

**IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY**

APPEAL NO. 1 OF 2020-21

BETWEEN

**M/S HANANASIF WOMEN DEVELOPMENT
INVESTMENT APPELLANT**

AND

ILALA MUNICIPAL COUNCIL 1ST RESPONDENT

M/S KAJENJERE TRADING CO. LTD 2ND RESPONDENT

DECISION

CORAM

- | | |
|-------------------------------------|-----------------|
| 1. Hon. Justice (rtd) Sauda Mjasiri | - Chairperson |
| 2. CPA. Fredrick Rumanyika | - Member |
| 3. Mr. Rhoben Nkori | - Member |
| 4. Adv. Rosan Mbwambo | - Member |
| 5. Ms. Florida Mapunda | - Ag. Secretary |

SECRETARIAT

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

FOR THE APPELLANT

- | | |
|------------------|--------------|
| 1. Mr. Ande John | - Consultant |
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2. Mrs. Natalia Magongo - CEO, Hananasif Women Development Investment
3. Mr. Lwazi Peter Magongo - Executive Officer, Pick Trading

FOR THE 1ST RESPONDENT

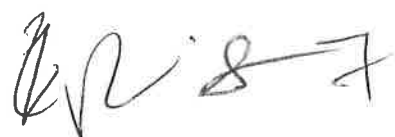
1. Ms. Florah A. Luhala - Municipal Solicitor
2. Mr. Vincent L. Odero - Procurement Officer
3. Mr. Enock J. Fredrick - Procurement Officer
4. Ms. Janeth W. Balozi - Procurement Officer
5. Ms. Yohana Thomas - Procurement Officer
6. Ms. Victoria Mnyambwa - Legal Officer
7. Mr. Paschal Mwaduga - Procurement Officer

FOR THE 2ND RESPONDENT

1. Mr. Mathew John Andrew - Managing Director, Kajenjere Trading Co. Ltd

The Appeal was lodged by **M/S HANANASIF WOMEN DEVELOPMENT INVESTMENT** (hereinafter referred to as "**the Appellant**") against the **ILALA MUNICIPAL COUNCIL** (hereinafter referred to as "**the 1st Respondent**") and **M/S KAJENJERE TRADING CO. LTD** (hereinafter referred to as "**the 2nd Respondent**").

This Appeal is in respect of Tender No. LGA/015/IMC/2019-2020/HQ/NC/24 LOT 37 for the provision of Revenue Collection for Waste Products at Gerezani Ward (*ZABUNI YA KUFANYA USAFI, KUKUSANYA TAKA NGUMU KWENYE MAKAZI YA WATU, MAJENGO YA*



BIASHARA, MITAA NA OFISI MBALIMBALI, KUZOA TAKA NA KUPIPELEKA KATIKA DAMPO LA PUGU KINYAMWEZI NA KUKUSANYA ADA ZA TAKA KATIKA KATA ZA MJINI KATI (CBD) KATIKA MANISPAA YA ILALA – LOT 37 (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 this Appeal may be summarized as follows: -

The Tender was conducted competitively through online system (TANePS) as per 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 1st Respondent through Tanzania National e-Procurement System (TANePS) issued an Invitation to Tender through a letter dated 25th March 2020 whereby qualified tenderers were invited to submit their tenders. The deadline for submission was set for 14th April 2020. Only three tenderers, the Appellant inclusive, responded to the invitation and the tenders were publicly opened through TANePS.

Tenders were then subjected to evaluation which was conducted into four stages namely; preliminary, technical, detailed and post-qualification. During preliminary evaluation all tenderers were found to be responsive hence subjected to technical evaluation. According to the Evaluation Report dated 4th June 2020 two tenderers including the Appellant were disqualified at this stage. The Appellant was disqualified



for failure to comply with the three years experience requirement as it submitted contract number LGA/015/2016/2017/NCS/02 LOT 04 of 2016 which was between M/s Pick Trading Ltd and Ilala Municipal Council as a proof of its experience. The remaining tenderer that is the 2nd Respondent was subjected to detailed evaluation and later on post qualification. The 2nd Respondent was found to be the highest evaluated and was recommended for award of the contract at a monthly remission of Tanzanian Shillings Eight Million Five Hundred Thousand (TZS 8,500,000/=).

The recommendations of the evaluation committee were submitted to the Tender Board at its meeting held on 20th June 2020 and the proposed award was approved. The 1st Respondent through a letter dated 8th July 2020 issued the notice of intention to award the Tender to all tenderers who participated in the Tender process. The Notice informed them that the Tender is intended to be awarded to M/s Kajenjere Trading Co. Ltd at a monthly remission of Tanzanian Shillings Eight Million Five Hundred Thousand (TZS 8,500,000/=). The said notice also informed the Appellant that, its tender had the lowest price of Tanzanian Shillings Six Million (TZS 6,000,000/=) compared to the price of the 2nd Respondent, thus it was not recommended for award.

Dissatisfied with the reason given for its disqualification, on 13th July 2020, the Appellant applied for administrative review to the 1st Respondent pursuant to Section 96 (1) and (4) of the Act. On 17th July 2020 the 1st Respondent issued a decision which dismissed the Appellant's application for administrative review. Aggrieved further, on 27th July 2020, the Appellant lodged this Appeal.

GROUND OF APPEAL

The grounds of Appeal as stated in the Appellant's Statement of Appeal as well as oral submissions during the hearing are summarized as follows: -

1. That, the Appellant disputes its disqualification for the reason that it had the lowest price of TZS 6,000,000/= from the revenue collection of TZS 65,000,000/=: compared to the highest price of TZS 8,500,000/= from the revenue collection of TZS 100,000,000/=: quoted by the 2nd Respondent. The Appellant contended that the price quoted by the 2nd Respondent during the opening of the tender was TZS 12,325,000/= as indicated in the TANePS system. However, the same was reduced to TZS 8,500,000/= during evaluation.

The Appellant disputes the changes made to the price of the 2nd Respondent on the ground that according to Item (a), (b) and (i) of the evaluation criteria provided in the Tender Document tenderers were required to submit detailed and correct breakdown of the expected income and expenditure of the project. Thus, the 1st Respondent having noted errors on the 2nd Respondent's quoted price it ought to have disqualified it. The 1st Respondent's act of correcting errors found in the 2nd Respondent's tender contravened the requirement set on its own Tender Document.

2. That, the evaluation of the tender by the 1st Respondent was based on unrealistic and non achievable assumption due to the current data of revenue collection at Gerezani Ward. The Gerezani



Ward has a total of 507 households from which a total revenue of TZS 10,140,000/= could be collected. The revenue from other businesses in the same area is TZS 59,960,000/= which makes a total revenue collection per month to be TZS 70,000,000/=. There is a float of TZS 5,000,000/= for unforeseen circumstances. Thus, if float charges are deducted from monthly collection the remaining balance as a total revenue collection per month is TZS 65,000,000/=. According to the Appellant its breakdown of revenue collection is based on reports from POS Machines of M/s Pick Trading Company Limited who was operating at Gerezani Ward and its revenues were audited by the 1st Respondent.

The Appellant expounded its argument by indicating that due to changes brought by Ilala Municipal By Laws titled "Sheria Ndogo za (Afya na Usimamizi wa Mazingira) za Halmashauri ya Manispaa ya Ilala za mwaka 2019 GN. No. 526 (hereinafter referred to as "**GN. No. 526 of 2019**") rates of revenues were reduced in most of the sources, thus collection of TZS 100,000,000/= is impossible.

The Appellant added that, the highest evaluated price of TZS 8,500,000/= is equivalent to 8.5 % of the total revenue collection of TZS 100,000,000/= per month. Thus, the Tender has been awarded to the 2nd Respondent based on unrealistic and non achievable assumption.

3. That, if the 1st Respondent's interest was to award a tender to a service provider who had offered the highest price, the 2nd Respondent ought to have been awarded Lot 38 where it offered to



remit TZS 14,960,000 /= per month compared to the price of TZS 6,414,040/= offered to be remitted by the proposed bidder in that particular Lot. That is to say, the 2nd Respondent ought to have been awarded Lot 38 and 41.

4. That, the 1st Respondent's decision to award the tender to the 2nd Respondent contravened the procurement principles enshrined under Section 4 of the Act as it was irrational, unreasonable, unfair, excessive, highly technical based on rigid form over substance and highly pre-judicial to the Appellant.
5. That, the 1st Respondent's allegation that the Appellant submitted a contract in the name of M/s Pick Trading Ltd instead of the Appellant's name was an afterthought raised by the 1st Respondent with the purpose of distracting the Appellant's complaint, since the same has not been raised in the notice of intention to award. The Appellant argued that it has been working together with M/s Pick Trading Ltd in some of the business ventures. The 1st Respondent was duly notified about such a relationship through a letter dated 6th June 2016.

The Appellant submitted further that, it complied with the experience requirement as it had attached its previous performed contracts to substantiate the same.

6. Finally, the Appellant prayed for the following orders: -
 - i. An order requiring the 1st Respondent to set aside its decision to award the tender to the 2nd Respondent and reconsider all the bids in accordance with fairness and justice;

- ii. Alternatively, the Appeals Authority reverses the 1st Respondent's unlawful decision and substitute it with its own decision and re-evaluate the tenders fairly;
- iii. A declaration that the Appellant satisfied the requirements of the Tender Document;
- iv. Payment by the Respondents of TZS 3,000,000/= incurred as total costs and legal fees in handling this matter;
- v. Payment by the Respondents of TZS 300,000/= being costs for filing this appeal; and
- vi. Any other remedy as this Appeals Authority may deem fit and just to grant.

REPLY BY THE 1ST RESPONDENT

The 1st Respondent's reply as well as oral submissions to the Appellant's grounds of Appeal are summarized as follows: -

1. The 1st Respondent submitted that, according to GN. No. 526 of 2019, revenue collection would increase as other sources have been identified. The new sources of collection include godowns, open air restaurants, stores and sim banking agents.
2. That, the procurement process was conducted in compliance with Regulation 203 of the Regulations which indicates that in revenue collection, the award should be made to the highest evaluated bidder after consideration of all the criteria provided in the Tender Document. It added further that, the 2nd Respondent complied with all the criteria stipulated in the Tender Document and



emerged the highest evaluated bidder, thus was recommended for award of the Tender.

3. That, the 1st Respondent's decision observed the requirement of equality and fair treatment to all the bidders throughout the tender process. It added that, the Tender was published in the TANePS and was open to all bidders. Also, in conducting this Tender process the 1st Respondent adhered to the requirement of Regulations 76 and 347 of the Regulations. Bidders were given chances to seek for clarification and positive replies were given to all bidders. Further, the notice of intention to award the Tender was issued to all bidders and a chance to lodge complaints was given, thus the procurement process was not biased as claimed by the Appellant.
4. That the 2nd Respondent complied with the requirements of Item 10 of the statement of requirement as it requested a profit of 15% which does not exceed 20% of the total revenue collection minus expenditure.
5. That, the breakdown of revenue collection as stated by the Appellant in its Statement of Appeal differs with those submitted by the 2nd Respondent particularly on total expenses, whereby the Appellant's breakdown indicates TZS 70,000,000/= while that of the 2nd Respondent is TZS 90,000,000/=.
6. Regarding the revenue collection from each household of Gerezani Ward plus other businesses, the Respondent disputes the said breakdown by the Appellant.



7. That, the Appellant was also disqualified for failure to submit documents to prove its experience. The Appellant attached a contract which belongs to another company that had not participated in the Tender process contrary to Item 9 of the Conditions of Contract and Item (g) of the Instruction to Tender. The Respondent added further that there was no joint venture document attached to the Appellant's tender to indicate that there was any relationship between M/s Pick Trading Ltd and the Appellant.
8. Finally, the 1st Respondent prayed for the following orders: -
 - i. That, this Appeals Authority uphold the decision made by the 1st Respondent and declare that the process of awarding the Tender to the 2nd Respondent was done fairly;
 - ii. That, this Appeals Authority maintain the lawful decision made by the 1st Respondent;
 - iii. That, this Appeals Authority maintain and bless the intention of the 1st Respondent to award the tender to the highest evaluated bidder since the Appellant did not comply with the Tender requirement compared to the 2nd Respondent;
 - iv. That, the cost for this appeal be borne by the Appellant; and
 - v. That, the 1st Respondent prayed for dismissal of the Appeal in its entirety for lack of merits.



REPLY BY THE 2ND RESPONDENT

The 2nd Respondent's reply as well as oral submissions are summarized as follows: -

1. That, the 2nd Respondent's price is realistic and achievable as it is based on the existing revenue sources as well as new sources introduced by GN. No. 526 of 2019. Among the newly introduced sources include; fee for stores, godowns, sim banking agents and open-air restaurants. The new sources are provided for under Items 15, 20, 21, 28, 35, 40, 49, 61, 62(a), 65, 78, 82, 93, 94, 95 and 99 of the First Schedule to GN. No. 526 of 2019. The new levy assured the 2nd Respondent that revenue collection quoted by it would be achieved.

In expounding this point, the 2nd Respondent argued that the Appellant had attached to its Statement of Appeal a letter substantiating that M/s Pick Trading Ltd in the months of March and July of 2017 and March, 2018 had collected revenues above TZS 70,000,000/= at Gerezani Ward. This was achieved even before the new sources of the revenue were introduced.

2. That, the 2nd Respondent was proposed for award of the Tender after being evaluated and found to have complied with all the criteria specified in the Tender Document. Further, it had the highest evaluated price compared to other bidders pursuant to Regulation 203 of the Regulations.
3. That, the 2nd Respondent complied with Item 10 of the Statement of requirement as it requested a profit of 15% of the total profit.



The Appellant's argument that the 2nd Respondent's profit exceeds the 20% stipulated in the Tender Document is unfounded.

4. That, the 2nd Respondent disputes the Appellant's calculations contained on its Statement of Appeal since the same was not submitted by the 2nd Respondent. The Appellant indicated that the 2nd Respondent's expenditure was TZS 70,000,000/= which was not true.
5. That, the documents attached by the Appellant to prove its experience on revenue collection are in the name of M/s Pick Trading Ltd for the year 2016, 2017, 2018, 2019 and 2020, while the firm has not participated in the Tender Process. The Appellant's act in this regard contravened Item 6 of the requirement of the Tender Document.
6. Finally, the 2nd Respondent prayed for the following orders: -
 - i. That, the Appeals Authority uphold the decision made by the 1st Respondent to award the contract to the 2nd Respondent because the Tender process was conducted fairly;
 - ii. That, the Appeal be struck out as it has no substance in law and there is no need to re-evaluate the tenders because the decision made was lawful and fair;
 - iii. The Appeals Authority should not declare the Appellant as a successful bidder because it does not meet the requirement of the Tender Document and the Regulations as it was not the highest evaluated bidder;



- iv. The costs requested at paragraph (iv) and (v) of the Appellant's prayer should be carried by the Appellant because the Appeal has no merit and filed maliciously with the intention to delay the process of awarding the contract to the 2nd Respondent on time.
- v. The Appellant to pay the 2nd Respondent's legal and administration costs incurred in preparing and filing the statement of reply at a tune of TZS 3,000,000/= for legal services and TZS 500,000/= for administrative expenses.

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: -

- 1. Whether the disqualification of the Appellant's tender is justified;**
- 2. Whether the award of the Tender to the 2nd Respondent is justified; and**
- 3. What reliefs if any are the parties entitled to.**

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

1. Whether the disqualification of the Appellant's tender is justified

In analyzing this issue, the Appeals Authority revisited the Evaluation Report obtained from the TANePS system together with other relevant



documents submitted by the parties. In the course of so doing it was observed that, the Appellant was disqualified at the technical evaluation stage for failure to comply with the experience requirement. It transpired that the Appellant submitted two contracts each for a period of three months. It also submitted contract number LGA/015/2016/2017/NCS/02 LOT 04 of 2016 which was between M/s Pick Trading Ltd and Ilala Municipal Council as a proof of its experience.

Furthermore, it was observed that, the notice of intention to award dated 8th July 2020 from the 1st Respondent indicated that the Appellant was disqualified for having quoted a lower price of Tanzanian Shillings Six Million (TZS 6,000,000/=) compared to Tanzanian Shillings Eight Million Five Hundred Thousand (TZS 8,500,000/=) quoted by the 2nd Respondent.

The Appeals Authority revisited Item 2(c) of the evaluation criteria contained in the Tender Document and observed that it clearly required tenderers to submit proof of their three years working experience on works of similar nature. The said Clause read as follows: -

2 "Uchambuzi wa kina

c) Uthibitisho wa uzoefu wa kazi zinazofanana na hii (usiopungua miaka 3)"

The Appeals Authority revisited the Appellant's tender in the TANePS system and observed as a proof of its experience it had attached contract number LGA/015/2016/2017/NCS/02 LOT 04 of 2016



between M/s Pick Trading Ltd and Ilala Municipal Council; Addendum to contract No. IMC/WAK/172/2009 between Ilala Municipal Council and the Appellant for Solid and Waste Collection, Transportation and Disposal at Kivukoni, Kisutu and Mchafukoge Wards in Ilala Municipal Council; and the contract entered on 14th May 1997 between the Appellant and Dar es Salaam City Council, Ilala Zone for road cleaning.

Furthermore, the Appellant attached a letter of appreciation which shows that, it once entered into contract number LGA/015/IMC/2016/2017/HQ/NCS/10 LOT 01 of 2016 with Ilala Municipal Council, but the contract itself was not attached.

From the documents submitted it is crystal clear that the Appellant lacked the requisite experience as copies of contracts attached do not indicate that it had performed contracts of similar nature. The only contract which is similar to the tender under Appeal was the one entered between Ilala Municipal Council and M/s Pick Trading Ltd which had no legal relationship with the Appellant.

The Appeals Authority revisited Regulation 206 (2) of the Regulations which provides 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 provided)

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Given the circumstances, it is evident that the Appellant failed to comply with the experience requirement in this Tender thus, it was properly disqualified.

The Appeals Authority noted with concern failure by 1st the Respondent to inform the Appellant the actual reason for its disqualification in the notice of intention to award as required under Regulation 231(4) (c) of the Regulations. It is clear from the Evaluation Report that the Appellant was disqualified at the technical evaluation stage and did not even reach the price comparison stage. Therefore the reason for its disqualification was not the lower price. The appropriate reason was mentioned at a later stage when rejecting the Appellant's application for review. Given the existence of a comprehensive Evaluation Report, the appropriate reason should have been clearly indicated in the notice of intention to award sent to the Appellant.

From the above findings the Appeals Authority concludes the first issue in the affirmative, that the disqualification of the Appellant was justified.

2. Whether the award of the Tender to the 2nd Respondent is justified

In resolving this issue, the Appeals Authority considered the Appellant's argument that the award proposed to the 2nd Respondent was not valid as its read out price was TZS 12,325,000/= as indicated in the TANePS system and not TZS 8,500,000/= indicated in the notice of intention to award.



The Appeals Authority revisited the appeal record and observed that the price quoted by the 2nd Respondent at the Tender Opening was TZS 12,325,000/=. However, the notice of intention to award indicated that the intended monthly remission is TZS 8,500,000/=. The Appeals Authority further observed that the said amount was changed due to the correction of arithmetical errors done by the Evaluation Committee during detailed evaluation.

Regulation 207 (2) (a) of the Regulations allows a procuring entity to conduct correction of arithmetical errors which are discovered during the examination of tenders. Regulation 207 (2) (a) reads as follows: -

*"A procuring entity shall correct purely arithmetical errors that are **discovered during the examination of tenders and the procuring entity shall give prompt notice of any such correction to a tenderer that submitted the tender**".*

(Emphasis provided)

Having revisited the 2nd Respondent's bid, it was observed that the corrections done were due to summation errors. Therefore, the Appeals Authority finds that the correction of errors which led to the change of the read out price was properly done.

Given the circumstances the Appeals Authority concludes the 2nd issue in the affirmative.

3. What reliefs if any are the parties entitled to.

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

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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 parties this 21st day of August 2020.

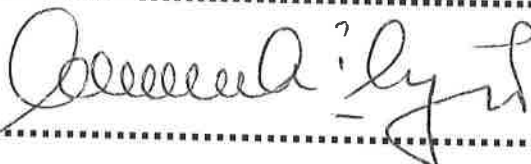
HON. JUSTICE (RTD) SAUDA MJASIRI


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CHAIRPERSON

MEMBERS:

1. CPA. FREDRICK RUMANYIKA 
.....

2. MR. RHOBEN NKORI 
.....

3. ADV. ROSAN MBWAMBO 
.....