

**IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY
AT DAR ES SALAAM**

APPEAL CASE NO. 23 OF 2013-14

BETWEEN

M/S PALEMO BETA BIDDING JV.....APPELLANT

AND

KAHAMA TOWN COUNCILRESPONDENT

DECISION

CORAM:

1. Hon. Augusta G. Bubeshi, J. (rtd) - Chairperson
2. Mr. Kesogukewe M. Msita - Member
3. Ms. Esther J. Manyesha - Member
4. Mrs. Rosemary A. Lulabuka -Member
5. Mr.Ole-Mbille Kissioki -Ag. Secretary

SECRETARIAT:

1. Mrs. Toni S. Mbilinyi - Principal Legal Officer
2. Mr. Hamisi O. Tika - Legal Officer
3. Ms. Violet S. Limilabo -Legal Officer

FOR THE APPELLANT.

1. Mr. Victor Gogadi- Managing Director, Betta Bidding Company Limited.
2. Mr. Christopher Mwita –Legal Officer.

FOR THE RESPONDENT

1. Hon. Machibya G. Shija–Chairman, Kahama Town Council
2. Mr. Felix H. Kimaryo – Kahama Town Director
3. Mr. Michael Nzengula – Chairman, Tender Board.
4. Mr. Stephen J. Magala -Legal Officer.
5. Mr. Msajigwa Mwaipopo - Procurement Officer
6. Mr. Msoka E.Msumba – Town Engineer

This decision was scheduled for delivery today 28th January, 2014, and we proceed to deliver it.

The Appeal at hand was lodged by **M/s PALEMO BETA BIDDING JV** (hereinafter referred to as "**the Appellant**") against the **KAHAMA TOWN COUNCIL** (hereinafter referred to as "**the Respondent**").

The said Appeal is in respect of tender **No. LGA/155/2013-14/W/ROAD/04-001 for Upgrading of Kahama Town Roads to Bitumen Standard** (hereinafter referred to as "**the tender**").

According to the documents submitted to the Public Procurement Appeals Authority (hereinafter referred to as "**Authority**") as well as oral submissions by parties during the hearing, the facts of the Appeal may be summarized as follows:

On 1st November, 2013, the Respondent invited four shortlisted tenderers to submit their tenders for the tender under appeal.

The said tender was to be conducted through restricted tendering procedures specified in the Public Procurement (Goods, Works, Non- Consultant Services and Disposal of Public Assets by Tender) Regulations, 2005 hereinafter to be referred to as "**the GN.NO. 97 of 2005**".

The deadline for submission of tenders was set for 14th November, 2013, whereby all four tenderers submitted their tenders.

Immediately after the deadline, the tenders were opened in the presence of all tenderers and the Respondent's representatives. The read out prices were as follows;

S/N	Tenderers Name	Quoted price in Tshs. exclusive of VAT
1.	M/s Palermo -Betta Bidding JV.	6,434,309,704.03
2.	M/s Nyanza Road Works Limited.	8,120,024,457.00
3.	M/s China Henan International Cooperation Group Co. Ltd.	6,781,520,950.00
4.	M/s. Jassie and Company Limited (Jasco)	2,514,811,353/-

The tenders were then subjected to two stages of evaluation, namely; preliminary and detailed evaluation.

At the preliminary evaluation stage, tenders were examined to determine if they were substantially responsive to the Tender Document whereby, the tender by the Appellant and M/s Jassie and Company Limited

(Jasco) were disqualified for being non-responsive to the technical specifications provided for in the Tender Document.

The remaining two tenders by M/s Nyanza Road Works Limited and that by M/s China Henan International Cooperation Group Co. Ltd. were found to be substantially responsive and were therefore subjected to detailed evaluation.

During the detailed evaluation stage, the tenders were checked for arithmetical errors whereby the Evaluation Committee found both tenders to have errors. The corrected prices were as hereunder;

S/ N	TENDERER'S NAME	READ PRICE IN TSHS.	OUT	CORRECTED PRICE IN TSHS.
1.	M/s Nyanza Road Works Limited.	8,120,024,457.00		8,119,138,857.00
2.	M/s China Henan International Cooperation Group Co. Ltd.	6,781,520,950.00		6,697,470,950.00

Having corrected the above errors, the Evaluation Committee ranked the tenderers as hereunder;

S/N	TENDERER'S NAME	CORRECTED PRICE IN TSHS.	RANKING
1.	M/s Nyanza Road Works Limited.	8,119,138,857.00	2 nd
2.	M/s China Henan International Cooperation Group Co. Ltd.	6,697,470,950.00	1 st

Thereafter, the Evaluation Committee recommended award of the tender to M/s China Henan International Cooperation Group Co. Ltd at a contract price of Tshs. 6,697,470,950.00.

The Tender Board at its meeting held on 21st November, 2013, deliberated the recommendations by the Evaluation Committee and observed that the price tendered for by the recommended tenderer was higher than the amount set by the Respondent for the project. The Tender Board therefore, ordered the Respondent to negotiate with the recommended tenderer on reduction of quantity of works in the Bills of Quantities to suit the availability of funds jointly contributed by ABG and the Government of the United Republic of Tanzania.

The Respondent, on undisclosed date convened the negotiations meeting with the recommended tenderer.

The negotiations having been successfully conducted, the Tender Board at its meeting held on 3rd December, 2013, approved the recommendations by the Evaluation Committee and awarded the tender to M/s China Henan International Cooperation Group Co. Ltd at a contract price of Tshs. 4,472,778,662.50.

On 4th December, 2013, the Respondent informed the Appellant that their tender was unsuccessful.

While the tender process was in progress, the Appellant vide their letter dated 16th November, 2013, wrote to the Registrar of the Contractors Registration Board (hereinafter referred to as "**the CRB**") seeking for clarification on the legality of M/s China Henan International Cooperation Group Co. Ltd which is a foreign firm, to participate in a tender whose threshold was below Tshs. 10,000,000,000.00. The Appellant was of the considered view that the tender suited local contractors only. The said letter was also copied to the Respondent.

The Registrar vide a letter referenced C3/0064/11/2008/6 dated 18th November, 2013, informed the Appellant that,

they had information that the government had granted the request. Thus, the threshold for an exclusive preference for local contractors had been raised from 1 billion to Tshs. 10 billion. Therefore, all government funded projects not exceeding Tshs. 10 billion thresholds should exclusively be for local contractors. Therefore, if the referred tender is below Tshs. 10 billion; and if is fully funded by the government of Tanzania, then the foreign firm was not eligible to tender. The said letter was also copied to the Respondent.

Having received the Respondent's notification letter, and having received the CRB's letter, the Appellant on 16th December, 2013 lodged their Appeal to this Authority.

SUBMISSIONS BY THE APPELLANT

The Appellant's arguments as deduced from documents availed to this Authority, as well as oral submissions and responses to questions raised by the Members of the Authority during the hearing may be summarized as follows:

That, the Appellant was amongst the four tenderers who were invited to tender.

That, despite the Respondent's invitation, the tender was not widely advertised as the law requires. Hence, the tender lacked transparency and the need to maximize competition was not achieved.

That, the award of the tender had been made to a foreign firm which was not supposed to tender, since, the threshold for the tender was below the minimum threshold of Tshs. 10 billion approved by the government.

That, despite the above anomaly, the Respondent did not communicate the award of the tender to the Appellant except to M/s China Henan International Cooperation Group Co. Ltd who won it.

That, the Respondent's failure to communicate the award and other related information, led to unequal treatment of tenderers.

That, the award of the tender to M/s China Henan International Cooperation Group Co. Ltd, was marred by procedural irregularities, favouritism and political interference.

That, the tender suited local contractors only, since, the Government had changed the exclusive preference margin for local contractors from Tshs, 1,000,000,000.00 to Tshs. 10,000,000,000.00. Thus, it was not proper for the Respondent to award the tender to a foreign firm.

Finally, the Appellant prayed for the following;

- i. The Authority to make a thorough review of the tender process and the award thereof.
- ii. The award of the tender to the successful tenderer be nullified if the Authority proves that, the tender procedures were not adhered to by the Respondent.

2.0 REPLIES BY THE RESPONDENT

The Respondent's arguments as deduced from the documents availed to this Authority, as well as oral submissions and responses to questions raised by the Members of the Authority during the hearing may be summarized as follows:

That, four tenderers were invited to participate in the tender through restricted tendering method provided for under Regulation 67 of **GN. NO 97 of 2005**) due to the

urgency need of the project. The Appellant's assertion that the tender was not advertised was therefore misleading.

That, Tender Document provided for the criteria which all tenderers had to comply with. The Appellant was disqualified for failure to comply with the requirement of having experience in works of similar nature provided for in the Tender Document.

That, the Appellant's assertion regarding Tshs. 10,000,000,000.00 threshold to suit local tenderers only had no legal basis, since the law does not provide for such a limitation to foreign contractors. To the contrary, the Appellant had relied upon CRB's letter which was mere information.

That, the Appellant had an opportunity to request for any clarification including the participation of a foreign contractor on the tender, if they had doubt. To the contrary, they did not do so.

That, all information regarding the tender was communicated to the Appellant through their Joint Venture partner M/s Palemo Construction Limited, vide their postal address.

That, the successful tenderer had met all the criteria provided for in the Tender Document. It was therefore proper for the Respondent to award them the tender.

That, all tenderers were treated equally and that, the tender process was conducted fairly and in a transparent manner in accordance with the law.

That, they had complied with all procedures provided for in the Tender Document before they awarded the tender.

The Respondent therefore prayed for dismissal of the Appeal for lack merits.

ANALYSIS BY THE AUTHORITY

Having gone through the documents submitted and having heard the oral arguments from parties, the Authority is of the view that the Appeal is centred on the following issues:

1. Whether it was justifiable for a foreign firm to participate in the tender.

2. Whether the tendering procedures for the tender were adhered to by the Respondent.

3. Whether the Appellant's disqualification was proper at law.

4. Whether the award of tender to the successful tenderer was proper at law.

5. To what reliefs, if any, are parties entitled to.

Having identified the issues in dispute, the Authority proceeded to resolve them as follows:

1. Whether it was justifiable for a foreign firm to participate in the tender

In resolving this issue the Authority considered the Appellant's contentions that, it was not proper for the Respondent to allow participation of M/s China Henan International Cooperation Group Co. Ltd in this tender since the government had approved exclusive preference for local contractors to the tune of Tshs. 10 billion; and since the value for the tender was below the said threshold set for local contractors.

In ascertaining whether or not the participation of M/s China Henan International Cooperation Group Company Limited (foreign firm) in the tender was justified, the Authority examined the oral and documentary evidence

produced vis-à-vis the applicable law and the Tender Document.

In the course of doing so, the Authority observed that, to a great extent, the Appellant relied upon on a letter addressed to them by the Registrar of the Contactors' Registration Board referenced C3/0064/11/2008/6 dated 18th November, 2013, which was a response to the former's letter dated 16th November, 2013. In that letter, the Appellant sought for clarification on the eligibility of a foreign contractor to participate in the tender under appeal.

The letter by CRB reads in part as follows;

“...during a joint consultative meeting between the Contractors Registration Board (CRB), the Engineers Registration Board (ERB) and the Architects and Quantity Surveyors Registration Board (AQRB) held in Dar es Salaam in 2011, the contractors requested the President of the United Republic of Tanzania who was the chief guest to change the amount for exclusive preference from TZS 1 Billion to TZS 10 Billion. **We have information that, the Government has granted the request. Therefore all Government funded projects not exceeding**

TZS 10 billion are exclusive for local contractors...

In view of the above, if the referred tender is below TZS 10 billion and is fully funded by the Government of the United Republic of Tanzania, the foreign company was not eligible to participate in the tender".

(Emphasis Added).

The Authority revisited further the availed documents and observed that, vide a memorandum of understanding between the Respondent and the African Barick Gold (a foreign company dealing with extraction of gold) (hereinafter referred to as "**the ABG**"), the fund for the project was to be made by ABG for almost 90%, in which they had to provide a sum of Tshs. 3,749,889,212.50 while the government through the Respondent had to contribute Tshs. 722,889,450.00.

The Authority revisited once the CRB's letter, and observed that, it explicitly provided that; exclusive preference would have been applicable only if, the tender was fully funded by the Government of the United Republic of Tanzania. In this tender however, the Authority observed that, the tender was co-financed by ABG and the Government of the United

Republic of Tanzania. Thus, the letter by the CRB waters down the Appellant's contentions to that effect.

Furthermore, the President's proclamations as referred by CRB's letter, bears no legal force if the same are put in a proper legal manner acceptable in our jurisprudence in any of the following options;

- publishing a special order in the official government gazette;
- issuing a special circular to suit the circumstances;
- making amendments to an existing law;
- enacting a new law to suit the proclamations.

The Authority revisited the aailed documents and observed that none of the above was used by the relevant authorities to legalise the proclamations by the President.

The Authority further revisited Section 50 (1) of the Public Procurement Act, N0.21 of 2004, Cap 410 (hereinafter referred to as "**the Act**"), Regulation 26 (1) of GN.NO.97 of 2005 and the Fourth Schedule to it, and observed that, the said provisions provide for exclusive preferences for local firms. However, none of them support the Appellant's contentions.

For purposes of clarity, the Authority reproduces the said provisions and the schedule as hereunder;

S.50 (1) “Where financial resources **are exclusively provided by a Tanzanian public body,** each procurement of works, goods or services that **has a value not exceeding a threshold specified in the Regulations shall be reserved exclusively for local persons or firms**”.

Reg.26 (1) “procurement of works or goods with a value not exceeding the value provided **in the Fourth Schedule of these Regulations shall be reserved exclusively for local persons or firms** who meet the requirements of Section 49 of this Act”.

FOURTH SCHEDULE.

NATIONAL AND EXCLUSIVE PREFERENCE.

(c). project value below which Exclusive Preference will be applied.

Procurement type	Value Tshs.
Works	1,000,000,000
Goods	200,000,000

In view of the above findings, the Authority agrees with the Respondent that, the letter by CRB in which the Appellant had made reference to, bears no legal basis to restrict

involvement of a foreign firm in the tender. Furthermore, the Authority observed that the tender was not fully financed by the government.

Accordingly, the Authority's conclusion with regard to the first issue is that, participation of M/s China Henan International Cooperation Group Company Limited as a foreign firm in this tender process was justified.

2. Whether the tendering procedures for the tender were adhered to by the Respondent.

In resolving this issue, the Authority considered the Appellant's contentions that, the tender was not widely advertised as the law requires, thus, it minimized competition. Furthermore, that, the Respondent did not communicate the tender outcome to all tenderers which entails that there was unequal treatment of tenderers who participated in the tender. Moreover, the Authority considered the Appellant's arguments that according to CRB's letter which was copied to the Respondent, only local contractors were to participate in the tender but the Respondent did not take any action regarding that letter. In this manner, the Appellant contended that, the tender process lacked transparency and the award made thereof,

might have resulted from favouritism or political interference.

In order to ascertain the Appellant's contentions, the Authority examined the availed documents as well as the Tender Document vis-à-vis the applicable law.

In doing so, the Authority deemed it necessary to frame the following sub issues as guidance in resolving the said contentions:

- i) Whether it was justified for the tender not to be widely advertised.**
- ii) Whether there was unequal treatment of tenderers who participated in the tender**
- iii) Whether the Respondent was under an obligation to take necessary actions on CRB's letter.**
- iv) Whether the award of the tender was influenced by favouritism or political interference.**

Having framed the sub-issues above, the Authority proceeded to resolve them as follows;

i. Whether it was justified for the tender not to be widely advertised.

In resolving this sub-issue, the Authority considered the Appellant's argument that the tender was not widely advertised, thus, it minimized competition to tenderers as the law requires.

In the course of doing so, the Authority revisited the Act and observed that, the Respondent had used Restrictive tendering procedure due to the urgent need of the matter. The Authority is of the considered view that, since the law allows procuring entity to choose the procurement method depending on the circumstances, then, it was justified for the Respondent to invite four tenderers the Appellant inclusive to participate in the tender.

In view of the above findings, the Authority's is of the considered view that the advertisement of a tender in a manner preferred by the Appellant could not be possible under the circumstances.

Accordingly, the Authority's conclusion regarding this sub-issue is that, there was justification for the tender not to be widely advertised.

ii. Whether there was unequal treatment of tenderers who participated in the tender

In resolving this sub-issue, the Authority considered the Appellant's argument that the Respondent did not communicate the award of tender to other tenderers, except to the successful tenderer. Thus, there was unequal treatment of tenderers in the tender process.

In ascertaining the Appellant's arguments, the Authority revisited the availed documents and observed that, the Appellant's Statement of Appeal lodged before the Authority contained an averment that, on 4th December, 2013, the Respondent issued a notice of award of the tender to M/s China Henan International Cooperation Group Company Limited. The Authority observed further that, the said statement of Appeal contained another statement to the effect that, on the same date, that is 4th December, 2013, the Respondent did sign a contract with the named tenderer.

Upon being asked by the Members of the Authority to clarify on how did they know about the award of the tender if the Respondent did not communicate to them, the Appellant gave different and conflicting answers to that effect. The Appellant firstly, submitted that they knew about the tender results from undisclosed source that the

award had already been made to M/s China Henan International Cooperation Group Company Limited. They confirmed the said information upon finding the successful tenderer on site on 16th December, 2013.

Secondly, the Appellant submitted in their Statement of Appeal that, on 4th December, 2013, the notice of award of the tender was given by the Respondent.

The Respondent on the other hand, upon being asked by Members of the Authority as to why they did not communicate the tender results to the Appellant, they submitted that they had communicated the award of the tender through the Appellant's partner, M/s Palemo Construction Limited, the firm which they had invited to tender.

Upon being asked to substantiate that contention, the Respondent availed this Authority with a copy of the letter addressed to M/s Palemo Construction Limited. The Authority observed that, the Respondent vide a letter referenced TD/F.20/13/VOL XI dated 10th December, 2013, they wrote to M/s Palemo Construction Limited informing them that their tender was unsuccessful and that the award of the tender had been made to M/s China Henan International Cooperation Group Company Limited.

In view of the above findings, the Authority is of the considered view that, the Appellant ought to have acquired information from their partner. The Respondent was not obliged to communicate with the Appellant as a separate firm since they tendered for as a Joint Venture. The Authority is of the further considered view that, since the Joint Venture agreement between the Appellant and their partner did not specify who was the lead partner, the Respondent's submissions that their communication to a person they had invited to tender cannot be underestimated.

Accordingly, the Authority's conclusion regarding the second sub-issue is that, there was no unequal treatment of tenderers in the tender process.

iii. Whether the Respondent was under an obligation to take necessary actions on CRB's letter.

In resolving this sub-issue, the Authority took cognizance of its findings on the first issue above, and also the Appellant's contentions that, the Respondent did not take any action upon being informed by CRB that the tender suited only local contractors. In the course of doing so, the Authority observed that, the Appellant's letter for

clarification was addressed to the Registrar of the CRB and the copy of the same was sent to the Respondent. The Authority observed further that, the CRB's letter did not compel the Respondent to act on the issue raised by the Appellant or the CRB.

The Authority is of the settled view that, since the Appellant did not write to the Respondent seeking for clarification regarding participation of a foreign firm, it was not proper for the Appellant to blame the Respondent for their failure to take action. Had the letter been addressed to the Respondent and requiring them to respond to the raised issues, and if at all the Respondent could not have responded, the Authority would have been better placed to blame the Respondent.

Accordingly, the Authority's conclusion with regard to the third sub-issue is that the Respondent was not under any obligation to take action based on CRB's letter.

iv. Whether the award of the tender was influenced by favouritism or political interference.

In resolving this sub-issue, the Authority revisited the Appellant's arguments that, lack of wide advertisement of the tender and the Respondent's failure to communicate the

tender results made the tender to lack transparency and therefore the subsequent award might have been influenced by favouritism or political interference.

When asked by Members of the Authority to explain how favouritism and political interference had affected the tender process, the Appellant failed to substantiate their assertions.

Accordingly, the Authority's conclusion with regard to the fourth sub-issue is that the award of the tender was not influenced by favouritism or political interference as alleged by the Appellant.

In view of the above findings and conclusions, the Authority's conclusion with regard to the second issue is that, the tendering procedures for the disputed tender were adhered to by the Respondent.

3. Whether the Appellant's disqualification was proper at law.

In resolving this issue, the Authority observed in the Evaluation Report that, the Appellant was disqualified for failure to comply with Clause 12.5(b) of the Instructions To Bidders (hereinafter referred to as "**the ITB**") as modified by Clause 9 of the Bid Data Sheet (hereinafter referred to as "**the BDS**") which required tenderers to indicate their

experience in works of similar nature for the last three years.

For purposes of clarity the Authority reproduces the said provisions as hereunder;

Clause 12.5 "To qualify for award of the contract, tenderers shall meet the following minimum qualifying criteria:-

(b) experience as prime contractor in the Upgrading of works of a nature and complexity equivalent to the works over the period specified in the Tender Data Sheet (to comply with this requirement, works cited should be at least 70 percent complete)".

BDS Clause 9 "Period for which experience as a prime contractor of the construction works of a nature and complexity equivalent to this work **should be Three(3) years (from the date of this bid)**".

The Authority revisited the Appellant's tender to verify whether it contained the said requirement and observed that, it contained only one project of similar nature and complexity to the tender under Appeal. The rest of the projects listed by the Appellant related to routine

maintenances of roads and not construction as the Tender Document required.

The Authority is of the considered view that the Appellant's disqualification with respect to the above criterion was in conformity with Clause 27.5 of the ITB and Regulation 90 (16) of GN.NO.97 of 2005 which read as follows;

Clause 27.5 "if a tender is not substantially responsive, it will be rejected by the procuring entity and may not subsequently be made responsive by the tenderer by the correction of the non conformity".

Reg.90 (16). "If 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". (Emphasis Added).

In view of the above findings, the Authority's conclusion with regard to the third issue is that, the Appellant's disqualification was proper at law.

4. Whether the award of the tender to the successful tenderer was proper at law.

In resolving this issue, the Authority observed in the Evaluation Report that, the successful tenderer had met all the criteria provided for in the Tender Document and that they had technical and financial capability to execute the contract pursuant to the requirements of the Tender Document. The Authority observed further that, the award to them was sanctioned by the Respondent's Tender Board pursuant to Section 68 of the Act.

Taking cognizance of the above findings and taking cognizance of the Authority's conclusion on the first issue, the Authority's conclusion with regard to this issue is that the award of the tender to the successful tenderer was proper at law.

5. To what reliefs, if any, are the parties entitled to.

Having resolved the issues in dispute the Authority considered the prayers by the parties.

To start with, the Authority considered the prayer by the Appellant that, the Authority should intervene and make a thorough review of the award of the tender to M/s China

Henan International Group and if the review proves that tendering procedure were not followed; the said award should be nullified.

In ascertaining the Appellant's prayer, the Authority took cognizance of its findings and conclusions on issues one to four above and observed that, all procedures regarding this tender were complied with, by the Respondent and the subsequent award thereof was in compliance with the law.

The Authority hereby rejects the Appellant's prayer for the nullification of the award of the tender made by the Respondent since it was in conformity with the law.

With regard to the prayer by the Respondent that, the Appeal be dismissed for lack of merits, the Authority agrees with the Respondent based on its findings and conclusions on the issues above.

On the basis of the aforesaid, the Authority dismisses the Appeal and orders each party to bear their own costs.

Right of Judicial Review as per Section 85 of the Act explained to parties.

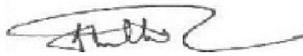
Decision delivered in the presence of the Appellant and the Respondent this 28th day of January, 2014.

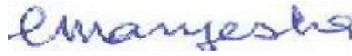


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JUDGE (rtd) A. G. BUBESHI

CHAIRPERSON

MEMBERS:

1. MR.K.M. MSITA.....

2. MS.E.J.MANYESHA.....

3. MRS.R.A.LULABUKA.....