

**IN THE  
PUBLIC PROCUREMENT APPEALS AUTHORITY  
AT DAR ES SALAAM**

**APPEAL CASE NO. 19 OF 2019-2020**

**BETWEEN**

**M/S SHINYANGA I AND M COMPANY  
LIMITED.....APPELLANT**

**AND**

**TANZANIA REVENUE AUTHORITY.....1<sup>ST</sup> RESPONDENT**

**INNOX TRADING COMPANY LIMITED....2<sup>ND</sup> RESPONDENT**

**RULING**

**CORAM**

- |                                      |                 |
|--------------------------------------|-----------------|
| 1. Hon. Justice (Rtd), Souda Mjasiri | - Chairperson   |
| 2. Dr. Leonada Mwangike              | - Member        |
| 3. Mr. Rhoben Nkori                  | - Member        |
| 4. Ms. Ndeonika Mwaikambo            | -Member         |
| 5. Ms. Florida Mapunda               | -Ag. Secretary. |

**SECRETARIAT**

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

**FOR THE APPELLANT**

Mr. Issa Mbaraka Benedicto -Managing Director

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## FOR THE 1<sup>ST</sup> RESPONDENT

1. Ms. Sarah Senso -Ag. Regional Manager
2. Mr. Colman Makoi - Legal Counsel
3. Mr. Mozes Mwakatunga -Regional Supplies Officer
4. Ms. Bivery B. Lyabonga - Legal Intern

## FOR THE 2<sup>ND</sup> RESPONDENT

Ms. Magreth K. Salum - Office Coordinator

This Appeal was lodged by M/s Shinyanga I and M Company Limited (hereinafter referred to as "the Appellant") against Tanzania Revenue Authority commonly known by its acronym, TRA and M/s Innox Trading Company Limited (hereinafter referred to as "the 1<sup>st</sup> and 2<sup>nd</sup> Respondent respectively").

The Appeal is in respect of Tender No. AE/023/TRA/SHY/S.1/2019/2020 for the Provision of Cleaning Services (hereinafter referred to as "**the Tender**").

The Tender was conducted using the Restricted Tendering procedures specified in the Public Procurement Regulations, Government Notices No. 446 of 2013 and 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 Appeal can be summarized as follows:-

On 31<sup>st</sup> October 2019, the Respondent randomly selected six (6) shortlisted tenderers by the Government Procurement Services



Agency (GPSA) to submit their quotations for the Tender. The deadline for the submission of Quotations was set for 6<sup>th</sup> November 2019. By the deadline, five (5) Tenderers submitted their bids including the Appellant. The Bids were opened and then subjected to evaluation which was conducted into four stages namely; Preliminary Evaluation, Evaluation of Technical specifications, Financial comparison and the Post Qualification. Four (4) bids including that of the 2<sup>nd</sup> Respondent were disqualified at the Preliminary stage for being non-responsive to the requirements of the Tender Document. The 2<sup>nd</sup> Respondent's bid was disqualified for failure to contain currently executed contracts. The Appellant's bid was solely subjected to financial analysis and was ultimately proposed for award of the contract by the Evaluation Committee.

On 20<sup>th</sup> December 2019, the Tender Board deliberated on the Evaluation Report and observed that there were contradictions with regard to the number of past and current contracts, leading to four (4) out of five (5) bidders to be disqualified for failure to submit current and past contracts. While the Instructions to Tenders (ITT) required bidders to submit a number of past and current contracts, the Terms of Reference required bidders to submit a number of completed contracts. It also observed that the read out prices of some bidders were VAT inclusive while others were VAT exclusive. Therefore, the Tender Board ordered the Procurement Management Unit to return the Evaluation Report to the Evaluation Committee for re-evaluation.



On 5<sup>th</sup> and 6<sup>th</sup> February 2020, the Evaluation Committee re-evaluated all Tenders afresh. In that process, the bid by the Appellant and that by the 2<sup>nd</sup> Respondent were found to be responsive in all stages of evaluation and were finally subjected to price comparison. The Tender by the 2<sup>nd</sup> Respondent was ranked first and that by the Appellant was ranked second. Therefore, the tender by the 2<sup>nd</sup> Respondent was proposed for award of the contract by the Evaluation Committee. On 6<sup>th</sup> February 2020, the Tender Board approved the award recommendations to the 2<sup>nd</sup> Respondent at a contract price of TZS. 2,000,000/- VAT inclusive per month, for five (5) months.

On 16<sup>th</sup> February 2020, the 1<sup>st</sup> Respondent issued a Notice of Intention to award the Tender to all tenderers who participated in the Tender. The Notice informed the Appellant that its tender price was higher than the 2<sup>nd</sup> Respondent's. Dissatisfied, on 21<sup>st</sup> February 2020, the Appellant filed its application for administrative review to the 1<sup>st</sup> Respondent's Accounting Officer. However, the Accounting Officer did not issue its written decision within seven (7) working days prescribed by the law. Hence, on 11<sup>th</sup> March 2020, the Appellant filed this Appeal.

### **SUBMISSIONS BY THE APPELLANT**

The Appellant's grounds of Appeal as deduced from its documents may be summarized as follows:-

1. That, on the Tender opening date, the Appellant's Managing Director was among the bidders' representatives who attended the session. The bidders' representatives were allowed to check



the submitted quotations. In the course of doing so, the Appellant's representative observed that the 2<sup>nd</sup> Respondent, (M/s Innox Trading Company) did not attach the number of currently executed contracts as required under Clause 1.3 of the Instructions to Tenderers.

2. That, the 2<sup>nd</sup> Respondent attached irrelevant tax clearance certificate issued in January 2019, which was not for the respective tender. The Tax Clearance ought to be relevant to the respective tender and issued on time to suit the intended purpose and not vice versa.
3. That, the 2<sup>nd</sup> Respondent deliberately violated Clause 10. 4, Part II of the Quotation Document (Statement of Requirements/ Terms of Reference and Price Schedules) which provided clearly that the service provider must be a compliant tax payer, legally registered by relevant authorities. The 2<sup>nd</sup> Respondent is not tax compliant.
4. That, the 2<sup>nd</sup> Respondent did not comply with Clause 1.9 of the ITT for failure to submit three (3) months current Bank Statement. In addition, its Bank Statement had a nil balance.
5. That, if the evaluation process was conducted properly and in accordance with the Tender Document, the 2<sup>nd</sup> Respondent would not have emerged the winner and that its Tender would have been disqualified before price comparison as required by

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Regulations 202(3),(4)(a) and (5), (203)(1) and (2), (204)(1) and (2)(b) of the Regulations.

6. That, the Evaluation and selection process of the Tenders were not conducted in accordance with the Tender Document and the laid down procedures under the Public Procurement Act.
7. That, the 1<sup>st</sup> Respondent's decision to award the tender to the 2<sup>nd</sup> Respondent was reached without taking into consideration the fact that the tender submitted by the 2<sup>nd</sup> Respondent was not substantially responsive to the terms, conditions and specifications.
8. That, the 1<sup>st</sup> Respondent did not communicate the Notice of Intention to award the Tender timely. While the Notice was issued on 16<sup>th</sup> February 2020, the same was delivered to the Appellant on 20<sup>th</sup> February 2020.
9. That, the accounting officer violated Regulation 106 (1) (b) of the Regulations and Regulation 32 (a) and (e) of the Public Procurement (Amendments) Regulations GN. No. 333 of 2016 for its failure to notify the Appellant on the existence of the complaint lodged. While the Appellant lodged its complaint on 21<sup>st</sup> February 2020, it was notified of the same on 2<sup>nd</sup> March 2020.
10. That, the Accounting Officer participated in handling the complaint contrary to the doctrine of natural justice.



11. That, the Accounting Officer did not respond to the request for administrative review sought.

Finally, the Appellant prayed for the following orders:-

- i. To quash the decision to award the Tender to the proposed successful Tenderer.
- ii. To order the 1<sup>st</sup> Respondent to re-start the Tender process in observance of the law.
- iii. Order the Respondents to pay costs of the Appeal.

### **REPLY BY THE 1<sup>ST</sup> RESPONDENT**

The 1<sup>st</sup> Respondent's reply to the grounds of Appeal may be summarized as follows:-

1. That, it is true that the Appellant's representative was present during Tender Opening Ceremony. However, the assertion that its representatives were allowed to peruse all documents submitted by bidders is unfounded. What was read out during the Tender Opening Ceremony were the names of the bidders and their quoted prices. A claim by the Appellant that it accessed or saw the 2<sup>nd</sup> Respondent's or other bidders' Tax Clearance Certificates is incorrect.
2. That, the Instructions to Tenderers required bidders to submit Tax Clearance Certificate of which the 2<sup>nd</sup> Respondent managed to submit a valid Tax Clearance Certificate.
3. That, the 2<sup>nd</sup> Respondent appended to its tender a bank statement covering a period of ten (10) months. The three (3)





months requirement under the Tender Document was fully met. Therefore there was no unfair advantage given to it by attaching a bank statement for more than three months.

4. That, the tender process as well as the process of review was handled in accordance with the law and procedures. The claim by the Appellant that the process was mis-handled is unjustified and unfounded.
5. That, the Tender evaluation and selection process was done in accordance with the Tender Document and the laid down procurement laws and regulations.
6. That, the 2<sup>nd</sup> Respondent's tender was responsive to all requirements prescribed in the Tender Document.

Finally, the 1<sup>st</sup> Respondent prayed for dismissal of the Appeal with costs.

### **REPLY BY THE 2<sup>ND</sup> RESPONDENT**

The 2<sup>nd</sup> Respondent's reply to the grounds of Appeal may be summarized as follows:-

1. That, it is a Tax Payer and legally registered by the relevant authorities and it operates in accordance with the law.
2. That, it is not true that it violated Clause 1.9 of the ITT as asserted by the Appellant.

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3. That, it is true that the Tender Document required a three months current Bank Statement, which it adhered to and enough amount was deposited in its account.
4. That, the award decision was reached on the basis of law and justice; therefore it deserves to win the Tender under Appeal. The Appellant has failed to address as to how the principle of natural justice was not adhered to by the 1<sup>st</sup> Respondent.

At the hearing of this Appeal and during the framing up of issues, the Appeals Authority was of the considered view that, there was a point of law for determination before hearing the appeal on merit. This was in relation to the legal status of the Tender. From the record of the Appeal, the Appeals Authority noted that the Bid Validity Period had expired and there was no evidence indicating that the same was extended. The Appeals Authority therefore, invited all the parties to address it as to "*whether or not there was a valid tender for consideration*".

### **SUBMISSIONS BY THE APPELLANT**

The Appellant submitted that the Bid Validity Period for this Tender was sixty (60) days. Counting from 6<sup>th</sup> November 2019, when Tenders were opened to 16<sup>th</sup> February 2020 when the 1<sup>st</sup> Respondent communicated the intention to award decision to all bidders, the Bid Validity Period for the Tender had already expired. The Appellant added that it had not received any letter from the Respondent which requested for extension of the Bid Validity Period. Therefore, there is no valid tender for consideration. It was argued further that, since there is no valid Tender in place, the Appeals Authority should nullify

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the whole Tender and order the 1<sup>st</sup> Respondent to re-start the Tender process afresh in observance of the law.

### **SUBMISSIONS BY THE 1<sup>ST</sup> RESPONDENT**

The learned counsel for the 1<sup>st</sup> Respondent conceded that the Bid Validity Period for this Tender was sixty (60) days and that the award of the Tender was made after a lapse of one hundred and six (106) days. He admitted further that the 1<sup>st</sup> Respondent did not seek extension of Bid Validity Period from Tenderers. In concluding his submissions he conceded that failure to extend the Bid Validity Period affected the legality of the Tender. Thus, there is no valid tender.

### **SUBMISSIONS BY THE 2<sup>ND</sup> RESPONDENT**

The 2<sup>nd</sup> Respondent's representative conceded that the Bid Validity Period for the Tender was sixty (60) days but the award of the Tender was not made within such time. No extension of time was granted. She left the matter in the hands of the Appeals Authority.

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

The main issue for consideration and decision is *whether or not there is a valid tender for consideration.*

The Appellant readily conceded that the Bid Validity Period for the Tender under consideration had already expired. Both Respondents conceded as well.

According to Clause 6 of the Instructions to Tenderers (ITT), the Bid Validity Period for the Tender was sixty (60) days from the date of tender opening, that is, 6<sup>th</sup> November 2019. Counting from the tender opening date, the Bid Validity Period expired on 5<sup>th</sup> January 2020. The record of Appeal indicates that the 1<sup>st</sup> Respondent never

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requested for extension of the Bid Validity Period on the bids; instead, it proceeded to issue the Notice of Intention to Award on 16<sup>th</sup> February 2020 as if the Tender was still valid.

The Appeals Authority revisited Section 71 of the Act and Regulations 191 (3) and (4) and 232 (2) of the Regulations which provides guidance on the requirement of the Bid Validity Period. For purposes of clarity the said provisions are reproduced herein below:-

Section 71: *"The procuring entity shall require tenderers to make their tenders and tender securities including tender securing declaration valid for the periods specified in the tendering documents, sufficient to enable the procuring entity to complete the comparison and evaluation of the tenders and for the appropriate tender board to review the recommendations and approve the contract or contracts to be awarded **whilst the tenders are still valid**".*

Regulation 191 (3): *"The period fixed by a procuring entity shall be sufficient to permit evaluation and comparison of tenders, for obtaining all necessary clearances and approvals, and for the notification of the award of contracts and finalise a contract but the **period shall not exceed one hundred and twenty days from the final date** fixed for submission of tenders.*

*(4) In exceptional circumstances, **prior to expiry** of the original period of effectiveness of the tenders, a procuring entity may*

*request tenderers to extend the period for an additional specified period of time”.*

Regulation 232 (2) “***The award shall be made within the period of tender validity*** to the tenderer whose tender has been determined to be the lowest or the highest evaluated, as the case may be, and meets the required financial and managerial capability, legal capacity, experience and resource to carry out the contract effectively”.

[Emphasis Added]

From the above quoted provisions, it is crystal clear that a procuring entity is required to finalize its procurement processes including award of Tenders within the specified Bid Validity Period. It should be noted further that while the law permits extension of time under Regulation 191(4), the same is not automatic. The law allows extension of time if there are exceptional circumstances and the procuring entity is required to request the said extension from the tenderers. In this Tender extension of time was not requested. The Appeals Authority is of the firm view that since the Bid Validity Period had expired way back in January 2020, all the subsequent acts done by the 1<sup>st</sup> Respondent were null and void.

In view of what is stated hereinabove, the Appeals Authority is of the firm view that there exists no valid tender for consideration after the lapse of the Bid Validity Period. Therefore, Appeals Authority shall not delve on the merits of the Appeal.

**What relief (s), if any, are the parties entitled to**



Given the Appeals Authority's findings on the point of law, that there is no valid tender after the expiry of the Bid Validity Period, the Appeal is hereby dismissed. Consequently, the Appeals Authority hereby nullifies the whole Tender process.


As the point of law was raised *suomotu* by the Appeals Authority, each party is to bear its own costs.

Order accordingly.

This Ruling 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 Ruling is delivered in the presence of the Appellant, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents on this 2<sup>nd</sup> day of April 2020.

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

**CHAIRPERSON**

**MEMBERS:**

1. MR. RHOBEN NKORI   
.....

2. DR. LEONADA MWAGIKE   
.....

3. MS. NDEONIKA MWAIKAMBO   
.....