

IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY
AT DAR ES SALAAM
APPEAL NO. 30 OF 2017-18

BETWEEN

M/S BAMBA EAGLES LIMITEDAPPELLANT

AND

TANZANIA PORTS AUTHORITY.....RESPONDENT

DECISION

CORAM

- | | | |
|----------------------------|---|-----------------|
| 1. Ms. Monica P. Otaru | - | Ag. Chairperson |
| 2. Eng. Francis T. Marmo | - | Member |
| 3. Mr. Louis P. Accaro | - | Member |
| 4. Mr. Ole-Mbille Kissioki | - | Secretary |

SECRETARIAT

- | | | |
|------------------------|---|----------------------|
| 1. Ms. Florida Mapunda | - | Senior Legal Officer |
| 2. Ms. Violet Limilabo | - | Legal Officer |
| 3. Mr. Hamis Tika | - | Legal Officer |

FOR THE APPELLANT

- | | | |
|-------------------------|---|-------------------------|
| 1. Mr. Asanterabi Mfuko | - | Chief Executive Officer |
| 2. Mr. Patrick J. Mfuko | - | Sales Officer |

FOR THE RESPONDENT

- | | | |
|-------------------------|---|-------------------------------|
| 1. Mr. Alex Seneu | - | Operations Legal Officer |
| 2. Mr. Richard Biramata | - | Principal Procurement Officer |
| 3. Mr. Donald B. Ngaile | - | Principal Operations Officer |
| 4. Mr. Boniface Mbuya | - | Procurement Officer |
| 5. Mr. Leonard Mpemba | - | Security Officer |

The Appeal was lodged by M/s Bamba Eagles Limited (hereinafter referred to as "the Appellant") against the Tanzania Ports Authority (Tanga Port), (hereinafter referred to as "the Respondent"). The Appeal is in respect of Tender No. AE/016/2016-17/TA/NC/07 for Provision of Daily Paid Workers Operational and Non Operational Services at Tanga Port (hereinafter referred to as "the Tender").

After going through the records of submissions by the parties to the Public Procurement Appeals Authority (hereinafter referred to as "the Appeals Authority"), the facts of the Appeal are summarized as follows:-

The Respondent through the Daily News newspaper dated 23rd February 2017 invited tenderers to participate in the Tender. The deadline for submission of tenders was set for 17th March 2017; whereby eleven firms, the Appellant inclusive, submitted their tenders.

The tenders were subjected to evaluation which was conducted in two stages, namely; Preliminary and Detailed Evaluations. During preliminary evaluation, three tenders including that of the Appellant were disqualified for failure to comply with eligibility requirement provided for in the Tender Document. The remaining eight tenders were subjected to detailed evaluation whereby all firms were found to have complied with Tender requirements. The tenders were then subjected to price comparison and two firms were found to have quoted the price above the rates recommended by the Respondent, thus they were disqualified. The remaining six tenders were recommended for award of the contracts which the Tender Board approved accordingly.

On 10th January 2018, the Respondent issued a Notice of Intention to award to all tenderers who participated in the Tender. The said notice informed unsuccessful tenderers, the Appellant inclusive, the names of the proposed bidders and the awarded rates. The notice did not contain reasons for disqualification of unsuccessful tenderers and the same was received by the Appellant on 18th January 2018. Dissatisfied with the

Tender results; on 19th January 2018 the Appellant submitted application for review to the Respondent challenging, amongst others, their disqualification and award proposed to the successful tenderers.

On 22nd January 2018 the Appellant received a letter from the Respondent dated 16th January 2018 which informed him that his tender was not successful due to the reason that he submitted Business License for “Wakala wa TIGO PESA and MPESA”. The Appellant was not satisfied with the reason given for his disqualification and on the same date applied for administrative review.

On 24th January 2018 the Respondent issued its decision and rejected all the Appellant’s grounds for review. Dissatisfied, the Appellant lodged this Appeal on 24th January 2018.

SUBMISSIONS BY THE APPELLANT

The Appellant’s grounds of Appeal may be summarized as follows;

1. That, the Respondent wrongly disqualified the Appellant for submitting Business License for “Wakala TIGO PESA and MPESA” while the Tender Document did not elaborate the type of Business License that was required for this Tender. Elaborating on this point the Appellant submitted that, on 28th February 2017 before deadline for submission of tenders he sought for clarification in relation to TIN Certificates, VAT Certificates, Business License, Audited Report e.t.c which were to be submitted since the Tender Document was not so clear. However, the clarification issued thereafter through Addendum No. 1 did not specify precisely amongst others the type of business license that was required. Thus, it was not proper for the Respondent to disqualify the Appellant based on the requirement that was not explicitly provided for in the Tender Document.
2. That, the Respondent’s Notice of Intention to award contravened the requirement of the law as it did not mention the awarded contract

price and reasons for disqualification of unsuccessful tenderers as required. Expounding further on this point the Appellant submitted that, the Respondent's Notice of Intention to award clearly indicated that all proposed bidders' prices were loaded with Service Delivery Levy (SDL) of 4.5% instead of 5.0% as per the Tender Document and that there was no Addendum issued to that effect.

3. That, the Respondent erred in law by issuing the Notice of Intention to Award which was signed by one Mr. Donald Ngaile who is the Operations Manager of the Port instead of Mr. Percival N. Salama who is the Port Master. The Appellant expounded further that, according to the Public Procurement Act of 2011 as amended (hereinafter referred to as "the Act") the Notice of Intention to award has to be signed by the Accounting Officer who in this case is a Port Master.
4. That, the Respondent erred in law by intending to award the contracts to tenderers whose bids were noted to have anomalies from the date of tender opening. Elaborating on this point the Appellant submitted that, on the date of Tender opening it was observed that some of the proposed bidders lacked some of the important documents like VAT, OSHA and FIRE certificates but surprisingly the Respondent intended to award the contracts to them.
5. That the Respondent erred in law by giving the Appellant 7 days to submit his complaint instead of 14 days as specified in the Tender Document.

Finally, the Appellant prayed for the following orders;

- a) The Tender process be stopped until determination of the matter;
- b) The Tender proceedings be nullified and tendering process be started afresh; in the alternative

- c) The re-evaluation be conducted to the extent of meeting the standards of Public Procurement Act and its Regulations; and
- d) Compensation to the sum of TZS 1,500,000.00

REPLY BY THE RESPONDENT

The Respondent's submissions on the grounds of the Appeal may be summarized as follows;

1. Responding to the first ground of Appeal the Respondent submitted that, the whole Tender process was conducted competitively and fairly in observance of the requirements provided for in the Tender Document. The Respondent further submitted that, the Appellant was not the lowest bidder as its bid was disqualified during preliminary evaluation for submitting Business License for "Wakala TIGO PESA and MPESA" instead of submitting business license relating to the provision of daily workers services.

That the Appellant was required to comply with sub Clauses 3.5 and 3.9 of the Instruction to Tenderers (ITT) which provide clearly that all tenderers are to satisfy relevant licensing and/or registration requirements. Furthermore, tenderers were required to submit evidence which proves their eligibility and compliance with legal requirements. The Appellant's act of submitting Business License for "Wakala wa TIGO PESA and MPESA" proves that he lacked the requisite Business License for this Tender; thus non responsive bid.

2. Regarding the Appellant's argument that the Tender Document was not clear to the extent of specifically mentioning the required Business License, the Respondent counter argued that the Tender Document clearly stated that the Tender was for "provision of daily paid workers for operational and non operational services at Tanga Port." Thus, it was obvious that the required Business License should relate to the Tender in question.

Elaborating further on this point the Respondent stated that after receipt of the Appellant's letter which sought for clarification on amongst other things, the issue of Business License, they issued Addendum No.1 which clarified all issues raised and tenderers were insisted to comply with Clause 3 of the ITT cited in paragraph 1 above.

3. Responding to the Appellant's argument in relation to SDL rate of 4.5%, the Respondent submitted that, SDL of 4.5% is a statutory rate resulting from the change of law which previously was at 5%. That this rate was uniformly applied to all bids that reached the final stage of evaluation, and that the applied SDL rate neither changed the responsiveness of the bidder nor bidders' ranking.
4. Regarding the signing of the Notice of Intention to Award, the Respondent submitted that the said letter was signed by the Operations Manager because the Port Master was out of the duty station and his duties were delegated to the Operations Manager.
5. With regard to the Appellant's argument that the awards were proposed to bidders who lacked mandatory certificates (VAT, OSHA and FIRE certificates), the Respondent argued that the proposed bidders complied with all the requirements of the Tender Document, hence proposed for the award of the Tender.

The Respondent expounded further that, in obtaining the successful tenderers the Tender process was conducted by following the requirement of the Act and Public Procurement Regulations, GN No.446 of 2013, as amended (hereinafter referred to as GN. No. 446 of 2013).

6. Responding to the Appellant's argument regarding the seven working days of lodging complaint, the Respondent submitted that, it is a requirement of the law that after issuance of the notification of award, bidders are to be given seven (7) working days to lodge their

complaint if they are dissatisfied with the tender results and not fourteen days.

Finally, the Respondent prayed for the following;

- a) The Appellant's request to nullify the Tender be rejected as it was conducted in accordance with laid down procedures;
- b) The award of tender be upheld as the Appellant's claims are baseless; and
- c) The Appellant's prayer for refund be rejected as the Appeal lacks merits.
- d) The Appeal be dismissed for lack of merits.

ANALYSIS BY THE APPEALS AUTHORITY

The Appeals Authority having gone through the Tender proceedings including various documents submitted by the parties and the oral submissions during the hearing, is of the view that the Appeal is centred on three main issues, which are:-

1. Whether the Appellant's disqualification is proper in law;
2. Whether the award proposed to the successful tenderers is justified; and
3. What reliefs if any are the parties entitled to

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

1.0 Whether the Appellant's disqualification is proper in law

In substantiating if the Appellant's disqualification from this Tender process is proper we revisited sub Clauses 3.5 and 3.9 of the ITT which provide as follows;

- 3.5 “National tenderers shall satisfy all relevant licensing and/or registration requirements with the appropriate statutory bodies in Tanzania....”
- 3.9 Tenderers shall provide to the procuring entity evidence of their eligibility, proof of compliance with necessary legal, technical and financial requirements and their capability and adequacy of resources to carry out the contract effectively”. (Emphasis supplied)

We are in agreement with the Respondent that the two provisions are clear and unambiguous as to what license/documentation should be submitted; the same should be relevant to the task at hand, which in this case is for provision of daily paid workers operational and non operational services. As such, the Appellant’s act of submitting business license for “Wakala wa TIGO PESA and MPESA” which did not relate to the Tender in question was not proper. The Respondent is therefore justified for considering the Appellant’ tender as non responsive.

We further revisited Regulation 206(2) of GN No. 446 of 2013 which states as follows;

“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)

From the quoted provision and the above facts it is the firm view of the Appeals Authority that the Appellant contravened the requirement of sub Clauses 3.5 and 3.9 of the ITT; hence the Respondent’s act of disqualifying them is proper and in accordance with Clause 27.5 of the ITT read together with Regulation 204(2)(b) of GN No. 446 of 2013.

Reverting to the Appellant’s argument that the Notice of Intention to award contravened the law as it lacked the awarded contract prices and reasons for disqualification of the unsuccessful tenderers; the Appeals Authority observed that, it is true that the Notice of Intention to award lacked reasons for disqualification of unsuccessful tenderers. The same however

was rectified by the Respondent's letter dated 22nd January 2018 which informed the Appellant the reason for his disqualification. It is this letter that formed the Appellant's basis for seeking administrative review and later on Appeal to this Appeals Authority.

We are mindful that, according to Regulation 231(4) of GN No. 446 of 2013 a notice of intention to award must state the name of the proposed tenderer, contract sum, completion period and reasons for disqualification of unsuccessful tenderers. The Respondent's Notice of Intention to award contained all other requirements save for the reasons for disqualification of unsuccessful tenderers. Since the reason for disqualification of the Appellant was availed to him four days after receipt of the Notice of Intention to award, the Appeals Authority is of the settled view that the Respondent's omission in this regard had not prejudiced the Appellant's right as he was able to seek for administrative review within the stipulated time limit.

The Appeals Authority also observed that, by virtue of Section 60(3) of the Act the seven working days indicated in the Notice of Intention to award is the proper time limit for submission of procurement complaints. The Appeals Authority thus rejects the Appellant's argument that the Respondent erred in law by giving tenderers seven working days to submit their complaint instead of fourteen days stipulated in the Tender Document.

Much as Clause 48 of the ITT provides for fourteen days (14) for the submission of complaints, the said Clause contravenes the requirement of Section 60(3) of the Act. Once there is a contradiction between the Act and the Tender Document, the provisions of the Act prevail. That is to say, the seven working days given to tenderers to submit complaint was proper and in accordance with the law.

Regarding the signing of the Notice of Intention to award by Port Operations Manager, we observed that, at the time of signing the Notice of Intention to award, Mr. Donald J.B Ngaile was the acting Port Master and

therefore officially assumed the office duties of the Accounting Officer. Therefore, the notice was properly signed.

Accordingly, the Appeals Authority's conclusion with regard to the first issue is that, the Appellant was fairly disqualified for failure to comply with the Tender Document.

2.0 Whether the award proposed to the successful tenderers is justified

In resolving this issue the Appeals Authority revisited the Appellant's argument that award is intended to be made to tenderers whose tenders were noted from the date of Tender opening lacking mandatory certificates (VAT, OSHA and FIRE certificates). The Appeals Authority reviewed the minutes of the Tender opening which indicated that, Bid Price, Bid Security, Power of Attorney and Tender Validity Period were read out during the Tender Opening. There is no indication that the certificates attached to the tenders were also read out.

We went further and revisited all the tenders submitted by the proposed successful tenderers and observed that all the relevant certificates were attached and none was missing. Thus, the Appeals Authority rejects the Appellant's assertion as it is baseless and unfounded as the proposed successful tenderers complied with the Tender requirements.

The Appeals Authority considered the Appellant's argument in relation to Service Delivery Levy (SDL) that it was changed from 5% to 4.5%. We observed that the SDL in the Tender Document was indeed 5%. However, the requirement of Vocational Training Education Act and Income Tax Act, as amended, SDL is compulsorily to be 4.5%. Having noted so, the Appeals Authority finds that the applicability of SDL of 4.5% as proper as the same was in accordance with the law and it had neither favoured nor discriminated any tenderer.

Accordingly, the Appeals Authority's conclusion with regard to the second issue is in the affirmative, that the award proposed to the successful tenderers is justified.

3.0 What reliefs if any are the parties entitled to

Taking cognizance of the findings above, the Appeals Authority hereby dismisses the Appeal for lack of merits as the Appellant was fairly disqualified and award proposed to the successful tenderers is justified.

The Respondent may proceed with the award of the Tender in observance of the law. Each party to bear own costs.

It is so ordered.

This Decision is binding on the parties 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 8th March 2018.


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Ms. MONICA P. OTARU
Ag. CHAIRPERSON

MEMBERS:

1. ENG. FRANCIS MARMO 
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2. MR. LOUIS ACCARO 
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