

**IN THE PUBLIC PROCUREMENT APPEALS AUTHORITY**

**AT DAR ES SALAAM**

**APPEAL CASE NO. 12 OF 2019-20**

**BETWEEN**

**M/S SALEM CONSTRUCTION LIMITED.....APPELLANT**

**AND**

**MWANZA URBAN WATER SUPPLY AND**

**SANITATION AUTHORITY.....RESPONDENT**

**DECISION**

**CORAM**

- |                            |                 |
|----------------------------|-----------------|
| 1. Adv. Rosan Mbwambo      | - Ag. Chairman  |
| 2. CPA. Fredrick Rumanyika | - Member        |
| 3. Dr. Leonada Mwangike    | - 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. Charles Casmir | - Project Quantity Surveyor |
| 2. Mr. Alfred Adams   | - Project Administrator     |

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## FOR THE RESPONDENT

1. Mr. Poas Kilangi - Head PMU
2. Mr. Oscar Twakazi - Legal Counsel
3. Mr. Deogratias Magayane - Administration and Human Resource Manager

This Appeal was lodged by M/s Salem Construction Limited (hereinafter referred to as "**the Appellant**") against Mwanza Urban Water Supply and Sanitation Authority commonly known by its acronym, MWAUWASA (hereinafter referred to as "**the Respondent**"). The Appeal is in respect of Tender No. AE/042/2019-2020/W/43 for Construction of Water Reservoirs at Buswelu and Kisesa (hereinafter referred to as "**the Tender**").

The Tender was conducted using the National Competitive Bidding 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 the Daily News newspaper dated 6<sup>th</sup> September 2019, invited eligible tenderers to participate in the Tender. The deadline for submission was set for 27<sup>th</sup> September 2019, whereby six tenders were received.

Tenders were then subjected to evaluation which was conducted in two stages, namely preliminary and detailed Evaluation. At the preliminary evaluation, one tender was disqualified for failure to comply with the



requirements of the Tender Document. The remaining five tenders were subjected to detailed evaluation. The detailed evaluation was also conducted in two stages, namely technical evaluation and arithmetic correction of errors. During technical evaluation all five tenders were found to be substantially responsive. In the arithmetic correction of errors three bids were found with errors and were accordingly corrected.

Tenders were then ranked according to their evaluated prices. M/s China Civil Engineering Construction Corporation emerged to be the first ranked tender while the Appellant's bid was ranked the third. After completion of the evaluation process the Evaluation Committee recommended award of the Tender to M/s China Civil Engineering Construction Corporation at a contract price of TZS 981,690,941.68 VAT inclusive. The Tender Board at its meeting held on 16<sup>th</sup> October 2019 approved the award as recommended.

On 21<sup>st</sup> October 2019, the Respondent issued a Notice of Intention to award to all tenderers who participated in the Tender process. The Notice informed the Appellant that its bid was unsuccessful as it was ranked the third.

Dissatisfied, on 22<sup>nd</sup> October 2019, the Appellant applied for administrative review to the Respondent's Accounting Officer, challenging the proposed award on the reason that exclusive preference was not applied to the Tender as per Section 55(1) of the Act. On 23<sup>rd</sup> October 2019, the Respondent issued a decision which dismissed the Appellant's complaints. Aggrieved further, on 29<sup>th</sup> October 2019, the Appellant lodged this Appeal.

Handwritten signature and initials in blue ink, appearing to be 'R. M. F.'

At the hearing, the Respondent raised a preliminary objection on a point of law that the Appellant lacked *locus standi* to appear before this Appeals Authority. The Respondent submitted that, the Appellant's firm through the Power of Attorney attached to its tender appointed one Eng. Abuzer Salem to be the lawful attorney and act on behalf of the Appellant's firm in all transactions related to this Tender. At the hearing of the Appeal Eng. Abuzer Salem did not appear; instead, Mr. Charles Casmir and Mr. Alfred Adams who claimed to be the Appellant's principal officers appeared. The Respondent challenged the appearance of the two personnel on the ground that only Eng. Abuzer Salem submitted a Power of Attorney in the Tender.

In its response, the Appellant conceded that the Power of Attorney for this Tender was given to Eng. Abuzer Salem who did not appear for the hearing of the Appeal as scheduled. Instead, the Appellant is represented by Mr. Charles Casmir and Mr. Alfred Adams who have been authorized by the Appellant to appear on its behalf at the hearing of this Appeal.

The Appeals Authority overruled that objection and reserved its reasons. The Appeals Authority now proceeds to give its reasons.

### **ANALYSIS OF THE APPEALS AUTHORITY ON THE PO**

In determining this objection, the Appeals Authority framed an issue as to whether Mr. Charles Casmir and Mr. Alfred Adams have *locus standi* to appear for the Appellant's company.

In resolving this issue, the Appeals Authority revisited provisions of the Act, the Regulations and the Public Procurement Appeals Rules GN. No 411 of 2014 (hereinafter referred to as the "**Appeals Rules**"). It also perused the documents submitted before it and observed that one Eng. Abuzer Salem was given the Power of Attorney to act on behalf of the Appellant in all transactions relating to this Tender. It was also noted that the PPAA Form No. 1, the Statement of Appeal was signed by Eng. Abuzer Salem.

According to Rule 3 of the Appeals Rules Appellant is defined as any person who lodges an appeal before the Appeals Authority. A person is defined in section 2 of the Act to "*include any association of persons whether incorporated or not.*"

Rule 4 of the Appeals Rules on the other hand provides for who may appeal to the Appeals Authority. It is stated in that Rule thus: "*Any person being a tenderer who is dissatisfied with the decision, matter, act or omission of a procuring entity or the Authority may lodge an appeal to the Appeals Authority.*"

The Appellant is a corporate body and as such a person under the law. Part IV of the Appeal Rules provides for appearance of the parties generally. This part and the Appeal Rules do not provide for appearance by a corporation. The Act and or Regulations do not provide for appearance by a corporation either. The Appeals Authority is of the view that this is a fit instance to resort to the general civil law.

Order XXVIII of the Civil Procedure Code, Cap 33 R.E. 2002 (the CPC) provides for suits by and against corporations. Under Order XXVIII rule (1)

of the CPC pleadings may be signed and verified on behalf of a corporation by a secretary or by any director or other principal officer of the corporation. Rule 3 of Order XXVIII allows appearance of the secretary or of any director or other principal officer of the corporation.

The Appeals Authority also wishes to remind the parties that according to Rule 24(2) of the Appeals Rules, proceedings before it are conducted with as little formality and technicality as possible. The provision reads:-

**"The proceedings before the Appeals Authority shall be conducted with as little formality and technicality as possible and, in relation thereto; the Appeals Authority shall not be bound by strict rules of evidence or court procedures".** (Emphasis supplied)

From the above facts, it is the Appeals Authority's firm view that the Appellant was duly represented. Thus, the Respondent's argument that the Appellant's representative during the hearing lacked *locus standi* is rejected. The preliminary objection is therefore, overruled.

### **GROUND OF APPEAL**

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

- i. That, the Respondent's acts of intending to award the tender to a foreign firm without due consideration to domestic preference while the contract is less than Tanzanian shilling ten billion contravenes the requirement of Section 55(1) of the Act, read together with Regulation 37 and 39 of the Regulations. In expounding its argument the Appellant submitted that the contract value falls within the

threshold of local preference as stipulated by the cited regulation, thus the Respondent ought to have exclusively reserved this Tender for locals firms.

- ii. That, Regulation 151(4) of the Regulations requires preference to be applied in evaluation of tenders under national competitive tendering where foreign firms have participated. The Appellant added that, the cited regulation is in line with Section 55C of the Act which requires procuring entities to grant margin of preference up to 15 percent in international or national competitive tenders. However, the Respondent failed to comply with such requirement.
- iii. That, Clause 22 of the Tender Data Sheet (TDS) which modified Clause 31.1 and 31.4(b) of the Instruction To Bidders (ITB) indicated that domestic preference would not be applicable. The wording of such provision contravenes the requirement of the law as well as the guidelines issued by the Public Procurement Regulatory Authority to all procuring entities regarding applicability of preference schemes.
- iv. Finally, the Appellant prayed for the following orders:-
  - i. The Respondent be ordered to compensate the Appellant all legal expenses involved in this Appeal;
  - ii. The Respondent be ordered to compensate the Appellant costs related to transport and time consumed during this Appeal; and
  - iii. The Respondent be ordered to award the Tender to a local firm.

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## REPLY BY THE RESPONDENT

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

- i. That, preference scheme was not applicable in this Tender as it was so specified under Clause 22 of the TDS. It was so specified because the Tender was conducted under national competitive tendering method and it allowed participation of all eligible tenderers registered in Tanzania and the Tender price was in Tanzanian shillings.
- ii. That, pursuant to the requirement of Regulation 151(1) of the Regulations, foreign tenderers were allowed to participate in the Tender regardless of their nationality. As a result foreign tenderers including the proposed successful tenderer participated in this Tender.
- iii. That, even if the margin of preference of 15% had been considered in this Tender, neither the Appellant's tender nor the second ranked tenderer would have qualified for the award of the Tender as their quoted price are higher compared to the price quoted by the proposed successful tenderer. The proposed successful tenderer M/s China Civil Engineering Construction Corporation quoted TZS. 981,690,941.68 and the Appellant's price was TZS. 1,297,582,769.70.
- iv. That, much as the Respondent concedes that the margin of preference was not applied in this Tender, he argued that such anomaly should not render the whole process a nullity. There were



steps in the evaluation process which were not complied with, thus the Appeals Authority should order for compliance with the same. In other words, if it may please the Appeals Authority the Respondent may be ordered to re-evaluate the tenders.

- v. Finally, the Respondent prayed for dismissal of the Appeal for lack of merits.

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

The Appeals Authority having gone through the Tender proceedings including various documents submitted and the oral submissions by the parties, is of the view that the Appeal is based on two main issues, namely:-

**1.0 Whether the intended award of the Tender to the proposed bidder is justified; and**

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

Having identified the issues we proceeded to determine them as follows:-

**1.0 Whether the intended award of the Tender to the proposed bidder is justified.**

In resolving this issue, the Appeals Authority revisited Section 55(1) of the Act read together with Regulation 39(1)(3) of the Regulations and observed that, the law provides clearly that where the funds are exclusively provided by public body and the value does not exceed a

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threshold provided in the regulations then that procurement shall be exclusively reserved for local firms.

Paragraph C of the Ninth Schedule to the Regulations provides that tenders for works with thresholds which does not exceed Tanzanian Shillings ten billion (10,000,000,000) shall be exclusively reserved for local suppliers, contractor or service provider. For purpose of clarity these provisions read as follows:-

*"Sec. 55(1) Where financial resources are exclusively provided by a Tanzanian public body, each procurement of works, goods or services that has a value not exceeding a threshold specified in the Regulations shall be reserved exclusively for local persons or firms.*

*(2) Where the procuring entity does not proceed with the local persons or firm set-aside under sub section (1), and procures on unrestricted basis, the procuring entity shall include in the procurement file the reason or reasons for unrestricted procurement.*

*(3) N/A*

*(4) Where the procuring entity receives no acceptable offers from responsible local persons or firms, the set-aside procurement shall be withdrawn and if the requirements are still valid, new offers shall be resolicited on unrestrictive basis.*

*Reg. 39 (1) The procurement of works, goods, consultancy or non consultancy services with a value not exceeding the amount prescribed in the Ninth and Thirteenth Schedules to these Regulations, shall be reserved exclusively for local persons or firms who meet requirements of Section 51 of the Act.*

*Para C. "Exclusive preference to local suppliers, contractors or service providers shall be applicable to tenders whose values for works is Tshs.10,000,000,000."*

The Appeals Authority also observed that Clause 2 of both the Invitation For Tenders and ITB had indicated that the funds for the intended project would be from the Respondent's own budget. The Appeals Authority observed further from the records of Tender opening that none of the bidders' prices exceeded two billion shillings. It follows that the value of work was below the threshold provided under the ninth schedule. Therefore the Respondent ought to have restricted this tender to local firms only.

In view of the above the Appeals Authority finds that the procurement process was conducted in contravention of the law. Thus the Respondent's proposition that it used a proper method in advertising this tender is not tenable in law.

Furthermore, the Appeals Authority considered the Respondent's argument that, the only anomaly in this tender process was its failure to apply a margin of preference in evaluating the tenders by the foreign firms. The Appeals Authority disagrees with the Respondent's since the issue is not the applicability of margin of preference to foreign firms but that this Tender ought to have been exclusively reserved for local firms.

The above notwithstanding, assuming that the Respondent had justification to advertise this tender nationally instead of reserving it for locals firms, still it could have not applied the margin of preference. This is because; Clause 22 of the TDS clearly indicated that domestic preference and margin of preference were not applicable. On that basis the Appeals Authority rejects the Respondent's prayer to order re-evaluation of tenders.

Therefore, the Appeals Authority finds that the Tender process was conducted in contravention of the law. As the result the intended award to the proposed bidder is not justified. The first issue is answered in the negative.

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

Based on the above findings and conclusion, the Appeals Authority hereby allow the Appeal and nullify the Tender process. The Respondent is ordered to re-start the Tender process in observance of the law. No order as to costs is made.

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 parties this 22<sup>nd</sup> day of November 2019.



**ADVOCATE ROSAN MBWAMBO**

**Ag: CHAIRMAN**

**MEMBERS:**

**1. CPA. FREDRICK RUMANYIKA.....** 

**2. DR. LEONADA MWAGIKE.....** 