompanied by a Manufacturer's Authorization letter from Dintek who is the top manufacturer of network materials. Dintek products complies with international standards, thus the Appellant could not have been disqualified on that basis.
4. That, the Respondent erred in law and procedure when it refused to award the contract to the Appellant on the ground of failure to



state whether all passive components were RoHS (Restriction of Certain Hazardous Substances) compliant. The Appellant complied with this requirement as it was indicated "yes" in the Compliance Schedule, CAT6 UTP CABLE, Item 19. The Respondent ought to have not disqualified the Appellant on this point.

5. That, the Respondent erred in law and procedure when it disqualified the Appellant on the ground of failure to state whether ETL Third Party Certificate submitted for the performance of CAT 6A cabling solution. The Appellant complied with this requirement by clearly stating "yes" in the Compliance Schedule CAT 6A Shielded Cabling System for the Performance up To 10G, Item 1.
6. Finally, the Appellant prayed for the following order:-
  - i) Award made to M/s Invention Technologies Co. Ltd be nullified and instead the same be issued to the Appellant as was the lowest evaluated bidder.

### **REPLY BY THE RESPONDENT**

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

1. That, the Appellant's quotation was found to be non-responsive and was disqualified at the technical evaluation stage, hence it cannot claim that it was the lowest evaluated bidder thus deserving to be awarded the contract.
2. That, the Appellant was disqualified for failure to indicate if all supplied passive networking material intended to be supplied were

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from ISO Standard OEM make only. According to the Schedule of Requirements the Appellant ought to have complied with all ISO Standard during Tender process as that is when the firm would be assessed of its capabilities to perform the intended contract. The Appellant's argument that the ISO Standard OEM make ought to be assessed during contract execution is wrong and in contravention with the Quotation Document.

3. That, the Appellant's quotation was found to be non responsive as it was not indicated if all passive components RoHS (Restriction of Certain Hazardous substance) were complied with. The Respondent added further that the Appellant failed to indicate on its quotation if all supplied copper & fibre components would be from one ISO standard OEM make. Further to that, the Appellant failed to substantiate if ETL third party certificate for the performance of CAT-6A cabling solution was attached to its quotation.
4. That, when reviewing the Appellant's application for review the Respondent observed other shortfalls contained in the Appellant's quotation and these were; the Appellant lacked one year requisite experience, no proof of experts who would be handling installation and configuration were provided, no proof of having positive network during the last three financial years were provided and no detailed information of the quoted system were provided. The Appellant ought to have attached to its quotation brochures which would elaborate in detail the make it offered to supply. Thus, the Appellant's failure to

comply with the above mentioned requirement led its bid to be disqualified.

5. Finally, the Respondent prayed for dismissal of the Appeal with costs for lack of merits.

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

During the hearing parties agreed on the following issues which were also approved by the Members of the Appeals Authority:-

- 1. Whether the Appellant's disqualification was justified; and**
- 2. 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 Appellant's disqualification was justified**

In resolving this issue the Appeals Authority revisited the Notice of Intention to award and observed that the Appellant's quotation was disqualified for the following reasons:-

- i) Failure to state the make offered;
- ii) Failure to indicate if all supplied passive networking material intended to be supplied were from ISO Standard OEM make only;
- iii) Failure to indicate if all supplied copper & fibre components would be from one ISO standard OEM make;
- iv) Failure to indicate if all passive components RoHS (Restriction of Certain Hazardous substance) were complied with;and

v) Failure to substantiate if ETL third party certificate for the performance of CAT-6A cabling solution was attached to its quotation.

In order to substantiate if the reasons given by the Respondent justified the Appellant's disqualification, the Appeals Authority revisited the Schedule of Requirements and observed that all the five requirements were contained in the Additional Terms and Conditions, specifically on the part of Active Networking Components and Passive Components.

The Appeals Authority reviewed the Appellant's quotation in order to verify whether or not there were valid reasons for its disqualification. The Appeals Authority observed that the Appellant did not specify the make intended to be offered as required under Item 1 of the Active Networking Components. During the hearing the Appellant argued that such a requirement was not necessary and did not have to be complied with during the tender process; instead the same ought to be complied with during the execution of the contract. The Appeals Authority rejected this argument on the ground that, it was necessary for the Respondent to assess if a bidder would be able to supply the required products as per ISO standard OEM make before proceeding to award the contract. The Respondent could not have qualified a bidder without ensuring that it met the required conditions as per Clause 9.1 of the Instruction to Tenderers (ITT). Thus, the Appeals Authority is of the considered view that the Appellant failed to comply with the requirement.

Regarding compliance with the condition that all supplied passive networking material should be from one ISO standard OEM make, the

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Appeals Authority observed that such a requirement was also not complied with by the Appellant. The Appellant advanced the argument that it had submitted a Manufacturer's Authorization letter from Dintek who is the top manufacturer of network materials in the world. Thus, there was no need to provide any specifications since Dintek meets international standards. The Appeals Authority is of the view that this argument has no basis as the Manufacturer's Authorization cannot substantiate compliance with the other requirements of the Tender. The Appeals Authority reviewed the manufacturer's authorization submitted by the Appellant and observed that it has not specified if the passive networking materials to be supplied complied with ISO standard OEM make. The Manufacturer's Authorization only indicated that it had authorized the Appellant to supply their manufactured goods. Therefore, it is crystal clear that the Appellant equally failed to comply with this criterion.

The Appeals Authority observed further that the Appellant had not indicated on its quotation that copper & fibre components to be supplied would meet ISO standards OEM make. Therefore, the requirement was not met as well.

In relation RoHS (Restriction of Certain Hazardous Substance) and ETL Third Party Certificate requirements, the Appeals Authority observed that these two requirements were complied with. In the Appellant's quotation it was indicated "**yes**" under Item 19 in the Compliance Schedule CAT6 UTP CABLE which substantiates compliance with RoHS requirement. Also Item 1 of the CAT 6A Shielded Cabling System for the Performance UP To 10G contained the word "**yes**" which indicated compliance with ETL Third Party

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Certificate requirement. Therefore, the Appeals Authority rejects the Respondent's argument that the Appellant failed to comply with these two requirements.

Given what has been stated hereinabove, it is evident that the Appellant failed to comply with three requirements out of the five mentioned in the Notice of Intention to award. Therefore, the Appeals Authority finds the Respondent's act of disqualifying the Appellant's tender to be proper and in accordance with Clause 10 of the ITT read together with Regulation 206(2) of GN. No 446 of 2013, which provide as follows:-

Clause 10 "***The procuring entity will award the contract to the supplier whose quotation has been determined to be substantially responsive and who has offered the lowest evaluated quotation price***".

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 supplied).

The Appeals Authority considered the Appellant's argument that it had quoted the lowest price and therefore ought to have been awarded the tender and observed that given the requirement of the above quoted provisions the tender is awarded to the tenderer who has been determined to be substantially responsive and who has offered the lowest evaluated price.

The Appeals Authority observed further that in the course of considering the Appellant's application for administrative review the Respondent noted other areas of non-compliance by the Appellant. Since it has already been established herein above that the Appellant was fairly disqualified for failure to comply with some requirements as stated in the Notice of Intention to award, the Appeals Authority need not delve into additional reasons raised by the Respondent.

In view of our findings that the Appellant failed to comply with the required specifications as indicated that is, three items out of the five as stated in its Notice of Intention to award, the Appeals Authority's conclusion with regard to the first issue is in the affirmative, that is the Appellant's disqualification was justified.

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

Taking cognizance of the findings herein above, that the Appellant was fairly disqualified, the Appeals Authority hereby dismiss the Appeal and hence the Respondent may proceed with the Tender process. Each party is to bear its own costs.

It is so ordered.

This Decision is binding on the Parties and may be executed in terms of Section 97 (8) of the Act.

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

The Decision is delivered in the presence of the Appellant and the Respondent this 5<sup>th</sup> day of December 2019.



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**HON. JUSTICE (rtd) SAUDA MJASIRI**  
**CHAIRPERSON**

**MEMBERS:**

1. CPA FREDRICK RUMANYIKA  .....

2. DR. LEONADA MWAGIKE  .....