

COMPLAINT MATTER NO. 04 OF 2023

BETWEEN

SUPER ENTERPRISES LIMITED

.....

COMPLAINANT

VERSUS

STATE UNIVERSITY OF ZANZIBAR

.....

RESPONDENT

DECISION OF THE BOARD OF DIRECTORS OF THE ZANZIBAR PROCUREMENT
AND DISPOSAL OF PUBLIC ASSETS AUTHORITY

THIS DECISION IS MADE UNDER SECTION 85 OF THE PUBLIC PROCUREMENT
AND DISPOSAL OF PUBLIC ASSETS ACT, ACT NO. 11 OF 2016.

11th December 2023

1.0 BACKGROUND

This review emanated from the decision of the **State University of Zanzibar** (the Respondent) made on the 09th March 2023 declaring the bid submitted by **SUPER ENTERPRISES LIMITED** (the Complainant) as unsuccessful.

To determine the merit of this matter, we better scrutinize the brief background that led to this review, as it is as follows;

The Respondent had floated a Tender for Procurement of ICT Equipment, Center for Digital Learning Equipment and Furniture for Computer Labs - RFB No. TZ SUZ - 372401-GO-RFB for State University of Zanzibar (SUZA).

Such floatation of the same tender subject matters was expressed for the second time, after the first one was ultimately annulled due to the complaint raised by the same Complainant.

In this current tender, the following bidders have participated:

	Lot 1 - ICT Equipment with installation	Lot 2 - Central for Digital Learning Equipment with installation	Lot 3 - Furniture for Computer Labs
1.	M/S ZAN IT Co. Ltd	M/S ZAN IT Co. Ltd	M/S EVOLVE Co. Ltd
2.	M/S Equator Traders	M/S Equator Traders	M/S OSAJU Company Ltd
3.	M/S EVOLVE Co. Ltd	M/S Super Enterprises	M/S Mpely Furniture
4.	M/S Super Enterprises		M/S New Home Furniture
5.	M/S OSAJU Company Ltd		

At the conclusion of the tendering course, the Respondent, by its letter referenced HA.129/365/02/67 dated 09th October 2023, has informed the Complainant, the ultimate results of the said tender, by announcing M/S Equator Traders as the winner of Lot 1 for TZS 1,086,180,000.00 and Lot 2 for TZS 181,267,500.00 and M/S EVOLVE Co. Ltd as the winner of Lot 3 for TZS 150,575,250.00.

Such an outcome was gotten, certainly, after disqualification of the other bidders, one among which is the Complainant. This disqualification of the Complainant, in particular, was based on the then two main grounds, that the bidder (Complainant):

- has submitted the bid security which expires earlier than the required time, contrary to the condition specified under Clause 19.1 of Instruction To Bidders (ITB) which requires the bid security to be valid until 28 days beyond the tender validity period of 90 days, and

- b. has submitted the bid form addressed to the Secretary of Tender Board instead of Accounting Officer, contrary to contents of bullets number 6 and 9 of letter of invitation.

In reacting to the Respondent's notice, the Complainant, through its letter with reference number SUP/SUZA/2023/10/04 dated 11th October 2023 had strongly denied the stated grounds of its disqualification by informing the Respondent that:-

- a. the submitted bid security in the form of banker's guarantee has complied with the said conditions specified under clause 19.1 of ITB, and to ensure the effectiveness of this point, the Complainant has inferred for the Respondents to go through the conditions stated in the security issued by PBZ Bank,
- b. not only the invitation letter but also Clause 22.1 states where to submit the bids. The Complainant went further to explain the stand taken by the Respondent as a personal view which has no room according to bid document of the Respondent and procurement rules which stresses separation of duties, and
- c. further the Complainant believes that, the intended awards are contravening ITB 40(a) to 40(f) as they, the Complainant, are the lowest priced bidder, hence, with those arguments and by inference, the Complainant is convinced that they are validly entitled to be awarded the tender, and not otherwise.

In its determination, the Respondent, via official letter with reference number HA.129/365/02/7 dated 13th October 2023, retained its decision of disqualifying the Complainant, on the same grounds.

2.0 GROUNDS OF THE COMPLAINT

Being dissatisfied with the Respondent's decision, through its letter referenced SUP/ZPPDA/2023/10/1 dated 19th October 2023, the Complainant has instituted this complaint by generally seeking for intervention of this Authority but, unfortunately, without stating the grounds on which their challenge against the Respondent's decision lay. This necessitated a request for clarification by the Authority, through its letter EA.25/41/01/25 dated 23rd October 2023, requiring the Complainant to submit a well-organized factual statement clearly outlining the Respondent's decision which is particularly challenged, the grounds upon which the application based in challenging such decision, as well the reliefs sought from the Authority.

Responding to the said Authority's letter, the Complainant, via its letter SUP/ZPPDA/2023/11/1 dated 06th November 2023, has submitted its response stating the following two mainly grounds (as paraphrased): -

- a. It is mandatory and common practice that the bid validity period should always correspond simultaneously with the bid security period, thus nowhere in the bid document issued by the Respondent the bid security has been stipulated to mention its timely validity but rather it stated the forms of bid security. By submitting bid security in an accepted form, the submitted bid security (which is in the form of banker's guarantee) has impliedly fulfilled the conditions specified under clause 19.1 of ITB.
- b. In bullets 6 and 9 of the invitation letter, Clause 22.1 of ITB and page 45 of tender document issued by the Respondent state where to submit the bids, which is to the **Secretary of the Tender Board, State University of Zanzibar** with which they addressed and submitted and hence believed to have complied with accordingly, and
- c. Under what have been referred to as the "**Other Information**", the prospective awards are meant to violate ITB 40(a) to 40(f), as the Complainant believes that they are the lowest priced bidder, hence, the one who are validly entitled to be awarded the tender, and not otherwise.

3.0 CONSIDERED TESTIMONY

From the nature of the matter in question which founded solely on the documentary aspect of proof that is sufficient to enable the appropriate decision, it became unnecessary to summon the attendance of officials of either party, thus this Authority has confined itself to examine the following submitted official documents: -

- a. Bid Document number TZ-SUZ-372401-GO-RFB for Procurement of ICT Equipment, Center for Digital Learning Equipment and Furniture for Computer Labs, issued on the 24th August 2023 by the Respondent to invite Bidders,
- b. The Bidding Document submitted by the Complainant in response to the said floated tender,
- c. Bids Evaluation Report and Recommendation for Award of Contracts,
- d. Respondent's letter of Notification of Award with reference SUP/ZPPDA/2023/10/1 dated 09th October 2023, notifying the Complainant of its unsuccessful bid,
- e. Complainant's letter referenced SUP/SUZA/2023/10/04 dated 11th October 2023, to complain to the Respondent,
- f. Respondent's letter referenced HA.129/365/02/7 dated 13th October 2023, maintaining its decision to the Complainant, and

- g. Complainant's letters referenced number SUP/ZPPDA/2023/10/1 dated 19th October 2023 and SUP/ZPPDA/2023/11/1 dated 06th November 2023, submitted to the Authority to challenge the Respondent's decision.

4.0 FINDINGS

a. Legality of the Complaint

Before determining the matter on its merit, the Board has felt obliged to address the propriety and tenability of this complaint, that is to say, to test its conformity with the legal requirements under the Public Procurement and Disposal of Public Assets Act, Act No. 11 of 2016.

Pursuant to section 84(2) of the Act, the Complainant is required to lodge its complaint to the Accounting Officer in not later than 10 working days since becomes aware of the Respondent's decision. The compliance is apparently seen in the Complainant's letter SUP/SUZA/2023/10/04 dated 11th October 2023 submitted in response to the Respondent's notification of 09th October 2023 to the Complainant.

Again, if aggrieved by the Respondent's decision after complaining, which is the case herein, under section 84(4), the Complainant is supposed to institute its complaint with the Authority in not later than 10 working days since the Respondent's decision was communicated to her.

The compliance is evidenced by its letter referenced SU/ZPPDA/2023/10/1 and dated 19th October 2023 submitted to this Authority after receiving the Respondent's decision through its letter referenced number HA.129/365/02/7 dated 13th October 2023.

It is therefore apparent that, the said Complaint is in conformity with, and has fully satisfied, the legal requirements under the Act, hence this Authority is obliged to entertain.

b. Grounds Determination

As pointed out earlier, this Complaint lies on the two main grounds as follows (in a condensed form):-

- a. It is mandatory and common practice that the bid validity period should always correspond simultaneously with the bid security period, thus nowhere in the bid document issued by the Respondent the bid security has been stipulated to mention its timely validity but rather it stated the forms of bid security. By submitting bid security in an accepted form, the submitted bid security (which is in the form of banker's guarantee) has impliedly fulfilled the conditions specified under clause 19.1 of ITB, and

- b. In bullets 6 and 9 of the invitation letter, Clause 22.1 of ITB and page 45 of tender document issued by the Respondent state where to submit the bids, which is to the **Secretary of the Tender Board, State University of Zanzibar** with which they addressed and submitted and hence believed to have complied with accordingly.

In determining the first ground, this Authority is exhaustively looking into the offered evidences regarding to the Respondent's decision alongside with the relevant legal rules.

First and foremost, it is extremely important to take note that, the bids evaluation should mandatorily be conducted basing on the criteria provided for within the solicitation (bid) document. This has been clearly stated under section 57(3) of the Public Procurement and Disposal of Public Assets Act, Act No. 11 of 2026 which reads:

57(3) No evaluation criteria other than sated in the bid documents shall be taken into account.

The emphasis of the same is also comprehended under clause 119 of the Public Procurement Regulations of 2021 which reads:

119. When examining the best evaluated bid, evaluation shall be consistent with the terms and conditions prescribed in the bid documents.

Now, starting with clause 19.1 of Section I - Instruction to Bidders (ITB) as stipulate at page 22 of the relative solicitation document (bid document), for easy of reference it states as hereunder quoted:

"The Bidder shall furnish as part of its bid, either Bid-Security Declaration or a Bid Security, as specified in the BDS, in original form and, in the case of a Bid Security, in the amount and currency specified in the BDS.

This clause is actually meant to instruct Bidders to enclose Bid Security with their bids, and to avoid any uncertainty, in the last two statements of clause 19.3 of Section I - ITB at the same page, the Respondent clarifies on the type of bid security required with the corresponding timely validity of such security, whereby it states as herein quoted:

..... In the case of bank guarantee, the Bid Security shall be submitted either using the Bid Security Form included in Section IV,

Bidding Forms or in another substantially similar format approved by the purchaser prior to Bid submission. The Bid security shall be valid for twenty eight (28) days beyond the original date of expiry of the Bid validity, or beyond any extended date if requested under ITB 18.2.

The obvious intention of this part of the Clause was to stress on the required form, but as well, to provide the scope of time for which such security should endure to cover the whole duration from when the bidding process begins (bid submission and opening date) to the end point of twenty eight (28) days after the expiry of Bid Validity Period.

To show that this requirement is mandatory, there was vividly stated that the nonfulfillment of this requirement shall render particular Bid ineligible. This has been stipulated under clause 19.4 of Section I - ITB at page 23- which states:

If a Bid Security is specified pursuant to ITB19.1, any Bid not accompanied by a substantially responsive Bid Security shall be rejected by the Purchaser as non-responsive.

Apart from other conditions attached with the Bid Security, all of the above descriptions have been expressly recaptured under Section II - Bid Data Sheet (BDS) at page 45 of the Respondent's Bid Document.

In this regard, it is now clear that, the Respondent is supposed to apply, among others, "the submission of Bid Security" together with all of its described conditions, as criterion to evaluate the Bidders, failure of which the relative Bid shall be ultimately declared non-responsive and hence be rejected accordingly.

Now, turning to the real facts surrounding this appeal, they all started with the tender which was officially floated by the Respondent issuing "Notice of Invitation to Bidders" on the 24th August 2023. The issuance has been proceeded by the Bids Opening which took place at 11:20am on the 13th September 2023, few hours after the closure of bid submission deadline, whereby, the Complainant's bid was among the validly received ones.

The Complainant's bid was accompanied by three different bid securities, all are in the form of bank guarantee from PBZ, and except for the security referenced AB.182/394/27/05/84 which was issued on 05th September 2023 to cover Lot 3, the remaining securities were issued on the same day of 06th September 2023. In particular, the security referenced

AB.182/394/27/05/83 was issued to cover Lot 1 and the security referenced AB.182/394/27/05/82 was issued to cover Lot 2.

The second page of each security begins with the paragraph which, in our rational opinion, has turned to be the root cause of the dispute. For ease of reference and comprehension it is hereunder reproduced as follows:

"This guarantee will expire: (a) If the Applicant is the successful Bidder, upon receipt of copies of the contract agreement signed by the Applicant and the performance security issued to the Beneficiary in relation to such Contract agreement; and (b) If the Applicant is not the successful Bidder, upon the earlier of: (i) Our receipt of a copy of the Beneficiary's notification to the Applicant of the results of the Bidding process; or (ii) Twenty eight days after the end of the Bid Validity Period. This guarantee shall become valid from 13th September 2023 and shall expire on 11th December 2023.

From the wordings of that paragraph, it can be easily noted that, there has been set various conditions, some of which seems to be alternatively operating, depending on the stated nature of the anticipated outcomes. But the main point here is, do such wordings certainly fulfill the requirements of the security as contemplated by the corresponding conditions issued within the Respondent's Bid Document?

The controversy is only raising when the two statements of the same paragraph confront each other; the statement under sub-para (b)(ii) and the closing statement therein which clearly and boldly indicates the dates to mark the interval of the security life time.

It is also clear that, basing on the securities contents themselves, the closing statements of all the pointed out securities' paragraphs, apart from being substantially diverting items far away from the instructions and sample given under Section IV - Bidding Form at page 74 of the Respondent's Bid Document, they are meant to assume authoritative status, to be commanding and overriding, thus one has to take them more seriously and prevailing, in case of its conflicting with other statements therein.

Besides, to test the validity of the securities we need to calculate number of days from the starting point which is 13th September 2023 to the elapsing of 28 days beyond bid validity period which is 90 calendar days as per Clause 18 of Section 1 - ITB read together with Section II - BDS at page 44 of the Respondent's Bid Document.

From 13th September 2023 on which all the Complainant securities came into being to 11th December 2023 when they expire, there are exactly ninety (90) calendar days. Thus, the securities' lives are shorter for 28 days than instructed within the conditions of Respondent's Bid Document.

Hence, from the above facts and the cited legal provisions, together with the instructions to bidders, it is clear that the bid securities submitted by the Complainant to accompany its bids are in serious violation of Instructions to Bidder issued within the Respondent's Bid Document which has been made a mandatory requirement to be complied with, failure of which shall render the bid nonresponsive and hence subject to rejection, as it goes to the root of the bidding process to cause uncertainty of successful completion.

Moreover, this Authority has found that the Complaint's contention *(It is mandatory and common practice that the bid validity period should always correspond simultaneously with the bid security period)* a mere presumption developed by the Complainant herself basing on her own reasonability which, if allowed to outweigh the legal requirements laid down under the provisions cited above, shall be absurd to the law.

With regard to the second ground, upon which this complaint is as well laid, concerning the address to which the bids should be directed, and the address to which the bids should be dropped (delivered).

There is a considerable importance of bringing this matter into common understanding that the two addresses are meant to be distinguishably utilized. *"VICE CHANCELOR, THE STATE UNIVERSITY OF ZANZIBAR"* is an addressee to which all the bids should expressly be directed. This can be construed by reading together the address provided under item 9 of invitation letter, instructions placed immediately before item (a) on the sample Letter of Bid provided under Section IV - Bidding Forms issued within the Respondent's Bid Document at page 56 there is instruction which reads *"insert complete name of Purchaser"*, whereby the name has been clearly indicated on the cover page of the Respondent's Bid Document as well as in part A of Section II - Bid Data Sheet at page 41 to be *"VICE CHANCELOR, THE STATE UNIVERSITY OF ZANZIBAR"*.

On the other hand, *"SECRETARY OF THE TENDER BOARD"*, unlike the aforementioned one, is only an address for physical reception of bidding documents where the bidders were instructed to physically submit their bids but not addressing to it. The contents of item 6 of invitation letter puts it much clearer that *"bids must be delivered to the*

address bellow” and proceeded to mention the Secretary of Tender Board of SUZA. Moreover, it has been made clearer that “Secretary of Tender Board” is an address only for the purpose of bid submission (physical delivery) from the contents of part D of BDS at page 45 where expressly stated that “For Bid submission purposes only, the Purchaser’s address is: Attention: *Secretary of Parastatal Tender Board*”

In line with the above determination, it can be reasonably maintained that, the Complainant, in this case, has herself to blame for allowing to be carried away with confusion in erroneously relating the concept of “delivery” similarly with the “addressing”.

Hence, by addressing its “Covering Letter” and “Bid Letter”, both dated 05th September 2023, to the Secretary of Tender Board, the Complainant has significantly wrongfully addressed its bid to the one who lacks authority, in terms of accountability, within the administration of public procurement to be addressed and to issue any official correspondence, let alone the bids, unless expressly delegated. This is vividly stated under the provisions of section 26(1) of the Public Procurement and Disposal of Public Assets Act which confers overall responsibilities of execution of procurement process within the respective entity to the Accounting Officer, and no one else.

Therefore, the act of the Complainant to address its bid to a person other than the authorized one, is a material breach of legal provisions, bid conditions as well as official correspondences standards, hence ultimately subject to rejection, unless there is a clear proof that the Secretary of Tender Board, to whom the Complainant’s bid has been addressed, possesses an official delegation to discharge such particular function, which is in fact has never been in place.

It is further indispensable to articulate here that, by being in writing directed to the wrong addressee in violation of all the aforementioned legal and standard authorities, although physically dropped to the rightful person as per the bid instructions, the Complainant’s bid is as good as never been lodged any way. Thus, in this particular matter, it was a material fault on the side of SUZA to consider the bid to the evaluation stages, which would otherwise be supposed to drop it down from the outset.

With regard to the other raised ground, upon which this complaint is also relied, it’s a clear settled conception that, determination of either lowest or highest bid should always focus on the bidder’s read out price or otherwise any other factors expressed in monetary terms as stipulated under regulation 124(1) of Public Procurement and Disposal of Public Assets Regulations.

Now, in order to test the credibility of the contention that the Complainant's bid was the lowest priced, it is of great essence to display them hereunder:

	Lot 1 - Bidders with Bid Price in TZS (VAT exclusive)		Lot 2 - Bidders with Bid Price in TZS (VAT exclusive)	Lot 3 - Bidders with Bid Price in TZS (VAT exclusive)
1.	M/S ZAN IT Co. Ltd	1,191,675,000.00	234,372,000.00	—
2.	M/S Equator Traders	872,254,700.00	140,740,875.00	—
3.	M/S EVOLVE Co. Ltd	1,505,272,017.01	—	1,313,278,050.00
4.	M/S Super Enterprises	859,529,312.60	91,623,884.25	—
5.	M/S OSAJU Company Ltd	1,205,650,500.00	—	168,000,000.00
6.	M/S Mpely Furniture	—	—	209,380,500.00
7.	M/S New Home Furniture	—	—	129,323,250.00

Having seen the facts to this regard, this Authority coincides with the raised claim that the Complainant was the lowest priced bidder in this particular tender, since her price was the lowest comparing with those of the other bidders.

However, the sensible idea surrounding this argument is not actually the lowest bidder per se, but rather the **"lowest evaluated bidder"** who should be confirmed responsive, hence entitled to the tender award. This standpoint can be extracted from the clear wording of regulation 127 of the Public Procurement and Disposal of Public Assets Regulations, which is hereunder quoted:

127. The responsive bid shall be:

*(a) the bid with the **best evaluated bid** in case of goods or works or services, **but not necessarily the lowest or highest** submitted price subject to any margin of preference applied;*

From the above stand point of view, since the Complainant has not been able to advance to the last phase of the evaluation where the bidders' prices were getting to contesting, the Respondent had eventually no opportunity to evaluate the Complainant's price alongside with the others', hence the Complainant's price couldn't fall under the responsiveness anticipated by regulation 127 cited above.

Therefore, again, this ground of the Complainant doesn't suffice to cause us diverting from the Respondent's decision disqualifying the Complainant from the tender.

5.0 DECISION

Exercising the functions and powers vested upon it under the provisions of sections 5, 6(e) and 85 of the Public Procurement and Disposal of Public Assets Act, Act No. 11 of 2016 and basing on the findings mentioned earlier, this Authority decides that, since the above cited legal rules are quite exhaustive to apply, the Complainant's complain is unfounded, thus hereby dismissed accordingly, and the Respondent decision is upheld.

Appeal is open for an aggrieved party.

Dated in Zanzibar this 11 day of December 2023.




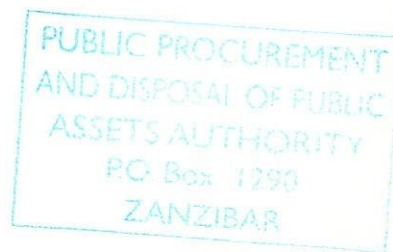
Mtumwa S. Sandal
Chairperson



Mohamed Y. Mohamed
Member,



Abbas J. Fakihi
Secretary,



Tatu A. Mtumwa
Member,