

**IN THE PUBLIC PROCUREMENT APPEALS AUTHORITY
AT DAR ES SALAAM
APPEAL CASE NO. 22 OF 2019-20**

BETWEEN

M/S JUNACO (T) LTDAPPELLANT

AND

**PERMANENT SECRETARY MINISTRY
OF WATERRESPONDENT**

DECISION

CORAM

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

SECRETARIAT

- | | |
|------------------------|-----------------|
| 1. Ms. Violet Limilabo | - Legal Officer |
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FOR THE APPELLANT

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| 1. Ms. Catherine Zakaria | - Company Legal Secretary |
| 2. Ms. Judith Lambert | - Group Operations Manager |
| 3. Ms. Jackline Mashaka | - Procurement Officer |
| 4. Ms. Magreth Mrema | - Procurement Officer |

FOR THE RESPONDENT

- | | |
|-----------------------------|--|
| 1. Mr. Simon Nkanyemka | - Director of Legal Services |
| 2. Mr. Christopher P. Nditi | - Director of Procurement
Management Unit |
| 3. Ms. Tunganega Alex | - Head of PMU TARURA –Dodoma |
| 4. Eng. Christer Mchomba | - Principle Engineer |
| 5. Ms. Edneck Kimaryo | - Supplies Officer |



The Appeal was lodged by M/s Junaco (T) Ltd (hereinafter referred to as "**the Appellant**") against the Permanent Secretary Ministry of Water (hereinafter referred to as "**the Respondent**"). The Appeal is in respect of Tender No. ME-011/2019-2020/G/23 for the Supply of Post-paid Domestic Water Meters and Fittings (hereinafter referred to as "**the Tender**").

The Tender was conducted through the International Competitive Bidding procedures 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 26th February 2020, the East African newspaper dated 29th February 2020, the PPRA's website and the Ministry of Water's website invited eligible tenderers to participate in the Tender. The deadline for submission of Tenders was set for 18th March 2020, whereby ten (10) tenders including that of the Appellant were received.

Tenders were then subjected to evaluation which was conducted into three stages namely; preliminary, detailed and financial evaluation. During preliminary evaluation two tenders were disqualified for being non responsive to the requirements of the Tender Document. The remaining eight tenders were subjected to detailed evaluation. In that process seven tenders, including that of the Appellant, were disqualified for failure to comply with some technical requirements. The remaining tender by M/s



Nyamanolo Investment Ltd was subjected to Financial Evaluation. After completion, the Evaluation Committee recommended award of the Tender to it at a contract price of Tanzanian Shillings Ten Billion Six Hundred Fifty Four Million Six Hundred Seventy Seven Thousand Forty Two only (TZS.10,654,677,042.00), inclusive of VAT and Weight and Measures Agency (WMA) charges, at a contract period of 60 days subject to successful negotiations.

The Tender Board at its meeting held on 3rd April 2020, deliberated on the recommendations of award and directed that due diligence and negotiations be conducted to the proposed successful tenderer.

Due diligence was conducted from 23rd to 25th April 2020, followed by negotiations which took place on 5th May 2020. The findings of due diligence and negotiations were submitted to the Tender Board at its meeting held on 8th May 2020 whereby after deliberations it approved award of the Tender to M/s Nyamanolo Investment Ltd at a negotiated contract sum of Tanzanian Shillings Eight Billion Three Hundred Fifty Nine Million One Hundred and One Thousand One Hundred Fifty Eight and Sixteen Cents only (TZS.8,359,101,158.16) inclusive of WMA Charges and with exclusion of VAT.

On 11th May 2020, the Respondent issued the Notice of Intention to award the Tender to all tenderers who participated in the Tender process. The said notice informed the tenderers that the Respondent intends to award the Tender to M/s Nyamanolo Investment Ltd. Tenderers who were



unsuccessful were also informed of the reasons for their disqualification. The Appellant was informed that, its tender was disqualified for the following reasons:-

- i) Failure to submit test results of the three mandatory flows (Q_1 or Q_{min} , Q_2 or Q_t and Q_4 or Q_{max}) in accordance with the latest ISO 4064-1;
- ii) Failure to submit current WMA calibration test results and certificates along with the submitted meter samples. Instead, it submitted WMA calibration test results for various meters and fittings issued on 24th August 2017, TBS certificates of conformity for fittings dated 20th March 2018, 9th April 2018 and 30th April 2018. Either, the meters had no WMA seal to confirm testing of the provided samples;
- iii) Submitted samples of $\frac{1}{2}$ and $\frac{3}{4}$ inches were not marked with permanent meter sizes on their casings; and
- iv) Submitted sample meters of 1 $\frac{1}{2}$ inch had no permanent marked serial number bar code format on the meter body.

Dissatisfied with the reasons given for its disqualification, on 14th May 2020, the Appellant applied for administrative review to the Respondent. On 20th May 2020, the Respondent issued a decision which rejected the Appellant's application for review. Aggrieved further, on 29th May 2020, the Appellant lodged this Appeal.



GROUNDS OF APPEAL

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

1. That, the Appellant is dissatisfied with its disqualification from the Tender process on the ground that it complied with the requirement of submitting test results of the three mandatory flows (Q_1 or Q_{min} , Q_2 or Q_t and Q_4 or Q_{max}) as the same were in accordance with the latest ISO 4064-2 which is equivalent to ISO 4064-1 specified under Section VII-C Technical specifications Item (d) (a). The Appellant expounded that the question of when water meters were to be tested was neither stated in the Tender Data Sheet (TDS) nor in the Technical Specifications. It added that, the sample meters submitted by it were pressure tested by the manufacturer and the certificates thereof were attached. The Appellant also claimed to have attached TBS certificates of conformity of fittings of 2018 as there was no time limit within which the test was to be performed. According to the Appellant TBS issues a certificate of conformity during importation of the fittings.
2. That, the Appellant disputes the Respondent's act of disqualifying its tender on the ground that sample meters submitted lacked WMA seal. In support of this point the Appellant submitted that, WMA seal requirement was neither stated in the TDS nor in the Technical Specifications. It added that, Section VII-Technical Specifications requires each meter to be pressure tested by the manufacturer and batch certificate attesting such test to be



submitted. The Appellant complied with such requirement as certificates issued by BAYLAN, the manufacturer were attached.

3. According to Clause 37.1(h) of the Instruction to Tenderers (ITT) read together with Regulation 225 of the Regulations, negotiations are to be undertaken with the lowest evaluated tenderer. However, such negotiations were to be undertaken after the Notice of Intention to award has been communicated to all tenderers who participated in the Tender proceedings. In this Tender negotiations were conducted prior to the issuance of the Notice of Intention to award the Tender. Thus, the Respondent's act in this regard contravened Clause 29 of the ITT and Clause 30.2 of the TDS.
4. Regarding submission of sample meters of $\frac{1}{2}$ and $\frac{3}{4}$ inches which were not marked with permanent meter sizes on their casing and sample meter of $1 \frac{1}{2}$ inch which have not been permanently marked with serial number "bar code" format on the meter body, the Appellant conceded to have not complied with such requirements. However, it argued that non compliance with such requirement could have not led to the disqualification of the Appellant; instead, the same ought to have been treated as a minor deviation.
5. That, the Appellant doubts the correction of errors undertaken which led the price quoted by the proposed successful tenderer of TZS 10,654,677,042.00 to be reduced to TZS 8,359,101,158.16. The Appellant does not only doubt the validity of the reduction of TZS 2,295,575,884.00



from the price quoted by the proposed successful tenderer, it also doubts if the said tenderer understood the requirements provided for under Section VI-Schedule of Requirements. The Appellant further doubts if the proposed successful tenderer had complied with requirement of Clause 35 of the ITT which requires a tenderer to be assessed so as to establish if it is technically and financially capable to perform the intended task.

6. The Appellant challenged the modality used by the Respondent to determine its application for administrative review. According to Section 96(2) of the Act, the Respondent after receipt of the Appellant's complaint ought to have formed an independent review team which would review the complaint and advise the Respondent's accounting officer on proper actions to be taken. The Respondent failed to abide by such requirement of the law as the complaint was determined in disregard of the laid down procedures.
7. Regarding the previously cancelled Tender, the Respondent ought to have adhered to the requirement of Section 59 of the Act read together with Regulation 16 of the Regulations. Thus, the Respondent's failure to abide to such requirement amounts to major deviations of the tendering procedures.
8. Finally, the Appellant prayed for the following orders:-
 - i. Declaration that the Respondent has acted unlawfully without following legal rules and procedures in determining award of the Tender;



- ii. Prohibit the Respondent from acting or deciding unlawfully;
- iii. Require the Respondent to reach the decision of the Tender in a lawful manner by following the procedures;
- iv. To review/revise the Respondent's unlawful decision and order award of the Tender to the Appellant; and
- v. Order the procurement proceedings to be terminated.

REPLY BY THE RESPONDENT

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

1. That, the Appellant was disqualified from the Tender process for failure to comply with the requirement of the Tender Document. The Appellant was required to submit test results of the three mandatory flows (Q_1 or Q_{min} , Q_2 or Q_t and Q_4 or Q_{max}) in accordance with the latest ISO 4064-1. Such requirement was specified under Section VII:C – Technical Specifications Item (d)(a). The Appellant failed to prove that full and current test results of sample meters were submitted as required. The Respondent added that, Section VII:C (d)(b) requires copies of the calibration test results/certificates be supplied together with the sample meters. The calibration certificates required apart from ones issued by the manufacturer were those issued by WMA an institution vested with powers to issue calibration certificates after assessing that the imported goods are in accordance with its established requirements. The Appellant failed to



comply with such requirement as it submitted the manufacturer's certificates only.

In expounding this point the Respondent argued that, the manufacturer's certificates submitted by the Appellant were issued in March 2020 while the WMA certificate attached was issued in 2017 and bears different serial numbers from the sample meters submitted.

2. Regarding water meter samples with WMA seal, the Respondent submitted that Clause 14 of the Special Conditions of Contract (SCC) and Clause 15.1 of the General Conditions of Contract (GCC) states clearly that suppliers were responsible for measuring and sealing meters before delivery and certified by WMA. Furthermore, Technical Specifications requires imported meters to be tested at acceptance and failure to pass the test may lead to the rejection of the whole batch of meters supplied. Thus, it was mandatory for the Appellant who imported sample meters to conduct calibration testing as required. The Appellant submitted old calibration test results for various meters and fittings; however, the same did not relate with the submitted sample meters. The Respondent stated that the WMA tested meters bear a seal as proof of test; the Appellant's samples lacked such a seal. It added that, sample meters are a good symbol of the whole batches of meters which a bidder is proposing to deliver, if would be considered, the lowest evaluated. Thus, the same ought to have been tested.



3. With regard to the TBS certificate of conformity of fittings, the Respondent submitted that Clause 13.3(b) Item 5 of the ITT requires goods to be submitted to conform with Technical Specifications and Schedule of Requirements and where no applicable standard is mentioned, then the standard should be equivalent or superior to the official standards whose application is appropriate to the goods of the country of origin. TBS issue certificates of conformity to fittings which are imported. The TBS certificates for imported fittings submitted by the Appellant were too old as some were dated 20th March 2018, 9th April 2018 and 5th December 2018. Thus, non-submission of the current TBS certificates which relates to the fittings was a major deviation.

4. Regarding the Appellant's argument that negotiations were wrongly conducted, the Respondent submitted that all procurement procedures specified in the Act and the Regulations were complied with. According to Regulation 225(4) of the Regulations negotiations are to be conducted with the lowest evaluated tenderer after approval by the Tender Board of the recommendations of award by evaluation committee. Thus, the Appellant's argument that negotiations were to be conducted after issuance of the Notice of Intention to award is misleading and contrary to the Act and Regulations.

The Respondent added that negotiations were conducted not only for purposes of reducing the prices but other factors were also considered. The Respondent adhered to the requirement of Clause 37.1 of the ITT as



well as Regulations 226, 227, 228 and 229 of the Regulations as amended.

5. Regarding corrections of errors, the Respondent submitted that there was no correction of errors done to the tender of the proposed successful tenderer. The changes from the quoted price of TZS 10,654,677.042 VAT and WMA charges inclusive to 8,359,101,156.16 VAT exclusive and WMA charges inclusive were the result of negotiations conducted between the Respondent and the proposed successful tenderer. The Respondent added that the change in price was due to reduction of 6.3% as a discount and exclusion of 18% VAT. The issue of financial capability of the proposed bidder was verified during the due diligence exercise.

6. Regarding non-adherence to the requirement of Section 96(2) of the Act, the Respondent submitted that it was not mandatory for an independent review team to be constituted after receipt of the Appellant's application for review. The wording of Section 96(2) entails clearly that the accounting officer has an option of either to constitute an independent review committee or not depending on the nature of the complaint. In this regard the Respondent's accounting officer found that there was no need of forming an independent review committee as it was clear from the records that the Appellant was disqualified for failure to comply with the Technical Specifications. Thus, the Respondent's decision with respect to the Appellant's application for review was proper and in accordance with the law.



7. With regard to re-advertisement of the Tender, the Respondent submitted that, if the Appellant was dissatisfied with the Respondent's act of rejecting all the tenders ought to have lodged a complaint within seven working days from the moment it became aware of such fact. The Respondent's act of rejecting the previous tender was made pursuant to Section 59 of the Act read together with Regulation 16 of the Regulations. Thus, the Appellant's act of participating in this Tender process while knowing that the previous one was rejected implies that it had no grievances.
8. The Respondent concluded its argument by indicating that the Tender process was done fairly and prudently. Hence, it was fair to disqualify the Appellant's Tender.
9. Finally, the Respondent prayed for the following orders:
 - i. The Appeal be dismissed;
 - ii. The Appellant be ordered to compensate the Respondent the cost of this Appeal; and
 - iii. Other remedies as the Appeals Authority deems just and fair for the Respondent.

ANALYSIS BY THE APPEALS AUTHORITY

During the hearing parties agreed on the following issues which were also approved by the Members of the Appeals Authority:-



- 1. Whether the Appellant's disqualification was justified;**
- and**
- 2. What relief(s), if any, are the parties entitled to**

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

1.0 Whether the Appellant's disqualification was justified

In resolving this issue the Appeals Authority considered the first ground for disqualification of the Appellant that it failed to submit test results of the three mandatory flows (Q_1 or Q_{min} , Q_2 or Q_t and Q_4 or Q_{max}). In order to substantiate if disqualification of the Appellant on that ground was proper, the Appeals Authority revisited Section VII:C Technical Specifications, Item (d) (a) and observed that it requires each meter to be tested at the three mandatory flows in accordance with the latest ISO 4064-1. During the hearing Members of the Appeals Authority asked the Appellant to substantiate if it complied with such requirement. In reply thereof it stated that meters were tested in accordance with ISO 4064-2 which is equivalent to ISO 4064-1. The Appeals Authority revisited the Appellant's tender and observed that it had attached ISO certificates 9001:2015, 14001:2015, 27001:2013, 45001:2018, 17020:2012 with the testing method EN ISO 4064-2.

The Appeals Authority reviewed the International Standard ISO 4064-1 Third Edition 2005-1-15 and observed that the same is for testing metrological and technical requirements (design features) of water meters.



The International Standard ISO 4064-2 Fourth Edition 2005-1-15 relates to testing methods. Having reviewed the ISO 4064-1 and 4064-2 the Appeals Authority observed that the two standards deals with different testing and one cannot claim that the tests done in ISO 4064-1 is equivalent to tests under ISO 4064-2. The Appeals Authority observed further that, according to Section VII:C Technical Specifications, Item (d) (a) the required testing was ISO 4064-1 and not any equivalent.

Based on such observation, the Appeals Authority is of the firm view that the Appellant failed to comply with the requirement of Section VII: C Technical Specifications Item (d) (a) which required all meters to be tested at the three mandatory flows (Q_1 or Q_{min} , Q_2 or Q_t and Q_4 or Q_{max}) in accordance with the latest ISO 4064-1. Therefore, the Appellant's argument that ISO 4064-2 is equivalent to ISO 4064-1 is rejected.

Regarding compliance with the requirement of Section VII: C Technical Specifications Item (d) (b) which required copies of the calibration test results/certificates to be supplied together with sample meters, the Appeals Authority observed that, the Appellant had attached certificates from manufacturer issued on March 2020. There was no calibration certificate from WMA which is an institution mandated to calibrate and certify water meters in the country. Therefore, we are of the considered view that there was non-compliance.



The Appeals Authority further took cognizance of the Appellant's admission that sample meters of 1/2 and 3/4 inches were not marked with permanent meter sizes on their casings and sample meters of 1 1/2 inch were not permanently marked with serial number "bar code" on the meter body as was required. The Appellant conceded to have not complied with such requirement and argued that the same ought to have been treated as a minor deviation.

The Appeals Authority revisited Section VII:C Technical Specifications, Item (d) and (e) which provides as follows;

Item (d)

"Each meter shall be permanently marked on the casing or the indicating device dial with the following:

(e) The serial number shall also be permanently marked in "bar code" format on the meter body. (Emphasis supplied)

From the wording of the above quoted provision it is crystal clear that tenderers were mandatorily required to permanently mark the meters on the casing and serial number in the "bar code" of the meter body.

The Appeals Authority revisited Clauses 28.2 and 29.2 of the ITT which provide guidance as what is material or non-material deviation. The Clauses read:-

28.2 "A substantially responsive Tender is one which conforms to all the terms, conditions, and specifications of the Tendering



*Documents, without material deviation or reservation. **A material deviation or reservation is one that:-***

*(b) limits in any substantial way, **inconsistent with the Tendering Documents**, the PE's rights or the Tenderers obligations under the Contract".*

29.2"*The PE shall evaluate the technical aspects of the Tender submitted in accordance with ITT 12, **to confirm that all requirements specified in Section VI – Schedule of Requirements of the Tendering Documents and Section VII – Technical Specifications have been met without material deviation or reservation'**.*

(Emphasis is added).

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'**.*

Given the circumstances it is clear that the Appellant failed to comply with the technical specifications provided for in the Tender Document.

The Appeals Authority considered the Appellant's argument that negotiations were to be conducted after the issuance of the Notice of Intention to award and observes that such an argument is misconceived.



According to Regulation 225(6) of the Regulations, negotiations are to be conducted after the evaluation process has been completed and the recommendations of award by the evaluation committee have been approved by the Tender Board. The record of Appeal indicates that the Tender Board meeting held on 3rd April 2020 approved award recommendations and directed that due diligence and negotiations be conducted to the proposed successful tenderer. Due diligence was conducted from 23rd to 25th April 2020, followed by negotiations which took place on 5th May 2020. The Tender Board approved the findings thereof on 8th May 2020. Thereafter, the Notice of Intention to award was issued on 11th May 2020. From the sequence of events, the Appeals Authority is of the settled view that the negotiation process complied with requirements of Regulations 225, 226 and 227 of the Regulations, thus the same was conducted in accordance with the law.

Regarding the change of the awarded contract price, the Appeals Authority observed that during negotiations the proposed successful tenderer gave a discount of 6.3% and VAT charges were excluded. The quoted price was TZS 10,654,677.042 and was reduced to TZS 8,359,101,158.16 after negotiations. The Appeals Authority finds such reduction of price to be proper as it is in accordance with Section 76(1) of the Act read together with Regulation 225(1)(g) of the Regulations which reads as follows:-

"Negotiations may be undertaken with the lowest evaluated tenderer relating to-



*(g) **the reduction of price** in case of procurement of goods works or non-consultancy services'.*

(Emphasis supplied)

The Appeals Authority considered the Appellant's argument in relation to the Respondent's failure to constitute an independent review panel to review its complaint; as such an act contravened Section 96(2) of the Act. In order to substantiate the validity of the Appellant's argument in this regard, the Appeals Authority revisited Section 96(2) which reads as follows:-

*"On receiving a complaint under this Section **the Accounting Officer may, depending on the nature of the complaint, constitute an independent review panel** from within or outside its organization which shall review the complaint and advice him on the appropriate actions to be taken'.*

(Emphasis added)

From the wording of the quoted provision it is clear that the formation of the independent review panel is not a mandatory requirement of the law. The Accounting Officer has an option of constituting it or not depending on the nature of the complaint. Thus, the Respondent cannot be faulted in this regard for a non mandatory requirement.

In view of what has been stated herein above, the Appeals Authority's conclusion on the first issue is in the affirmative, that the Appellant has been fairly disqualified.



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

Taking cognizance of the findings hereinabove, that the disqualification of the Appellant was justified, the Appeals Authority hereby dismiss the Appeal. The Respondent may proceed with the Tender process. Each party is to bear its own costs.

It is so ordered.

This Decision is binding on the Parties and may be executed in terms of Section 97 (8) of the Act.

The Right of Judicial Review as per Section 101 of the Act is explained to the Parties.

The Decision is delivered in the presence of the Appellant and the Respondent this 19th day of June 2020.



**HON. JUSTICE (rtd) SAUDA MJASIRI
CHAIRPERSON**

MEMBERS:

1. CPA FREDRICK RUMANYIKA 

2. RHOBEN NKORI 