

**IN THE  
PUBLIC PROCUREMENT APPEALS AUTHORITY**

**APPEAL NO. 19 OF 2020-21**

**BETWEEN**

**M/S PANONE AND COMPANY LIMITED..... APPELLANT**

**AND**

**SAME DISTRICT COUNCIL ..... RESPONDENT**

**DECISION**

**CORAM**

- |                                     |                 |
|-------------------------------------|-----------------|
| 1. Hon. Justice (rtd) Souda Mjasiri | - Chairperson   |
| 2. CPA. Fredrick Rumanyika          | - Member        |
| 3. Mr. Rhoben Nkori                 | - 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. Engelberth Boniphace | - Advocate, BF & B. CO (Advocates) |
| 2. Mr. Boniface Muthaura    | - Business Support Manager         |
| 3. Mr. Hamdani Makodia      | - Director                         |

## **FOR THE RESPONDENT**

1. Ms. Anastazia Tutuba - District Executive Director
2. Mr. Thomas Kiria - Head of Procurement Management Unit
3. Ms. Upendo Kivuyo - District Legal Officer
4. Mr. Dominic Nicholaus - Legal Officer

The Appeal was lodged by **M/S PANONE AND COMPANY LIMITED** (hereinafter referred to as "**the Appellant**") against the **SAME DISTRICT COUNCIL** (hereinafter referred to as "**the Respondent**").

The Appeal is in respect of Tender No. LGA/049/NC/2020/2021/10 for Ukodishwaji wa kituo cha mafuta kilichopo jirani na stendi ya mabasi Same Mjini (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 Tanzania National e-Procurement System (TANePS) as specified in 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**").

On 24<sup>th</sup> November 2020 the Respondent through TANePS invited qualified tenderers to submit their tenders. Two tenderers, the Appellant inclusive,

responded to the invitation. The submitted tenders were publicly opened on 9<sup>th</sup> December 2020 through TANEPS.

Tenders were then subjected to evaluation which was conducted into two stages namely; technical and financial. During technical evaluation both tenders were found to be responsive, hence were subjected to financial evaluation. After completion of the evaluation process, the Evaluation Committee recommended award of the Tender to the Appellant at the contract price of Tanzanian Shillings Two Million Six Hundred Fifty Thousand Shillings (TZS 2,650,000.00) Only VAT Inclusive. The Tender Board at its meeting held on 11<sup>th</sup> December 2020 approved award as recommended by the Evaluation Committee. However, the Accounting Officer after receipt of the Tender Board's resolution on approval of award raised a concern that the Appellant should not be awarded the Tender as it failed to pay rent for a period of six months in the previous contract and therefore required the Tender to be re-advertised.

The observations of the Accounting Officer were submitted to the Tender Board at its meeting held on 31<sup>st</sup> December 2020 whereby after deliberations Members of the Tender Board concluded that the tender be re-advertised.

On 31<sup>st</sup> December 2020, the Respondent issued the Notice of Intention to award to all tenderers participated in the Tender. The notice also informed the Appellant that its tender was unsuccessful as it failed to pay rent for a period of six months in the previous contract. The Appellant was also required to handover the petrol station to the Respondent on 1<sup>st</sup> January 2021 as its contract ended on 31<sup>st</sup> December 2020.

Dissatisfied with the reason given for its disqualification, on 7<sup>th</sup> January 2021, the Appellant applied for administrative review to the Respondent. On 14<sup>th</sup> January 2021 the Respondent issued its decision which dismissed the Appellant's application for review. Aggrieved further, on 20<sup>th</sup> January 2021, the Appellant lodged this Appeal.

### **SUBMISSIONS BY THE APPELLANT**

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 Respondent advertised the tender and the Appellant was one of the tenderers who participated and adhered to the requirements of the Tender Document.
2. That, on the 2<sup>nd</sup> January 2021 the Appellant received a Notice of Intention to award from the Respondent dated 31<sup>st</sup> December 2020 which informed it that its tender was unsuccessful.
3. That, in the said Notice the Respondent stated categorically that, the Appellant was disqualified for failure to pay rent for a period of six months in the previous contract. The Appellant submitted that, the reason given for its disqualification was not fair as payment of rent was not amongst the tender requirement. Thus, the Respondent unfairly disqualified the Appellant's tender.
4. That, evaluation process ought to have been conducted pursuant to Section 40(7) of the Act which requires adherence to the requirements of the Act, Regulations, Rules and Guidelines. To the contrary, the

Evaluation Committee did not adhere to the requirements of the law as a result it disqualified the Appellant in this Tender.

5. That, the Respondent failed to conduct a detailed evaluation of the Appellant's tender as it reached a conclusion which is "..... kwa sasa mmekuwa wasumbufu wa kulipa kodi ya pango kwa kipindi cha miezi sita, hivyo kutokana na sababu hiyo halmashauri imesitisha zoezi la kuwatunuku zabuni hiyo". The conclusion reached by the Respondent was contrary to Regulations 202(4) (a) and 203(1) of the Regulations.
6. That, way back in 2014 the Appellant entered into a contract with the Respondent to construct a petrol station. The said contract indicated clearly that the construction costs were to be refunded by the Respondent after completion of the assignment. The Respondent has been refunding the Appellant part of the claimed amount. The remaining balance to the Respondent is TZS. 13,030,594.54 and the Respondent had acknowledged to recognize the debt.
7. That, on 12<sup>th</sup> May 2020 the Appellant wrote a reminder letter to the Respondent referenced PAN/MD/000-46/20 for it to pay the remaining balance of TZS. 13,030,594.54. In response thereof, the Respondent informed the Appellant that the said debt will be included in the lease agreement. Based on the Respondent's response the Appellant assumed that the debt will offset the monthly rent as the said TZS. 13,030,594.54 was sufficient to pay rent for six months.
8. That, from 2014 the Appellant has been paying monthly rent and has invested in the Respondent's area an amount over TZS. 100,000,000.00. Thus, the Respondent's act of refusing to award

the Tender to it is illegal as it contravenes Section 72(1) (2) and (3) of the Act.

9. That, on 22<sup>nd</sup> January 2021 the Appellant became aware that the Respondent re-advertised the same tender while there was a pending Appeal before the Appeals Authority. Thus, the Appellant notified the Respondent about the existence of the Appeal and urge them to stop the process. To the contrary, the Respondent proceeded with the tender process.

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

- i. That, the re-advertised Tender No. LGA/049/NC/2020/2021/10 be cancelled ab-initially as there is an existing contract between the Appellant and the Respondent;
- ii. That, the Appellant be compensated in terms of time by the Respondent as for one year now the Appellant has been not comfortable in conducting his business;
- iii. The Respondent compensate the Appellant all the cost incurred by it in the course of making follow up of this case including but not limited to legal fees of TZS. 8,000,000.00;
- iv. Loss of profit by the Appellant to the tune of TZS. 23,000,000.00 be borne by the Respondent;
- v. General damages to the tune of TZS. 30,000,000.00 be paid by the Respondent to the Appellant; and
- vi. Any other reliefs this Honourable Authority may deem just and fit to grant the Appellant.

## REPLY BY THE RESPONDENT

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

1. That, failure to pay monthly rent a reason which disqualified the Appellant's tender was not among the evaluation criteria provided for in the Tender Document. The Respondent's Tender Board at its meeting held on 11<sup>th</sup> December 2020 approved award of contract to the Appellant. However, after the recommendations of the Tender Board being submitted to the Accounting Officer, the latter rejected the recommendation of award. The Accounting Officer indicated that it rejected the Tender Board's recommendations of award on the ground that the Appellant was defaulter, as it failed to pay six months rent in the previous contract despite several reminders issued on 3<sup>rd</sup> February 2019, 22<sup>nd</sup> November 2019, 15<sup>th</sup> December 2020 and 30<sup>th</sup> December 2020. Thus, the Accounting Officer required the Tender to be re-advertised.
2. That, the Appellant was served with a letter dated 31<sup>st</sup> December 2020 which informed it that its award was suspended temporarily due to rent arrears. The Respondent stated further that, the Appellant failed to act on time, hence on 8<sup>th</sup> January 2021 it re-advertised the tender and the Appellant was among the bidders who participated.
3. That, the Respondent recognized the Appellant's claim with regard to the construction of the petrol station and has already refunded the sum of TZS. 88,254,000.00 to the Appellant.

4. That, the Respondent's re-advertised the tender due to review of budget which was conducted internally and queries from Internal and External Auditors.

5. That, the Respondent argued that the Appellant failed to pay the required rent of six months despite being issued with several control numbers.

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

- i. That, there is no existing contract between the Appellant and the Respondent. The contract expired on 31<sup>st</sup> December 2020;
- ii. That, the Appellant is not entitled to any compensation as the Respondent never interfered with the Appellant peacefully and quite enjoyment of the demised premises;
- iii. That, the Appellant is not entitled to any disbursement for any follow up since that the Respondent doors were always open to the Appellant but he never showed up in person to discuss matters with the Respondent;
- iv. That, the Appellant did not incur any loss as it was operating its business through out its contract until 2<sup>nd</sup> February 2021 when it officially handed over the premises to the Respondent;
- v. That, the alleged general damages at the tune of TZS. 30,000,000.00 have not been substantiated; and
- vi. That, the Appeal being dismissed for being frivolous and unsubstantiated.



In making rejoinder the Appellant submitted that, the Respondent's letter dated 31<sup>st</sup> December 2021 to the Appellant was a notice of intention to award and not a rejection letter as purported by the Respondent. The Appellant added further that Section 59 of the Act elucidate various scenarios which may warrant a rejection of tender. Neither of the circumstances provided in Section 59 fits the Respondent's scenario.

Furthermore, the Appellant disputed the Respondent's argument that it re-advertised the tender due to review of budget which was conducted internally. According to the Appellant there was no review of budget. The re-issued tender document contained the same requirements as were provided in this disputed Tender. The Appellant further counter argued the Respondent's argument regarding failure to pay the required rent of six months despite being issued with control numbers. The Appellant denied to have been issued with any of the control numbers.

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

During the hearing 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; and**
- 2. What reliefs if any are the parties entitled to.**

The Appeals Authority proceeded to resolve the above mentioned issues as follows: -

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

In resolving this issue, the Appeals Authority revisited the Tender Document together with other relevant documents submitted by the parties and observed that, the Appellant's tender was disqualified for failure to pay rent for a period of six months in the previous contract.

To ascertain the validity of the Appellant's disqualification in this regard, the Appeals Authority revisited the criteria for evaluation provided for under page 8 and 9 of the Tender Document and observed that payment of rent on previous contract was not amongst the criteria for evaluation.

The Appeals Authority revisited Section 72 (1) & (2) of the Act read together with Regulations 203 (1) and 206 (1) of the Regulations which provide as follows: -

Sec. 72 (1) "***The basis for tender evaluation and selection of the successful tenderer shall be clearly specified in the tender document***".

Sec. 72 (2) "**The tender documents shall specify factors, in addition to price, which may be taken into account in evaluating a tender and how such factors may be quantified or otherwise evaluated**".

Reg. 203 (1) "**The tender evaluation shall be consistent with terms and conditions prescribed in the tender documents and such evaluation shall be**

**carried out using the criteria explicitly stated in the tender documents”.**

Reg. 206 (1) ***“The procuring entity’s determination of a tender’s responsiveness shall be based on the contents of the tender itself*** without recourse to extrinsic evidence”.

(Emphasis added).

The above quoted provisions require tenders to be evaluated in accordance with the criteria provided in the Tender Document and any tender which fails to comply with the stipulated criteria should be rejected.

Having related the record of Appeal to the above quoted provisions, the Appeals Authority is of the settled view that, Respondent erred in law for disqualifying the Appellant’s tender basing on the requirement which was not provided for in the Tender Document.

The Appeals Authority observed further that, if the Respondent was not satisfied with the Appellant’s conduct in the previous contract, it ought to have dealt with all the underlying issues as per the terms of that contract. The Respondent’s act of including issues relating to previous contract to the Tender under Appeal was not proper as this were two distinct processes.

The Appeals Authority noted with concern the Respondent’s act of proceeding with the tender process of the re-advertised tender while it was required to suspend the whole process. According to the record of Appeal, the Appeals Authority required the Respondent to suspend the

whole procurement process vide its letter dated 22<sup>nd</sup> January 2021 sent to it via email. The Respondent claimed to have received the Appeals Authority's letter on 25<sup>th</sup> January 2021. The record of Appeal indicates that tenders for the re-advertised Tender were opened on 22<sup>nd</sup> January 2021. The Respondent went on with its internal processes until on 27<sup>th</sup> January 2021 when the Tender Board approved award to the proposed successful tenderer. On the same date 27<sup>th</sup> January 2021, the Respondent further notified the unsuccessful tenderers the tender results. During the hearing the Respondent conceded to have not suspended the tender process as was required by the Appeals Authority. From the above facts the Appeals Authority finds the Respondent's act of proceeding with the Tender process and disobey the suspension order of this Appeals Authority to have contravened Section 100(4) of the Act.

From the above findings the Appeals Authority concludes the first issue in the negative that the Appellant's disqualification was not justified.

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

Given the Appeals Authority's findings hereinabove, that the Appellant was unfairly disqualified, the Appeal is hereby allowed. However, the Appeals Authority having revisited the record of Appeal observed that in the Tender under appeal the Appellant offered a rent of TZS. 2,650,000.00 per month. In the re-advertised tender in which the Appellant also participated, the successful tenderer offered to pay a rent of TZS. 5,000,000.00 per month to the Respondent. For the sake of public interest it is obvious that the price offered by the successful tenderer in the re-advertised tender has value for money rather than the

price offered by the Appellant in the tender under appeal. Since the re-advertised tender was conducted in the contravention of the law as the Respondent disobeyed the order of this Appeals Authority which required it to suspend the procurement process after the appeal was lodged, the Appeals Authority find it to be improper to bless the Respondent's act in this regard. Therefore, the Appeals Authority hereby nullifies the whole tender processes and orders the Respondent to re-start the tender process in observance of the law. 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 26<sup>th</sup> day of February 2021.

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



**CHAIRPERSON**

**MEMBERS:**

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

**2. MR. RHOBEN NKORI** .....