

IN THE PUBLIC PROCUREMENT APPEALS AUTHORITY

AT DAR ES SALAAM

APPEAL CASE NO. 23 OF 2019-20

BETWEEN

M/S SALEMA ENTERPRISES LIMITED.....APPELLANT

AND

MINISTRY OF FINANCE AND PLANNINGRESPONDENT

DECISION

CORAM

- | | |
|-------------------------------------|-----------------|
| 1. Hon. Justice (Rtd) Souda Mjasiri | - Chairperson |
| 2. Eng. Stephen Makigo | - Member |
| 3. Adv. Rosan Mbwambo | - 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. Gibson Frank - Managing Director
2. Mr. Nolasco Nolaskus Mpoti - Advocate - Candor Attorney
3. Dr. Mary Mathania - Assistant Director
4. Mr. Nolaskus Nicholas Mpoti - Consultant

FOR THE RESPONDENT

1. Mr. Juma Dimoso Magoma - Legal Officer
2. Mr. Fredrick J. Mushi - Ag. Director Procurement
Management Unit
3. Mr. Innocent Kalinga - Principal Supplies Officer
4. Mr. Hamis Ally Mohamed - Supplies Officer

This Appeal was lodged by M/s Salema Enterprises Limited (hereinafter referred to as "**the Appellant**") against the Ministry of Finance and Planning (hereinafter referred to as "**the Respondent**").

The Appeal is in respect of Quotation No. ME/004/2019-20/HQ/NC/13 for the Provision of Canteen Services at the Treasury Square Building- Dodoma for the Ministry of Finance and Planning (Vote 50) (hereinafter referred to as "**the Tender**").



According to the documents submitted by the parties to the Public Procurement Appeals Authority (hereinafter referred to as "**the Appeals Authority**") the background of this Appeal may be summarized as follows.

The Respondent through a letter dated 8th November 2019, invited eligible tenderers with framework contract shortlisted by Government Procurement Services Agency (GPSA) to participate in the Tender. The invited firms included M/s Salema Enterprises Ltd, M/s New Adjust Investment Ltd, M/s Nice Catering Company Ltd, M/s Winners General Supplies Ltd and M/s Sivicafe Food and Catering Services. The deadline for submission was set for 20th November 2019, whereby four firms submitted their quotations out of the five shortlisted firms.

Quotations were then subjected to evaluation which was conducted in three stages namely, preliminary, detailed and price comparison. All bidders were found to be responsive to the preliminary and detailed evaluation, hence were subjected to price comparison. The Appellant's Quotation was ranked the highest followed by M/s Nice Catering Company Ltd. After completion of the evaluation process, the Evaluation Committee recommended award of the Tender to M/s Salema Enterprises Ltd at a quoted rental fee of Tanzanian Shillings Six Million Twelve Thousand One Hundred (TZS. 6,012,100.00) only VAT inclusive per month, that is Tanzanian Shillings Seventy Two Million One Hundred Forty Five Thousand Two Hundred (TZS. 72,145,200.00) per year. The proposed award was subject to successful negotiations.

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On 2nd January 2020, the Respondent's Tender Board through Circular Resolution No. 114 of 2018/2019 approved Award of the Tender to the Appellant as recommended by the Evaluation Committee subject to successful negotiations. On 10th January 2020, the Respondent informed the Appellant that, it has been proposed for award of the Tender subject to successful negotiations. The said letter invited the Appellant to attend a negotiation meeting.

Negotiations took place on 16th January 2020, whereby issues relating to price quoted by the Appellant on the provided menu were discussed. The parties also agreed that post qualification be conducted to verify the Appellant's capability and resources to perform the contract through past experience pursuant to Regulation 224(1)(3) and (6) of the Public Procurement Regulations of 2013 as amended (hereinafter referred to as "**the Regulations**").

On 11th February 2020, the Respondent conducted post qualification to ascertain the Appellant's capability by seeking reference from various Public Institutions mentioned by the Appellant, the Ministry of Energy, Energy and Water Utilities Regulatory Authority (EWURA), Public Procurement Regulatory Authority (PPRA), Ministry of Education, Science and Technology and National Health Insurance Fund.

PPRA informed the Respondent that it had no contract with the Appellant; it only used its services when it hired the NBS conference facilities. The Appellant had a contract for provision of Canteen Services with NBS. According to EWURA, it only worked with the Appellant on call basis in

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2019. The Ministry of Energy denied to have entered into any contract with the Appellant. The Ministry of Education, Science and Technology denied to have entered into any contract with the Appellant; it claimed that the appellant was only hired on a regular basis. NHIF also denied to have contracted the Appellant for catering services.

The Post-qualification findings were submitted to the Tender Board through Circular Resolution No. 212 of 2019/2020. Having reviewed it, the Tender Board rejected the award proposed to the Appellant as negotiations were not successful. Given the circumstances, the Tender Board directed that the second highest tenderer M/s Nice Catering Company Ltd be invited for negotiations and post qualification.

On 3rd March 2020 the Respondent invited M/s Nice Catering Company Ltd for a negotiation meeting. Negotiations took place on 9th March 2020, whereby parties agreed on the tabled issues. The firm was then subjected to post-qualification which was conducted to ascertain its capability and experience.

The Respondent conducted Post-qualification by seeking references from previous clients of M/s Nice Catering Company Ltd. These were Tanzania Meteorological Agency (TMA), University of Dar es Salaam (UDSM), Medical Stores Department (MSD), National Housing Corporation (NHC) and Bank of Tanzania (BOT). The above mentioned institutions confirmed that they had contracts with M/s Nice Catering Company Ltd.

The Tender Board at its meeting held on 7th May 2020, approved the post-qualification results and award recommendations to M/s Nice Catering

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Company Ltd at a contract price of Tanzanian Shillings Five Million Five Hundred Thousand only (TZS. 5,500,000.00) VAT inclusive per month.

On 8th May 2020, the Respondent issued the Notice of Intention to award the Tender to all bidders who participated in the Tender process. The Notice informed the bidders that M/s Nice Catering Company Ltd has been proposed for the award of the Tender. The Notice also informed the Appellant that it has been disqualified for failure to comply with Clause 2.4 of the Quotation Document which required bidders to submit a list of recent performed contracts of similar nature and volume for the past three years.

Dissatisfied, on 15th May 2020, the Appellant applied for administrative review to the Respondent challenging the reason for its disqualification. On 19th May 2020, the Respondent issued a decision by dismissing the Appellant's application for administrative review. Aggrieved further, on 3rd June 2020, the Appellant lodged this Appeal.

GROUND OF APPEAL

The grounds of Appeal as stated in the Appellant's Statement of Appeal and oral submissions may be summarised as follows:-

That, the Appellant is dissatisfied with its disqualification from the tender process on the ground that it lacked experience in performing contracts of similar nature and volume. The Appellant contended that it possess the required experience as it listed ten (10) previous clients to substantiate its experience in the catering field. Further to this, the Appellant claimed to



have a successful negotiation meeting with the Respondent, thus it was improper for the Respondent to disqualify its tender.

The Appellant further submitted that the Respondent was not clear in its letters which sought reference of the Appellant from its previous clients. The Respondent's letters were confined to contracts performed in relation to the provision of canteen services only. As a result the Respondent received a negative feedback from the Appellant's previous clients. The Appellant stated that it provided correct information as required by Clause 2.4 of the Quotation Document since it has been offering catering services which is similar to canteen services. Thus, the Respondent's allegation that the Appellant had provided false information is unfounded.

The Appellant further argued that the Respondent failed to take into account the Appellant's category provided by GPSA which is Catering Services.

That, the Appellant disputes the proposal of the award to M/s Nice Catering Company Ltd for the reason that the same was not fair and just, as it was made beyond the bid validity period. The Appellant claimed that, the request for extension of the bid validity period made by the Respondent in its letter dated 18th February 2020 was not communicated to the Appellant, was backdated and had no folio number. It was further argued that the second extension effective from 18th May to 17th June 2020 was made after the Appellant objected the proposed award to M/s Nice Catering Company Ltd.

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That, the Appellant disputes the way the Tender process was conducted as it had a bid validity period of ninety (90) days contrary to the requirements under Regulation 164 (2) (i) of the Regulations. The bid validity period for quotations is supposed to be forty five (45) days and not 90 days. The Appellant submitted further that, the Tender process took one hundred and ninety three (193) days from the date of opening the Quotation contrary to Regulation 191 (3) of the Regulations which requires the validity period not to exceed One Hundred and Twenty (120) days.

Finally, the Appellant prayed for the following reliefs:-

- i. To be restored with the award of contract as negotiated;
- ii. Reject award of contract intended to be given to M/s Nice Catering Company Ltd; and
- iii. Any other relief that the Appeals authority deems fit.

REPLY BY THE RESPONDENT

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

That, the Appellant was disqualified during post-qualification process for failure to comply with Clause 2.4 of the Quotation Document which required bidders to provide a list of previous performed contracts on works of similar nature and volume for the past three years. The Respondent submitted that, in order to comply with Clause 2.4 of the Quotation Document tenderers were required to list recent performed contracts and to include the address of employers for purposes of verification. The

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Respondent added that in verifying the information submitted by the Appellant it was observed that, three clients denied to have contracted the Appellant, while two clients claimed to have engaged the Appellant on call basis. The Respondent further observed that the Appellant had only one contract of similar nature with NBS.

That, the award proposed to M/s Nice Catering Company Ltd was fair and just, as it was made within the bid validity period. The award was issued on 27th May 2020 while the bid validity expired on 17th June 2020. The Respondent stated that the validity period for the Tender was ninety (90) days and it was extended twice. The first extension was made from 19th February to 18th May 2020 and the second extension was made from 18th May to 17th June 2020. The Respondent expounded further that, there was a typographical error in the first extension as it was stated in words that the bid validity period was extended for sixty days while the dates indicated that the extension was for ninety days. The letter which requested the first extension of time was not backdated as claimed by the Appellant. The Respondent stated further that all bidders did not confirm the acceptance of the first extension sought in its letter dated 18th February 2020.

Finally, the Respondent prayed for the following orders:-

- i. The Appellant not to be restored and awarded the contract; and
- ii. Award of contract to M/s Nice Catering Company Ltd be honored.

ANALYSIS BY THE APPEALS AUTHORITY

During the hearing, parties agreed to the following issues which were also approved by the Appeals Authority, these are:-

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

In relation to the first issue on **whether the Appellant's disqualification was justified**, the Appeals Authority observed from the pleadings and arguments by the parties that there is a complaint in relation to the bid validity period.

The Appellant contended that the proposed award to M/s Nice catering Company Ltd is bad in law as the same was made beyond the Bid Validity Period of ninety (90) days specified in the Quotation Document. The Respondent on its part argued that even though the Bid Validity Period was ninety (90) days, the validity period was extended twice. The first extension was from 19th February 2020 to 18th May 2020 and the second extension was from 18th May 2020 to 17th June 2020. The award was made on 27th May 2020 that is within the bid validity period.

In order to determine the validity of the parties' arguments, the Appeals Authority revisited the Quotation Document and observed that Clause 7 of the Quotation Document state in clear terms that the bid validity period is ninety (90) days from the deadline of submission of quotations. Section 71 of the Act read together with Regulation 191(3) of the Regulations provides guidance in relation to the Bid Validity Period. It is provided as follows:-

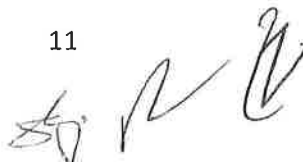


Sec.71 *"The procuring entity shall require tenderers to make their tenders and tender securities including tender securing declaration valid for the periods specified in the tendering documents, sufficient to enable the procuring entity to complete the comparison and evaluation of the tenders and for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

"Reg.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".*

In view of the above mentioned provisions, it is evident that a procuring entity is required to finalize its tender proceedings including the award and signing of the contract within the Bid Validity Period specified in the quotation document.

Much as the law requires completion of the tender process within the specified time limit, it also allows extension of the validity period if the tender process cannot be finalized within the specified time as per Regulation 191(4) of the Regulations which state as follows:-



Reg. 191 (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."*

According to the Quotation Document, it is undisputed that the tender validity period was ninety (90) days from the deadline of submission of quotations that is 20th November 2020. Counting from the date of opening the quotation, the validity period ought to have expired on 18th February 2020. However, the Respondent claimed to have extended the validity period through a letter dated 18th February 2020 with effect from 19th February to 18th May 2020. The second extension was made by a letter dated 18th May 2020 with effect from 18th May to 17th June 2020. The Appellant on its part denied to have received the first request for extension of time, hence no acceptance was made.

During the hearing of the appeal, Members of the Appeals Authority asked the Respondent to substantiate if the first letter requesting for extension of time was served to all bidders and whether a response was received from them agreeing to the extension of time. According to the Respondent, the letter requesting for extension of the validity period was served to all bidders including the Appellant but no response or acceptance was received from them.

Regulation 191(5) of the Regulations provides that once tenderers are served with a request for extension of time, they are required to accept it. If a tenderer refuse to accept the request, its tender is terminated after

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expiry of the un-extended validity period. Regulation 191(5) states as follows:-

*Reg.191 (5) "A tenderer may refuse the request under sub regulation (3) without forfeiting its tender security and **the effectiveness of its tender shall be terminated upon the expiry of the un-extended period of effectiveness.**"*

(Emphasis added)

Although the Respondent claimed to have served the bidders with a letter requesting for the first extension of the validity period on 18th February 2020, it is evident from the record that none of the four bidders, the Appellant inclusive, accepted the request. No response was received by the Respondent. Therefore, since there was no substantive proof that the first request for extension of the bid validity period was duly served to the bidders and the Respondent conceded that none of them accepted the extension, the Appeals Authority is of the settled view that the bid validity period of ninety (90) days expired on 18th February 2020. The tender process terminated after the expiry of the initial stipulated Tender validity period in view of the requirement of Regulation 191(5) supra. The Respondent proceeded with the Tender process regardless of the fact that the bid validity had expired. The Appeals Authority is of the firm view that, anything done after the expiry of the initial bid validity period was null and void as it was done contrary to the requirement of the law and the Quotation Document.



In relation to the complaint as to whether or not the bid validity period of ninety (90) days was proper for this type of tender, which is a *quotation*, the Appeals Authority revisited Regulation 164(2)(i) and observed that the bid validity period for a tender relating to a Quotation is forty five (45) days. However, no complaint and /or objection was raised by the Appellant on the ninety (90) days period despite being aware of this anomaly from the time it participated in the tender process, including negotiations.

Based on the above findings on the bid validity period, the Appeals Authority will not delve into other grounds of appeal.

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

Given the Appeals Authority's findings hereinabove, that there is no valid tender after the expiry of the bid validity period, the Appeal is allowed to that extent. Each party is to bear its own costs.

Order accordingly.


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.

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This Decision is delivered in the presence of the parties this 3rd July 2020.

HON. JUSTICE (RTD) SAUDA MJASIRI


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CHAIRPERSON

MEMBERS:

1. ENG. STEPHEN MAKIGO.....


2. ADV. ROSAN MBWAMBO.....
