

**IN THE PUBLIC PROCUREMENT APPEALS AUTHORITY**

**APPEAL CASE NO. 01 OF 2023-24**

**BETWEEN**

**M/S KGG INVESTMENT LTD.....APPELLANT**

**AND**

**RURAL WATER SUPPLY AND SANITATION  
AGENCY.....RESPONDENT**

**DECISION**

**CORAM**

- |                                     |               |
|-------------------------------------|---------------|
| 1. Hon. Justice (rtd) Souda Mjasiri | - Chairperson |
| 2. Ms. Ndeonika Mwaikambo           | - Member      |
| 3. Dr. William Kazungu              | - Member      |
| 4. Mr. James Sando                  | - Secretary   |

**SECRETARIAT**

- |                        |                              |
|------------------------|------------------------------|
| 1. Ms. Florida Mapunda | - Deputy Executive Secretary |
| 2. Ms. Violet Limilabo | - Senior Legal Officer       |

**FOR THE APPELLANT**

- |                       |                                 |
|-----------------------|---------------------------------|
| 1. Mr. James Kasusura | - Advocate - Kasubagi Attorneys |
| 2. Mr. Richard Mlay   | - Managing Director             |
| 3. Mr. Brendan Dibogo | - Technical Director            |

  
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## FOR THE RESPONDENT

1. Mr. Zam Mlimira - Director of Procurement Management Unit

**M/S KGG Investment Ltd** (hereinafter referred to as "**the Appellant**") has lodged this Appeal against the **Rural Water Supply and Sanitation Agency** commonly known by its acronym as "**RUWASA**" (hereinafter referred to as "**the Respondent**"). The Appeal is in respect of Tender No. AE/102/2022-2023/TBR/W/13 for Extension of Lake Victoria Pipeline to Kigwa B, Nzigala, Matanda, Kinamagi, Mbuyuni, Igalula, Ipululu, Vumilia, Isenefu, Imalakaseko, Goweko, Kamama, Mwitikila, Tambukareli, Nsololo, Kimungi, Itundaukulu and Kawekapina at Uyui District in Tabora Region (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 through National Competitive Tendering Method 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 as amended (hereinafter referred as "**the Regulations**").

On 16<sup>th</sup> February 2023, the Respondent issued an invitation to Tender through the Tanzania National electronic Procurement System (TANePS). The deadline for submission of tenders was on 3<sup>rd</sup> March 2023. On the deadline, the Respondent received eight tenders including that of the Appellant.



The received tenders were subjected to evaluation whereby six of them were disqualified at the preliminary and technical evaluation stages. The tender submitted by the Appellant and that of M/S Nipo Africa Engineering Co. Limited were found to have complied with eligibility and technical requirements and were therefore subjected to financial evaluation. After completion of the financial evaluation process, M/S Nipo Africa Engineering Co. Limited was ranked the first and was thus recommended for award of the Tender subject to negotiations. The recommended contract price was Tanzania Shillings Six Billion Two Hundred Twelve Million Seven Hundred Twelve Thousand Three Hundred Ninety one and Forty-seven cents only (TZS 6,212,712,391.47) VAT inclusive. The recommendations of the evaluation committee were approved by the Tender Board at its meeting held on 27<sup>th</sup> April 2023.

According to the record of Appeal, negotiations between the Respondent and M/S Nipo Africa Engineering Co. Limited took place from 04<sup>th</sup> to 6<sup>th</sup> May 2023. During negotiations it was observed that M/S Nipo Africa Engineering Co. Limited did not quote prices for supply of HDPE pipes as required by Item 2.2.2 to 2.2.12 of the Bills of Quantities (BOQ). In addition, M/S Nipo Africa Engineering Co. Limited provided discounts on some of the items on the BOQ which changed its price from TZS 6,212,712,391.47 to TZS 4,473,392,391.47 VAT inclusive. At the conclusion of the negotiations, M/S Nipo Africa Engineering Co. Limited indicated that it would be able to execute the contract including the supply of the HDPE pipes if the contract sum would be TZS 6,212,712,391.47 VAT inclusive. Conversely, M/S Nipo Africa Engineering Co. Limited indicated that if HDPE pipes would be



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supplied by the Respondent, it would execute the contract for TZS 4,473,392,391.47 VAT Inclusive. Thus, negotiations were concluded with no consensus on the contract price.

The record of Appeal indicates that the negotiation report was tabled before the Tender Board at its meeting held on 23<sup>rd</sup> May 2023. After deliberations the Tender Board observed that, M/S Nipo Africa Engineering Co. Limited failed to quote prices for the supply of HDPE pipes and its quoted prices on some of the items were unrealistic. Therefore, the Tender Board directed that the Appellant which was the second ranked tenderer be invited for negotiations.

On 24<sup>th</sup> May 2023, the Respondent invited the Appellant to attend negotiations scheduled to take place on 31<sup>st</sup> May 2023. Negotiations successfully took place from 31<sup>st</sup> May to 2<sup>nd</sup> June 2023. In the said negotiations, amongst others, the Appellant reduced its quoted price from TZS 7,818,704,458.98 to TZS 7,322,062,803.00 VAT inclusive. Then, the negotiation report was tabled before the Tender Board at its meeting held on 7<sup>th</sup> June 2023. After deliberations on the negotiation report, the Tender Board observed that the Appellant's price was on the higher side. Therefore, it directed that M/S Nipo Africa Engineering Co. Limited be contacted if it would be ready to execute the intended project for TZS 6,212,712,391.47 VAT inclusive. The price which should also cover the costs for the supply of HDPE pipes.

On 7<sup>th</sup> June 2023, the Respondent wrote a letter to M/S Nipo Africa Engineering Co. Limited seeking confirmation if it would be able to execute the contract for TZS 6,212,712,391.47 VAT inclusive. M/S Nipo Africa

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Engineering Co. Limited through a letter dated 8<sup>th</sup> May 2023 (*letter is wrongly dated in reference to the Respondent's letter dated 7<sup>th</sup> June 2023*) confirmed that it would be able to execute the project for TZS 6,212,712,391.47 VAT inclusive.

On 8<sup>th</sup> June 2023 the Respondent notified the Appellant of its intention to award the Tender to M/S Nipo Africa Engineering Co. Limited (the proposed successful tenderer) at a contract price of TZS 6,212,712,391.47 VAT inclusive. In addition, the Appellant was further informed that its tender was not considered for award for quoting a higher price than that of the proposed successful tenderer. According to the Appellant, it received the said Notice on 21<sup>st</sup> June 2023.

Dissatisfied with the Respondent's act of intending to award the Tender to the proposed successful tenderer, on 21<sup>st</sup> June 2023 the Appellant filed an application for administrative review to the Respondent. The Respondent through a letter dated 23<sup>rd</sup> June 2023 issued its decision which rejected the Appellant's application for administrative review. According to the Appellant, the Respondent's decision was received on 30<sup>th</sup> June 2023. The Appellant was aggrieved by this decision and on 3<sup>rd</sup> July 2023 it lodged this Appeal before the Appeals Authority.

When the matter was called on for hearing the following issues were framed:-

**1.0 Whether the award of the Tender proposed to the successful tenderer was in accordance with the law; and**

**2.0 What reliefs, if any, are the parties entitled to?**

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## **SUBMISSIONS BY THE APPELLANT**

The Appellant's submissions in this Appeal were made by Mr. James Kasusura, learned advocate. He commenced his submissions by providing a background of this Appeal where he stated that the Appellant was among eight tenderers which responded to the Respondent's invitation to Tender. During evaluation, the Appellant's BOQ was found with some errors and the same were corrected. The correction of the arithmetic errors changed the Appellant's price from TZS 7,819,028,958.98 to 7,916,729,195.12 VAT inclusive. The changes were communicated to the Appellant and the same were accepted.

The learned counsel submitted that after completion of the evaluation process, the proposed successful tenderer was found to be the lowest evaluated tenderer and was therefore invited for negotiations. The Appellant contended that during negotiations the tender of the proposed successful tenderer was found to be non-responsive for failure to quote a price for supply of HDPE pipes on its BOQ. Thus, its negotiations were terminated.

On 24<sup>th</sup> May 2023, the Appellant received a letter from the Respondent inviting it for negotiations. The Appellant stated that negotiations successfully took place from 31<sup>st</sup> May to 2<sup>nd</sup> June 2023. During negotiations, the Appellant reduced its quoted price from TZS 7,916,729,195.12 to TZS 7,322,062,803.00 VAT inclusive.

Surprisingly, on 21<sup>st</sup> June 2023, the Appellant received the Notice of Intention to award which indicated that the Respondent intended to award the tender to the proposed successful tenderer. The Appellant was

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dissatisfied with the Respondent's intention; therefore, it filed the application for administrative review and subsequently this Appeal.

Submitting on the first issue the learned counsel stated that the fact that the proposed successful tenderer was the lowest evaluated tenderer does not suffice for it to be awarded the Tender. The tender of the proposed successful tenderer was found to be incomplete during negotiations for failure to quote prices for supply of HDPE pipes as indicated on the BOQ. The noted anomaly led the negotiations between it and the Respondent to be terminated.

The learned counsel submitted that to the Appellant's surprise the Respondent reinstated the proposed successful tenderer to the Tender process and indicated its intention to award it the Tender. According to the learned counsel the Respondent's act in this regard contravened Section 76(2)(c) of the Act. The said provision prohibits alteration of anything that formed a crucial or deciding factor during evaluation. The record of this Tender indicates that the proposed successful tenderer did not quote prices for the supply of HDPE pipes as per the BOQ and that its tender was found to be non-responsive during negotiations. The learned counsel submitted that, since the proposed successful tenderer was found to be non-responsive, the Respondent's act of intending to award it the Tender implies that, the firm was allowed to alter its BOQ by indicating prices for the supply of HDPE pipes which were not initially quoted. Since the total price for supply of HDPE pipes was a crucial factor for determination of the contract price, the Respondent ought not to have allowed the proposed successful tenderer to amend its BOQ.

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The learned counsel stated that Regulation 225(2)(d) of the Regulations prohibits negotiations that intends to alter major components of the Tender. In this Tender the major component was the supply of HDPE pipes. Despite that being the major component, the proposed successful tenderer did not indicate the prices for the supply of the HDPE pipes as per Item 2.2.2 to 2.2.12 of the BOQ. Instead, the prices indicated under Item 2.2.2 to 2.2.12 on its BOQ was for excavation only. The Respondent without due regard to the requirements of the law allowed the proposed successful tenderer to amend the major component of the BOQ by adding costs for supply of HDPE pipes.

The learned counsel cited Regulation 193(1) of the Regulations which allows tenderers to modify their tenders prior to the deadline for submission. On the other hand, Regulation 193(2) of the Regulations prohibits modification of tenders after the deadline for submission of tenders. The learned counsel contended that despite the clear position of the law, the Respondent through a letter dated 7<sup>th</sup> June 2023 required the proposed successful tenderer to confirm the contract price and submit the revised BOQ. The proposed successful tenderer through a letter dated 8<sup>th</sup> May 2023 confirmed the contract price and submitted the revised BOQ. According to the Appellant the revised BOQ of the proposed successful tenderer was accepted by the Respondent. The learned counsel submitted that the Respondent's act of allowing the proposed successful tenderer to modify its BOQ after termination of negotiations, contravened the law as modification of tenders ought not to have been done after the deadline for submission of tenders.

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The learned counsel cited Regulation 336(2) of the Regulations which prohibits negotiations for purposes of increasing the price. The Respondent's act in this Tender of allowing the proposed successful tenderer to amend its BOQ contravened the cited regulation as the said amendment has increased the price on the major components of the Tender.

The learned counsel submitted further that Section 76(4) of the Act states clearly that if negotiations have been unsuccessful, the same should be terminated and after approval by the Tender Board, the next lowest evaluated tenderer may be invited for negotiations. In the disputed Tender negotiations between the proposed successful tenderer and the Respondent were unsuccessful and therefore the same were terminated. The Appellant being the next ranked tenderer was invited for negotiations after approval by the Tender Board. The learned counsel contended that, much as the Respondent complied with the requirements of the law at this point, it re-opened negotiations with the proposed successful tenderer contrary to the requirements of Regulation 230 of the Regulations. The referred regulation prohibits re-opening of negotiations that were previously terminated.

Regulation 230 of the Regulations also requires the procuring entity to inform a party whose negotiations have been terminated, reasons for such termination. The Respondent initially terminated negotiations with the proposed successful tenderer, however the said tenderer was not informed if its negotiations were terminated and the reasons for such termination. The Respondent also terminated negotiations with the Appellant.



Nevertheless, the Appellant was not informed about the termination or reasons that led to the said termination.

Regulation 237(1) of the Regulations requires a tenderer whose tender was the lowest and has not been accepted, if such a tenderer so requests, be informed the reasons that led the said tender not to be accepted. According to the referred provision a procuring entity is allowed to provide the reason or clarification thereof orally. That is to say, the Respondent ought to have informed tenderers about termination of negotiations and the reasons thereof orally. The law provides for a simplified way to procuring entities on how tenderers should be informed the reasons of their unsuccessfulness. However, the Respondent failed to use the provided means of communication and the Appellant remained uninformed of the reasons for termination of its negotiations.

The learned counsel contended further that since the tender of the proposed successful tenderer was determined to be non-responsive during negotiations for failure to quote prices for supply of HDPE pipes, the major components of the Tender, the Respondent ought not to have reinstated the proposed successful tenderer in the Tender process. Regulation 205(b) of the Regulations requires a tender that has been found to have failed to quote for the major item of the package to be rejected. Thus, the Respondent ought to have rejected the tender of the proposed successful tenderer as per the requirements of the law.

Regulation 240 of the Regulations requires tender processes to be conducted in strict confidentiality. To the contrary, the Respondent shared

some confidential information to the proposed successful tenderer that facilitated the modification of the BOQ while the same is prohibited under the law.

The learned counsel added that Regulation 17(1) of the Regulations requires procuring entities to reject a tender that has been determined to be abnormally low. In this Appeal the Respondent has indicated in its Statement of Reply that the Tender Board when deliberating on the negotiation report of the proposed successful tenderer, observed that the quoted prices by it were unrealistic. From such an observation, it is clear that the quoted price by the proposed successful tenderer would not have sufficed to execute the implementation of the project. Thus, the Respondent ought to have rejected the tender of the proposed successful tenderer for being abnormally low.

Regarding the contract price, the learned counsel submitted that this Tender required tenderers who are registered as local contractors civil works Class II by the Contractors Registration Board (CRB). This class has a ceiling of TZS 8,000,000,000.00. The Appellant's negotiated price was TZS 7,322,062,803.00 VAT inclusive, thus below the CRB's maximum required ceiling for Class II. Therefore, the Appellant's price was within the required limit.

Finally, the Appellant prayed for the following remedies: -

- i) The Appeals Authority to review the Tender process and order award of the Tender to the Appellant; and
- ii) Any other orders the Appeals Authority may deem fit and just to grant.

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## REPLY BY THE RESPONDENT

The Respondent's submissions were made by Mr. Zam Mlimira, Director of Procurement Management Unit from the Respondent's office. He commenced his submissions on the first issue by stating that, the Appellant was among the tenderers which participated in this Tender. After completion of the evaluation and other internal processes, the proposed successful tenderer was found to be the lowest evaluated tenderer and was therefore invited for negotiations. During negotiations it was observed that, the proposed successful tenderer quoted the price of TZS 5,000 for each HDPE pipe under Item 2.2.2 to 2.2.12 of the BOQ. The said amount was considered by the Respondent to be unrealistic for the execution of the said project. After a clarification that was provided by the Respondent, the proposed successful tenderer realized to have misunderstood the requirement by assuming that the supply of the pipes would be done by the Respondent and its role was to excavate the pipeline. During the negotiations the proposed successful tenderer gave a discount of TZS 1,739,320,000.00 which reduced its price from TZS 6,212,712,391.47 to TZS 4,473,392,391.47 VAT inclusive. The proposed successful tenderer indicated that, it was ready to execute the project for TZS 6,212,712,391.47 VAT inclusive the amount that would include the supply of the HDPE pipes.

The Respondent submitted that the findings of the negotiations were then tabled before the Tender Board at its meeting held on 23<sup>rd</sup> May 2023. After deliberations on the negotiation report the Tender Board observed that, the proposed successful tenderer failed to quote the price for the supply of

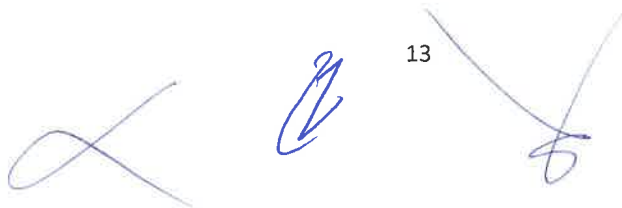
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HDPE pipes and that its prices on some of the items were unrealistic. The Tender Board directed that the Appellant who was the next ranked tenderer be invited for negotiations. The Tender Board believed that the Appellant would agree to execute the contract within the available budget.

According to the Respondent, negotiations with the Appellant took place from 31<sup>st</sup> May to 2<sup>nd</sup> June 2023 and were successful. The Appellant reduced its quoted price from TZS 7,916,729,195.12 to TZS 7,322,062,803.00 VAT inclusive. However, after the negotiation report was tabled before the Tender Board at its meeting held on 7<sup>th</sup> June 2023, it was observed that the Appellant's price was higher compared to the Respondent's estimated budget. The Tender Board therefore directed that the proposed successful tenderer be contacted if it would be able to execute the contract for the sum of TZS 6,212,712,391.47 VAT inclusive. The Respondent elaborated that having been contacted, the proposed successful tenderer accepted to execute the contract for the indicated total sum.

The Respondent contended that after the proposed successful tenderer's confirmation on the contract price, the Respondent issued the Notice of Intention to award the Tender to the proposed successful tenderer at the contract price of TZS 6,212,712,391.47 VAT inclusive. The Respondent asserted that the awarded contract price would enable it to execute the project by using the available resources. In addition, the named 18 villages for this Tender would be able to get clean and safe sustainable water services.

In relation to the Appellant's argument on Regulation 230 of the Regulations, the Respondent submitted that the said provision requires that

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after the Tender Board has approved termination of the negotiations, the respective tenderer be informed in writing about the termination and the reasons thereof. In this Tender when negotiations with the proposed successful tenderer were terminated at the Tender Board meeting held on 23<sup>rd</sup> May 2023, the said tenderer was neither informed about the termination nor the reasons thereof. The same position recurred when the Appellant's negotiations were terminated by the Tender Board on 7<sup>th</sup> June 2023. The Respondent asserted that instead, it issued the Notice of Intention to award to the Appellant believing that the same would serve as a notification for termination of negotiations. Thus, the Appellant cannot claim to have not been informed about termination of its negotiations.

Regarding modification of the proposed successful tenderer's BOQ, the Respondent submitted that the BOQ submitted by the proposed successful tenderer to confirm the contract price did not modify the original BOQ submitted on TANePS, instead the re-submitted BOQ indicates the action plan on how the works would be executed. Thus, there was no modification of the BOQ as alleged by the Appellant.

Finally, the Respondent prayed that its decision to award the Tender to the proposed successful tenderer be upheld and the Appeal be dismissed.

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

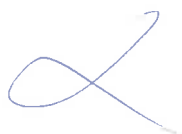


#### **1.0 Whether the award of the Tender proposed to the successful tenderer was in accordance with the law;**

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In resolving this issue the Appeals Authority revisited parties' contentions whereby on one hand the Appellant contended that the Respondent's proposal to award the Tender to the proposed successful tenderer was unjustified as the said tenderer failed to quote prices for the supply of HDPE pipes, the major component for the Tender. In addition, the Appellant asserted that the said anomaly was noted by the Respondent during negotiations and therefore it ought to have disqualified the proposed successful tenderer for being non-responsive to the Tender requirements. On the other hand, the Respondent alleged that its intention to award the Tender to the proposed successful tenderer was justified as the said tenderer has offered the price that would enable the Respondent to execute the project within the available budget.

In ascertaining the validity of the parties' contentions the Appeals Authority reviewed the record of Appeal. It observed that the Appellant and the proposed successful tenderer were among the eight tenderers who participated in this Tender. The record indicated further that the received tenders were subjected to evaluation and after completion of that process, the proposed successful tenderer was ranked the first and was followed by the Appellant.

The proposed successful tenderer was thereafter invited for negotiations. During negotiations it was observed that, the proposed successful tenderer quoted TZS 5,000 for HDPE pipes under Items 2.2.2 to 2.2.12 of the BOQ. According to the Respondent, tenderers were required to specifically quote for supply and excavation of pipes under Items 2.2.2 to 2.2.12 of the BOQ. The proposed successful tenderer alleged to have misconceived the

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requirement and quoted for excavation only, believing that the Respondent would supply the pipes. The proposed successful tenderer also provided a discount of TZS 1,739,320,000.00 that changed its price from TZS 6,212,712,391.47 to 4,473,392,391.47 VAT inclusive. Finally, the parties failed to reach a consensus on the final price for the execution of the assignment.

It was further observed that, the negotiation report was tabled before the Tender Board at its meeting held on 23<sup>rd</sup> May 2023. Having considered the negotiated matters, the Tender Board observed that the proposed successful tenderer failed to quote prices for the supply of HDPE pipes and that the prices quoted on other items were higher than the market prices. Therefore, the Tender Board directed that the Appellant which was the second lowest evaluated tenderer be invited for negotiations. Furthermore, the negotiations were to be particularly on the execution price of the project that should include the costs for supply of the HDPE pipes and excavation.

Negotiations with the Appellant successfully took place from 31<sup>st</sup> May to 2<sup>nd</sup> June 2023. The report thereof was tabled before the Tender Board at its meeting held on 7<sup>th</sup> June 2023. On its deliberations the Tender Board observed that the Appellant's price of TZS 7,322,062,803.00 was seen to be higher than the estimated budget. Therefore, the Tender Board directed that the proposed successful tenderer be contacted and asked if it would be able to execute the contract for TZS 6,212,712,391.47, the price that would include the supply of HDPE pipes and excavation.

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The proposed successful tenderer was contacted through a letter dated 7<sup>th</sup> June 2023 and it confirmed through a letter dated 8<sup>th</sup> May 2023 that it was ready to execute the contract for TZS 6,212,712,391.47 VAT inclusive. Therefore, on 8<sup>th</sup> June 2023 the Respondent issued the Notice of Intention to award the Tender to the proposed successful tenderer.

The Appeals Authority revisited Section 76(1), (2)(c) and (4) of the Act and Regulations 225(4)(a), (5), 228(3) and 230 of the Regulations in order to ascertain if the Respondent's act of intending to award the tender to the proposed successful tenderer is justified. The provisions read as follows: -

*"76(1) subject to the conditions stipulated in the regulations, a tenderer evaluated to have the capacity and capability to supply the goods, undertake the works, provide the services or purchase the assets shall be invited for negotiations by the procuring entity.*

**(2) Negotiations shall not be conducted-**

***(c) to substantially alter anything which formed a crucial or deciding factor in the evaluation of tender.***

***(4) where the negotiation under subsection (2) fails to result in an acceptable contract, the procuring entity shall terminate the negotiations and after consultation with the appropriate tender board, invite the next ranked firm for negotiations.***

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Reg.225(4) ***Negotiations with a tenderer are not permitted until after the tender board has approved the evaluation committee's recommendations-***

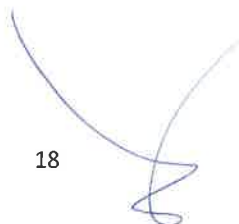
***(a) of the lowest evaluated tenderer in case of goods, works or services or highest evaluated tenderer in case of revenue collection, and the need to hold negotiation; or***

***(5) Negotiations shall only be held with the lowest evaluated tenderer for goods, services or works, or the highest evaluated tenderer for revenue collection for national and international competitive tendering.***

Reg.228(3) ***Where the negotiation team recommends rejection of the tenderer, it may also, where appropriate, recommend inviting the next ranked tenderer for negotiation in the case of competitive methods of procurement or a new tenderer to submit a tender in the case of direct contracting.***

Reg.230 ***Where negotiations are commenced with the next ranked tenderer or a new tenderer is invited, the procuring entity shall not reopen earlier negotiations; and the original tenderer shall be informed in writing of the reasons for termination of the negotiations'***.

(Emphasis supplied)



The above quoted provisions clearly indicate that a tenderer who has been determined to be the lowest evaluated tenderer for goods, works or services or the highest evaluated tenderer in case of revenue collection and who has been approved by the Tender Board can be invited for negotiations. The provisions indicate further that, if negotiations fail with the lowest evaluated tenderer, new negotiations may be commenced with the next lowest evaluated tenderer after obtaining the Tender Board's approval. The law requires once negotiations have been commenced with the next ranked tenderer, earlier negotiations should not be re-opened and a tenderer whose negotiations have been terminated should be informed in writing the reasons for termination.

Having related the above quoted provisions to the facts of this Appeal, the Appeals Authority observed that the proposed successful tenderer was the lowest evaluated tenderer and was therefore recommended for award subject to negotiations. The evaluation committee's recommendations were approved by the Tender Board pursuant to Regulation 225(4)(a) and (5) of the Regulations.

The record of Appeal indicates that negotiations were conducted as proposed and parties did not reach a consensus on the final contract price. The negotiation report was tabled before the Tender Board at its meeting held on 23<sup>rd</sup> May 2023. After deliberations, the Tender Board directed that the Appellant which was the second lowest evaluated tenderer be invited for negotiations. Section 76(4) of the Act quoted above allows a procuring entity to terminate negotiations if it fails to result in an acceptable contract and may invite the next ranked tenderer for negotiations. From the facts of



this Appeal, the Appeals Authority observes that much as it was not indicated specifically in the Tender Board's minutes that negotiations with the proposed successful tenderer were terminated, the Tender Board's act of directing the Appellant to be invited for negotiations implied that negotiations with the preceding tenderer were terminated.

In view of this observation the Appeals Authority is of the firm view that negotiations between the proposed successful tenderer and the Respondent were officially terminated on 23<sup>rd</sup> May 2023 when the Tender Board approved that the next lowest evaluated tenderer be invited for negotiations.

The record of Appeal indicates further that following the Tender Board's directive that the Appellant be invited for negotiations, the negotiations between it and the Respondent were successfully held from 31<sup>st</sup> May to 2<sup>nd</sup> June 2023. According to Regulation 230 of the Regulations quoted above, once negotiations have been commenced with the next ranked tenderer, the procuring entity is prohibited from re-opening earlier negotiations.

The facts of this Appeal indicate that after negotiations between the Appellant and the Respondent were successfully completed, the report thereof was tabled before the Tender Board at its meeting held on 7<sup>th</sup> June 2023. After deliberations, the Tender Board observed that the Appellant's price was higher than the estimated budget. Thus, it directed that the proposed successful tenderer be re-called and asked to confirm if it would be able to execute the contract for TZS 6,212,712,391.47 VAT inclusive. In view of the requirements of Regulation 230 of the Regulations, the Appeals Authority finds the Respondent to have contravened the law for re-opening

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deliberations with the proposed successful tenderer whose negotiations were terminated and new negotiations with the Appellant were already concluded.

In addition, under Regulation 230 of the Regulations the Respondent was required to inform tenderers on termination of negotiations and the reasons thereof. However, in this Tender process the Respondent failed to comply with this requirement of the law.

The Appeals Authority considered the Respondent's assertion that it was necessitated to re-call the proposed successful tenderer as its price was determined to be within the Respondent's budget and observes that since the said budget was not disclosed neither during negotiations nor at the hearing of this Appeal, the Appeals Authority doubts the authenticity of the Respondent's argument in this regard.

Regulation 225(1)(g) of the Regulations allows negotiations on reduction of price. If the prices quoted by the tenderers were determined to be above the Respondent's budget, the Respondent ought to have disclosed the available budget during negotiations and the same would have been negotiated accordingly. The negotiation minutes dated 31<sup>st</sup> May to 2<sup>nd</sup> June 2023 indicated that negotiations on prices were done on several items that led the Appellant to give a discount of TZS 496,641,655.99. The minutes of the said negotiations do not indicate that the Respondent disclosed the budget for the project.

In consideration of the fact that the proposed successful tenderers' negotiations were terminated by the Respondent for amongst other reason

failure to quote prices for the supply of HDPE pipes and that the law prohibits re-opening of negotiations once terminated, the Respondent ought not to have re-called the said tenderer on the basis that its quoted price was within the Respondent's budget. In view of the above observation, the Appeals Authority rejects the Respondent's basis for recalling the proposed successful tenderer and its intention to award the Tender to it.

The Appeals Authority considered the Appellant's contention that the proposed successful tenderer ought not to have been considered for award of the Tender as it failed to quote prices for the supply of HDPE pipes, a major component for the Tender. On the other hand, the Respondent admitted that during negotiations with the proposed successful tenderer, it was observed that the said tenderer did not quote prices for the supply of the HDPE pipes as required by Item 2.2.2 to 2.2.12 of the BOQ. The Respondent asserted that Item 2.2.2 to 2.2.12 of the BOQ is the major component of the Tender, however since the proposed successful tenderer was ready to execute the contract for its quoted price of TZS 6,212,712,391.47 that included the costs for supply of the HDPE pipes, the Respondent found its contract price to be reasonable and within its budget and therefore decided to recommend it for award of the Tender.

In ascertaining the validity of the parties' argument on this point, the Appeals Authority revisited Item 2.2 of the BOQ which provides general requirements on HDPE pipes. Item 2.2 reads as follows: -

*"Excavate trench for distribution network varying from 1m to 2m deep and 60cm to 150cm wide, **supply distribution pipes**, lay*

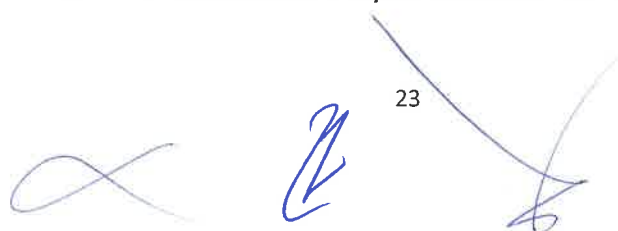
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*them in trenches with appropriate fittings (including also all fittings at pipes junctions and branch control valves) and backfill properly including anchoring every G.S pipe laid in valley and rock crossing and where pipe change direction by reinforced or mass concrete as may be directed by the Engineer. Including valve chambers and Control valve at all junctions".*

The Appeals Authority revisited the Tender of the proposed successful tenderer on TANePS and observed that it quoted a unit price of TZS 5,000 for each of the Item 2.2.2 to 2.2.12 of the BOQ. The Appeals Authority reviewed the record of Appeal and observed that it is an undisputed fact that the price quoted by the proposed successful tenderer was for excavation of pipes and not supply of HDPE pipes as required by the BOQ. During the hearing the Respondent also stated clearly that the supply of HDPE pipes was a major component for this Tender.

The Appeals Authority considered the above quoted provision of Item 2.2 and observes that tenderers were mandatorily required to quote prices for supply of HDPE pipes. Having related the requirement of Item 2.2 of the BOQ and the Respondent's own admission that supply of HDPE pipes was a major requirement for this Tender, the Appeals Authority finds the Respondent to have contravened Regulation 205(b) of the Regulations. The said Regulation requires a tender that has failed to quote for the major item to be rejected. Regulation 205(b) reads as follows: -

*"205 All tenders shall be checked for substantial responsiveness to the technical requirements of the tendering documents*

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*and non-conformity to technical requirements, which are justifiable grounds for rejection of a tender includes the following:-*

*(a) .....*

*(b) failure to quote for a major item in the package".*

(Emphasis supplied)

The Appeals Authority revisited Regulation 225(2)(d) of the Regulations which reads as follows: -

**"225(2) Negotiations shall not be conducted-**

***(d) to substantially alter anything which formed a crucial or deciding factor in the evaluation of tender".***

(Emphasis Added)

The above quoted provision clearly entails that negotiations should not be conducted to alter a crucial or deciding factor for the Tender. In this Tender it is an undisputed fact that the proposed successful tenderer failed to quote prices for the supply of the HDPE pipes which was a major component of the Tender. The record of Appeal indicates that the said anomaly was overlooked during evaluation, but was considered during negotiations. The Appeals Authority observes that, having noted the said anomaly, the Respondent instead of disqualifying the proposed successful tenderer, it directed it to re-submit the amended BOQ which includes prices



for supply of HDPE pipes. Given the position, the Appeals Authority finds the Respondent to have contravened Regulation 225(2)(d) of the Regulations as quoted above.

In view of the above, the Appeals Authority finds the Respondent's act of intending to award the Tender to the proposed successful tenderer while it is evident that the said tenderer was non-responsive contravenes Regulation 206(2) of the Regulations. The said Regulation states clearly that a non-responsive tender shall be rejected and it may not be made responsive by correction of the deviations. The provision reads as follows:-

*"Reg. 206(2) 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."*

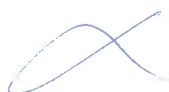
Given the above findings, the Appeals Authority concludes the first issue in the negative that award of the Tender to the proposed successful tenderer was not in accordance with the law.

## **2.0 What reliefs, if any, are the parties entitled to?**

Taking cognizance of the findings hereinabove, the Appeals Authority hereby allows the Appeal and order the Respondent to award the Tender to the Appellant.

We make no order as to 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 28<sup>th</sup> day of July 2023.

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



.....  
**CHAIRPERSON**

**MEMBERS: -**

**1. MS. NDEONIKA MWAIKAMBO**.....

**2. DR. WILLIAM KAZUNGU**.....