

IN THE PUBLIC PROCUREMENT APPEALS AUTHORITY

APPEAL CASE NO. 01 OF 2016-17

BETWEEN

M/S ZUMA OFFICE CLEANING AND GARDENINGAPPELLANT

AND

BABATI DISTRICT COUNCIL RESPONDENT

DECISION

CORAM

- | | | |
|--------------------------------------|---|-----------|
| 1. Hon. Vincent K.D. Lyimo, J. (rtd) | - | Chairman |
| 2. Ms. Monica P. Otaru | - | Member |
| 3. Mr. Louis P. Accaro | - | Member |
| 4. Mr. Ole-Mbille Kissioki | - | Secretary |

SECRETARIAT

- | | | |
|---------------------------|---|----------------------|
| 1. Ms. Florida R. Mapunda | - | Senior Legal Officer |
| 2. Mr. Hamisi O. Tika | - | Legal Officer |

FOR THE APPELLANT

- | | | |
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| Mr. Benson M. Thomas | - | Managing Director |
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FOR THE RESPONDENT

Mr. Salvatory E. Rugina - Ag. Head of Procurement Management Unit

This decision was set for delivery today 7th September 2016, and we proceed to deliver it.

This Appeal was lodged by M/s ZUMA OFFICE CLEANING AND GARDENING (hereinafter referred to as "the Appellant") against BABATI DISTRICT COUNCIL (hereinafter referred to as "the Respondent").

The Appeal is in respect of Request for Quotations for provision of Services at Babati District Council (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 facts of the Appeal may be summarized as follows:

On 27th June 2016, the Respondent invited service providers who were under the Framework Agreement by Government Procurement Services Agency (hereinafter referred to as GPSA) to collect Request for Quotation Form for the provision of Cleaning Services. The Quotations were to be returned on or before 30th June 2016. However, there was no indication of official time for the opening of the same. On the deadline of submission,

quotations were submitted but for unknown reasons, they were not opened. Tenderers were verbally informed that they will be notified of the opening date.

On 11th July 2016, as the Appellant had not received any communication from the Respondent, wrote a letter to the Respondent, requesting to be informed on the tender results. On 22nd July 2016, the Respondent by its letter with Ref. No. DED/BBT/F.10/32/Vol. X/297 informed the Appellant that the award had been made to a service provider who quoted TZS 3,420,000.00 per month. The Appellant who had quoted TZS 3,425,000.00 was ranked the second lowest and as a result was not awarded the tender.

Dissatisfied, the Appellant lodged his Appeal to the Appeals Authority on 10th August 2016.

SUBMISSIONS BY THE APPELLANT

The Appellant raised three grounds of Appeal which may be summarized as follows:-

- a) That, Respondent's Accounting Officer erred in law for awarding a tender to a tenderer who had not submitted the form on Request for Quotation.
- b) That, the Respondent erred in law for failure to conduct public opening of the submitted quotations.

c) That, Respondent erred in law for failure to inform the Appellant the tender result.

Addressing the Appeals Authority on the first ground, the Appellant submitted that although five tenderers were invited, the successful tenderer inclusive, the said tenderer did not return or submit his quotation on the deadline date. The Appellant asserted that together with other tenderers, he had remained at the Respondent's office until the closure of working hours 3:30 PM on 30th June 2016 and the successful tenderer did not show up, meaning that he had not returned its quotation on time. In other words, the Respondent awarded the tender to a tenderer who had not submitted the Quotation.

In support of the second ground, the Appellant submitted that, even if the tender was conducted under Mini-Competition as put by the Respondent, the Respondent was required to conduct public opening of all received quotations so as the quoted prices could be known. To the contrary, the Respondent did not do it. The Appellant believes that the Respondent deliberately favoured the tenderer thus contravening the principles of transparency and fairness. The Appellant was shocked after realizing that its offer was higher by a mere difference of TZS 5000.00. The Appellant argued that its quoted prices might have been revealed to its competitor, hence the small margin in the price differences.

Addressing the issues in ground three, the Appellant insisted that the Respondent was duty bound to inform all the unsuccessful tenderers the

tender result and reasons for disqualification. However, the Respondent did not do so. The Respondent had therefore acted in contravention of the Public Procurement Act 2011 (the Act) as amended and the Public Procurement Regulations GN. No. 446 of 2013 (hereinafter referred to as GN No.446 of 2013).

Finally the Appellant prayed for the following reliefs:

- i. The Appellant be declared the winner of the Tender;
- ii. Order the Respondent reach a lawful decision
- iii. The Respondent be ordered to compensate the Appellant a total sum of TZS. 7,200,000.00 as per the following breakdown;
 - (a) Appeal filing fees.....TZS. 200,000.00
 - (b) Legal Fees.....TZS. 4,000,000.00
 - (c) General damages TZS. 3,000,000.00
- iv. The Appeals Authority to take any other decision it deems necessary.

THE RESPONDENT’S SUBMISSIONS

In response to the above grounds of the Appeal, the Respondent submitted that the tender process was conducted under Open Framework Agreement through Mini Competition as per Regulation 131(1) - (7) of GN. No. 446 of 2013. He claimed that it was a mere call for price comparison and therefore the award process did not involve normal tendering process as

the Appellant wanted. Price comparison or Mini Competition meant that the Act and its Regulations were not applicable.

Further, the Respondent submitted that the disputed process was fair to all participants and that the award was made to the tenderer who had quoted the lowest price among all.

Finally, the Respondent prayed for dismissal of the Appeal for lack of merits.

In his brief rejoinder, the Appellant insisted that it was not his first time to participate in the tender process and that the Respondent was awfully wrong to consider the process not to be covered by the Act and its Regulations.

ANALYSIS BY THE APPEALS AUTHORITY

In this Appeal there were two triable issues namely:-

- Whether the procedure and award made to the successful tenderer complied with the law;
- To What reliefs, if any, are the parties entitled.

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

1.0 Whether the procedure and award made to the successful tenderer complied with the law

In determining this issue the Appeals Authority considered the arguments put forward by the parties and observed as follows; first that the Respondent was not informed on the legal requirements for the conduct of requests for Quotation or Mini Competition. The Appeals Authority revisited the documents submitted before it and observed that, the Tender Board at its meeting held on 14th June 2016, granted an approval to the Respondent to obtain Cleaning Service providers through mini competition pursuant to Regulation 131(1)-(7) of GN No. 446 of 2013. The said Regulations provide guidance on procurement of common use items and services. However, the document issued in respect to the disputed tender does not refer to provision of cleaning services; i.e. does not reflect the types of services required. While the document is titled Price Quotation, the contents therein relate to areas, units and items. The anomaly notwithstanding, it was noted that the Respondent's intention was to obtain prices for Cleaning Services from service providers under open framework agreement with GPSA. Thus, the Appeals Authority is of settled view that, the disputed tender process relates to Mini Competition Quotations and thus under the jurisdiction of the Act and its Regulations.

Having so stated, the Appeals Authority proceeded to determine if the whole process of Mini Competition and subsequent award made to the successful tenderer complied with the law.

In the course of so doing, the Appeals Authority deemed it proper to start by pointing out that, according to Section 3 of the Act, the word tender had been defined to mean “an offer, proposal or quotation made by a supplier, contractor or consultant in response to a request by a procuring entity”. That is to say, offers including those under mini competition are subjected to the provisions of the Act and its Regulations. Thus, the Respondent’s argument that the disputed process was not required to be subjected to the ordinary tendering procedure is untenable. The Respondent was required to comply with the requirements of the law. Having so stated, the Appeals Authority proceeded to determine grounds of Appeal by verifying whether Mini-Competition process complied with the law. In so doing, the Appeals Authority revisited the documents submitted as well as oral submissions by the parties and observed that-

- i. The Mini-Competition Quotation Form was not in accordance with the format issued by GPSA. The form that was issued by the Respondent requested tenderers to “furnish the items as described in the table provided therein”. However, going into the details of the said Mini-Competition Quotation Form and its table, there was nothing stated to show that the same was for provision of cleaning services. It was observed further that, according to GPSA’s format, the Mini-Competition Quotation Form should allow tenderers to provide, amongst others, description of supplies or services that will be offered, unit measure, quantity, unit price, Tax per unit price and extended

price. However, the Form issued by the Respondent lacked most of the items as it only required tenderers to indicate unit price and total sum. The column for description of the services/supplies to be offered was filled by the Respondent and it was not clear if it was for provision of services or supply of goods. Moreover, the Mini-Competition Quotation Form neither showed the deadline for submission nor the opening date and time contrary to Section 68(4) of the Act. Therefore, it is the considered view of the Appeals Authority that, the Mini-Competition Quotation Form issued by the Respondent did not comply with the the law.

- ii. There was no record or register to show the manner of submission of quotations/Mini-Competition Quotations. During the hearing, the Respondent conceded that, the returned quotations were not recorded anywhere; the only record available was the names of tenderers who had collected the Quotations forms. The Appeals Authority finds the Respondent's act in this regard to have contravened Section 73(2) of the Act read together with Regulation 195 (1) and (2) of GN No 446 of 2013 which require all submitted tenders to be recorded on a special register or give each tenderer a receipt showing the time and date that the tenders were received. The said provisions also require the procuring entity to keep the said tenders sealed until on the date scheduled for

public opening. To the contrary, the Respondent failed to comply with such requirement of the law. The Respondent had contravened the law by failing to keep a record of the submissions of quotations.

iii. There is no record which shows that the Mini-Competition Quotation Forms were publicly opened as per the requirement of the law. Based on the documents submitted as well as oral submissions, the Respondent conceded that there was no public opening of the submitted quotations on the assertion that the process was not competitive tendering rather it was simple quotation; hence there was no need of public opening. The Appeals Authority finds the Respondent's act in this regard to have contravened Section 73(3) of the Act read together with Regulation 196(3) and (4)(b) of GN No.446 of 2013. The said provisions require all tenders submitted before the deadline for submission to be opened in public, in the presence of tenderers or their representatives. The Respondent failed to comply with such requirement of the law.

iv. The Respondent failed to inform the Appellant and the other unsuccessful tenderers, on the tender result so as to ensure fairness and transparency of the whole process. The Appeals Authority has noted that, the deadline for the submission of the Quotations was on 30th June 2016 and the award was made on 1st July 2016. The Respondent's letter dated 22nd July

2016 and addressed to the Appellant and giving him the result of the tender has no value. The Appeals Authority finds the Respondent to have contravened Section 4A (2) and (3) of the Act which requires all procurement to be conducted in a manner that will maximize integrity, competition, accountability, efficiency, transparency and achieves value for money.

From the above findings, the Appeals Authority is of the settled view that, the Mini-Competition process conducted by the Respondent had been marred by serious irregularities which is evidence of lack of transparency and impartiality. The Respondent is hereby strongly advised to adhere to the spirit and the letter of the procurement legislations.

Therefore, the Authority's conclusion with regard to the first issue is that, the whole process was marred by irregularities; as a result, the subsequent award made to the purported successful tenderer was not proper at law. The Appeal is hereby upheld.

2.0 To What reliefs, if any, are the parties entitled

In considering prayers by the parties, the Appeals Authority took cognizance of the findings that award made thereof was not proper in the eyes of the law; and states that the award so made ought to be nullified. However, since the contract had already been signed and execution had commenced from 1st July 2016, the Appeals Authority finds it proper to

order for reasonable compensation as per Section 97(5)(f) of the Act. Thus, the Appeals Authority orders the Respondent to compensate the Appellant the sum of TZS 2,850,000.00 as per the following breakdown-

- Appeal filing fees TZS 200,000.00
- Transport Costs:
Babati – DSM – Babati: TZS 30,000/- x 2(trip) = 60,000.00
- Hotels and accommodation: TZS 30,000/- x 3 (nights) = 90,000.00
- General Damages: TZS 2,500,000.00

Total TZS 2,850,000.00

It is so ordered.

The Right of Judicial Review as per Section 101 of the Act was explained to the parties.

This Decision is delivered in the absence of all parties this 7th September 2016.



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VINCENT K.D. LYIMO, J. (RTD)
CHAIRMAN

MEMBERS:

1. MS. MONICA P. OTARU 

2. MR. LOUIS P. ACCARO 