

IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY
AT DAR ES SALAAM

CONSOLIDATED APPEAL CASES NO 37 & 38 OF 2014 – 15

BETWEEN

NYANZA ROAD WORKS LTD..... 1ST APPELLANT

NYAKIRANG'ANI CONSTRUCTION LTD... 2ND APPELLANT

AND

SHINYANGA MUNICIPAL COUNCIL.....RESPONDENT

DECISION

CORAM

1. Hon. Vincent K.D Lyimo, J. (rtd) - Chairman
2. Mrs. Rosemary A. Lulabuka - Member
3. Mr. Louis P. Accaro - Member
4. Eng. Aloys J. Mwamanga - Member
5. Mr. Ole-Mbille Kissioki - Executive Secretary

SECRETARIAT

1. Mrs. Toni S. Mbillinyi -Principal Legal Officer
2. Ms. Florida R. Mapunda - Legal Officer

3. Ms. Violet S. Limilabo - Legal Officer
4. Mr. Hamisi O. Tika - Legal Officer

FOR THE 1ST APPELLANT

1. Mr. Avinash K. Patel - Executive Director
2. Mr. Vishal N. Patel - Senior Engineer

FOR THE 2ND APPELLANT

1. Mr. Juvenali Shilianga – Contract Manager
2. Mr. Brown Kisamo - Technical Director
3. Mr. Brijesh Barot - Marketing Manager
4. Dr Mazala - Chairperson

FOR THE RESPONDENT.

1. Mr. Simon Ngagani - Representing Shinyanga MD
2. Mr. Godfrey Mwangairo - Head, Procurement
Management Unit

This decision was scheduled for delivery today 24th April, 2015 and we proceed to do so.

This is an appeal lodged by NYANZA ROAD WORKS LTD and NYAKIRANG'ANI CONSTRUCTION LTD (hereinafter referred to as 1st Appellant and 2nd Appellant respectively) against SHINYANGA

MUNICIPAL COUNCIL (hereinafter referred to as “the Respondent”). The Appeal is in respect of the tender with Reference No. LGA/112/2014-15/ULGSP/W/13 for Rehabilitation of Shinyanga Municipal Roads (31.08 km) to Bitumen Standard. Phase 1-13.1 km Roads (hereinafter referred to as “the tender”).

After going through the record of proceedings submitted to the Public Procurement Appeals Authority (hereinafter referred to as “the Appeals Authority”) and oral submissions of the parties during the hearing, the facts of the Appeal may be summarized as follows:

The Respondent through the Daily Newspaper dated 24th December 2014, invited tenderers to submit their tenders under National Competitive Tendering Procedures as provided for by the Public Procurement Regulations, GN 446/2013 (hereinafter called “GN 446/2013”). The deadline for the submission of tenders was on 13th January 2015 and as at the closing date; eight (8) tenders were received. During the tender opening ceremony, the read-out prices from each tenderer were as follows-

S/N	TENDERER’S NAME	QUOTED PRICE IN TSHS.
1	Great Lakes Construction Co. Ltd.	18,090,290,621.00 VAT Exclusive
2	Beta Bidding Limited	21,069,164,191.00 VAT Exclusive

3	China Sichuan Int. Cooperation Co. Ltd	18,223,886,267.86 VAT Exclusive
4	Jassie & Co. Ltd.	17,047,140,284.00 VAT Inclusive
5	Palemon Construction Ltd	17,666,666,000.00 VAT Inclusive
6	Nyakirang'ani Construction Ltd	13,314,909,091.44 VAT Inclusive
7	Nyanza Road Works Ltd	19,077,895,898.39 VAT inclusive
8	Bharya Engineering & Contracting Co. Ltd	30,460,506,154.40 VAT Exclusive

The tenders were then subjected to evaluation process which was conducted in three stages namely, preliminary examination, detailed and price comparison and lastly, post qualification.

During the Preliminary examination stage, five tenders including the 2nd Appellant's tender were disqualified for various reasons. The remaining three tenders by M/s Jassie & Company Ltd, M/S Nyanza Road Works Ltd and M/S Bharya Engineering & Contracting Co. Ltd qualified for the detailed evaluation and price comparison stage.

The detailed evaluation included checking for arithmetic errors before price comparison of the bids. As a result, all three tenders were found to contain

arithmetical errors. Correction of errors was made, alongside deduction of provisional sums and unconditional discounts from the corrected sums, if any and respective tenderers were notified. Eventually, the bid price of M/S Jassie & Co. Ltd became the lowest compared to the remaining two and therefore it was subjected to post qualification.

During the post qualification, the evaluation committee was satisfied with other pertinent factors such as the list of essential equipment by the evaluated bidder, the qualification and experience of proposed staff, information regarding litigations, program of works and experience on works of similar nature and complexity. The evaluation committee therefore recommended M/S Jassie & Company Ltd for award of the tender at a contract price of Tshs. 18,215,344,285/= inclusive of VAT.

At its meeting held on 13th February 2015, the Respondent's Tender Board approved the recommendations of the evaluation committee and approved an award of the tender to M/S Jassie & Company Ltd at the said contract price.

Thereafter, the Respondent as required by law, on 24th February 2015, by his letters Ref. No. SHY/MC/C.50/8VOLVIII/35 and SHY/MC/C.50/8VOLVIII/33 notified the Appellants respectively on his intention to award the tender to M/S Jassie & Co. Ltd. By virtue of the said letters, the Respondent also gave the two Appellants the reasons for their respective disqualification. The 1st Appellant was disqualified on the basis

of price comparison, while the 2nd Appellant was disqualified not only for submitting an invalid business license and improperly certified technical personnel certificates but also for failure to show evidence of experience of works of similar nature.

Being aggrieved by the Respondent's notice, on 3rd March 2015, the two Appellants severally filed applications for administrative review to the Respondent's accounting Officer.

The 1st Appellant raised three main issues for review asserting that -

- i. The contractor to be awarded the tender had no experience of executing works of similar nature and complexity;
- ii. The Respondent contravened the law for reducing the period of lodging complaints from 28 days provided under Clause 45.1 to fourteen (14) days' without prior notice;
- iii. The arithmetical corrections performed by the Respondent were a material deviation going to the root of the tender process.

The 2nd Appellant for his part contested the Respondent's decision and raised four grounds to the effect that:-

- i. The Appellant had indeed submitted a valid business license contrary to the assertions by the Respondent;

- ii. Certificates in respect to technical personnel had been endorsed in line with ITT Clause 19.2;
- iii. The Appellant's Co is a class one company (according to engineers ordering) and were thus eligible to execute any civil works without regards to its magnitude or complexity; in any, the Appellant insisted he had attached documents to show evidence of works of similar nature and complexity executed in Mwanza.
- iv. Their tender document had been accompanied with all supporting evidence.

In response to the said administrative review by the two appellants, the Respondent stuck to the reasons he had earlier issued in the Notices of Intention to award the tender, thereby prompting the two Appellants to file their respective appeals with this Authority.

At the hearing of this appeal, the 1st Appellant abandoned ground two of his grounds under which he had alleged that the Respondent had contravened ITT Clause 45. Therefore he remained with two grounds of appeal; first that the proposed successful contractor lacks both the relevant experience and qualification to perform the works. His second ground of appeal centered on complaints that the arithmetical corrections made by

the Respondent in the bid prices amounted to a fundamental error which went to the root of the tender process.

On his part, the 2nd Appellant asserted that in the main, his company had been unlawfully disqualified. He strongly denied to have filed an invalid business license and to have failed to properly certify the respective CV records of his key technical personnel.

SUBMISSIONS BY THE APPELLANTS ON THE GROUNDS OF THE APPEAL

Addressing the Members of the Authority on the first ground, the 1st Appellant strongly argued that the proposed contractor does not meet the requirements in executing such works which are complex in nature. He maintained that the said company should have completed road projects of similar nature and complexity of at least *39.3 km in the last 10 years including key activities like stabilization to tune of 27,311 m³, CRS – 65540 and Asphalt – 6424m³*. (Emphasis added). Further that the said company is well known in Mwanza and has not met those requirements. According to the Appellant, the Respondent had not taken into account such controlling facts and thus had not done his work properly.

Reverting to the second ground of the appeal, the appellant first admitted that tenderers had their bid prices corrected. While admitting that there was no quantum fixed by law or ITT clauses on the margins of arithmetical

corrections, the 1st Appellant asserted that there was a purposeful or targeted correcting of errors. Making reference to Clause 28 of the ITT, the Appellant admitted that the said Clause makes allowances for correction of errors and there is no mechanism to differentiate between trivial and gross errors in the tender. That notwithstanding, the appellant insisted that the tender prices read out at the opening ceremony were by far very different from the corrected bid prices. He could not appreciate why the bidder who had quoted the bid price of Tshs. 17,047,144,284/= should be awarded the tender at a price of Tshs. 18,215,344,285/= after the arithmetical corrections. To him, whatever corrections were made were targeted and that was against the spirit of competitive bidding. He concluded his submissions by stating that the arithmetical corrections so made were gross or material deviation which, if allowed to stand, would unfairly affect the position of other tenderers with substantial responsive tenders. The 1st Appellant therefore prayed for the following orders:-

- i. The authority to make a thorough review of the tenders and the award thereof;
- ii. The award to the successful tenderer be nullified if it is proved that the tender procedures were not adhered to by the respondent;
- iii. The Respondent be ordered to pay compensation for the costs of the Appeal; and
- iv. Any other action the Authority deems necessary

The 2nd Appellant's grounds of appeal remained unchanged and these have been reproduced herein below as follows:-

- i. That, it had attached a valid business licence to the tender document. The alleged copy of the expired business license is evidence that the Respondent and or his agents had tampered with the tender documents.
- ii. That, the tender document did not impose a requirement for certification of Technical personnel certificates. What was stipulated was to initial all unprinted parts of the tender document.
- iii. That, the Appellant had submitted alongside the tender documents respective evidence showing his firm's experience in works of similar nature as demanded in the tender document, notwithstanding the fact that the scope of work or experience requirement was not relevant to class 1 contractors.

The Appellant prayed that this Authority makes a thorough review of the procurement process and to make orders as it may deem fit.

REPLIES BY THE RESPONDENT TO THE APPEALS BY THE APPELLANTS.

In response to the complaints raised by the 1st Appellant, the Respondent stuck to his position and strongly submitted that bearing in mind the

project was donor funded, the tender proceedings were conducted in compliance with the law and related regulations. Addressing the Members on the basic requirements for experience and qualification, he stated that the proposed contractor to be awarded the works had the necessary experience and equipment to execute the works. He did not want to address the formula referred to by the 1st Appellant because as he put it, the 1st Appellant was disqualified at the price comparison stage. He stressed that the proposed contractor had complied with the requirements set out in TDS Clause 9 and that there was evidence to that effect.

Touching on the arithmetical corrections that were made to the three bid-prices, the Respondent stated that during evaluation of tenders, it is a normal practice for corrections to be made. Indeed the correction of errors was done to all the three tenderers and that all were informed in writing and were called upon to indicate whether they were agreeable to such corrections. He denied that the corrections conducted were targeted or done with bad faith.

As regards the 2nd Appellant's appeal, the Respondent indicated that the said Appellant had submitted an expired business license (expired on 30th June, 2014) and that it is not true that the business licenses were read out at the opening of tenders. He stressed that if the 2st Appellant alleges tampering, it was his duty to prove the same.

Regarding the certification of technical personnel, the Respondent informed the Members of the Authority that the 2nd Appellant had miserably failed to comply with the requirements of TDS Clause No. 9 and had submitted doubtful supporting documents in respect to works executed previously. The Respondent insisted that the disqualification of the Appellant should not be interfered with as he lacks the necessary qualifications.

ANALYSIS BY THE APPEALS AUTHORITY

The Appeals Authority having gone through the tender proceedings including various documents submitted by both parties and the oral submissions during the hearing of the appeal it is of the view that, there are three main issues calling for determination; and these are:-

1. Whether the award of the tender to the proposed successful tenderer is justified;
2. Whether the 2nd Appellant was unlawfully disqualified;
3. To what reliefs are the parties entitled to

Having identified the issues, the Appeal Authority proceeded to resolve them as hereunder:

Whether the award of the tender to the proposed successful tenderer is justified

In answering this issue, the Appeals Authority formulated two sub issues as follows-

- Whether the correction of errors contravened the law; and
- Whether the proposed successful tenderer has no experience with works of a similar nature and complexity.

In resolving the first sub-issue, the Authority considered the 1st Appellant's contention that the margin of arithmetical error which was rectified in the successful tenderer's tender during the evaluation of tenders is a fundamental error which should not been accepted since the margin is so huge and it makes the offer very uncertain.

The Appeals Authority went through the Bills of Quantity of the successful tenderer's tender and verified the calculations and summations and have confirmed that the totals of Bill No. 1 were wrongly recorded to read Tshs. 2,300,033,771/= instead of Tshs. 3,200,033,771/= which is the correct arithmetical sum.

The Appeals Authority further verified the correction of errors done in respect of the 1st Appellant's tender and observed that indeed the Appellant himself made a multiplication error on item 7.20 of his bills of

quantity, the error which in turn affected subtotals and eventually the grand totals. Similarly he had made an error in respect of item 42.02 wherein he had a wrongly quoted 6424m³ instead of 6426m³ on Asphalt. The same were as well corrected. The 1st Appellant admits this arithmetical mistake.

The Appeals Authority went further to ascertain as to whether the correction of errors exceeded the scope enshrined under the ITT Clause 28.1 which states as follows:

“Tenders determined to be substantially responsive will be checked for any arithmetic errors. Errors will be corrected as follows

- a) If there is a discrepancy between the unit prices and the total price that is obtained by multiplying the unit price and quantity, the unit price shall prevail, and the total price shall be corrected, unless in the opinion of the procuring entity there is an obvious misplacement of the decimal point in the unit price, in which the total price as quoted shall govern and the unit price shall be corrected; and
- b) If there is an error in a total corresponding to the addition or subtraction of subtotals, the

subtotals shall prevail and the total shall be corrected; and

c) Where there is a discrepancy between the amounts in figures and words, the amount in words will govern”

The Authority has noted that the correction of errors which was done in respect of proposed successful tenderer's tender was within the ambit covered under the ITT Clause 28.1 (b) supra. The correction in respect of the tender by the Appellant complied with Clause 28.1 (a) and (b) quoted above.

The Appeals Authority has also checked as to whether there is any limit to a margin of error which can be corrected by the Evaluation Committee and found out that neither the Act nor the ITT provides a limit of an amount that can be corrected during tender evaluation. The 1st Appellant on the other hand failed to substantiate the basis of his argument in this line.

The Appeals Authority is therefore satisfied that the correction of errors in respect of successful tenderer's tender was done in compliance with the law and it is of the firm view that that the Respondent was justified in doing arithmetic correction of errors. The first sub issue is therefore answered in the affirmative. We now turn to consider whether the proposed successful tenderer has the requisite experience with works of a similar nature and complexity.

In resolving the second sub- issue, the Appeals Authority considered the 1st Appellant's argument that the successful tenderer has no experience of works of similar nature and complexity and Respondent's replies thereto.

The Appeals Authority went through the successful tenderer's tender to establish whether there was evidence of experience on works of a similar nature and complexity in line with the requirements of the tender document. In doing so, the Appeals Authority went through the various documents submitted by the parties. The Appeals Authority, contrary to the submissions by the 1st Appellant has found ample evidence to show that the proposed successful tenderer had experience of completing projects of similar nature and complexity. For example Construction to double bituminous surface treatment standard (Km 117 + 600 – km 120+600) along Iyumbu (TBR/SGD BRD), Mgungira – Mtunduru – Magereza (SGD) Regional Road (R436), Upgrading/Construction of Mkuyuni –Bitumba, Pepsi Cola & Tunza Airport Loop Roads; skip pads and upgrading of Dabil Escarpment and Mbulu Town Roads, among others.

The Appeals Authority also analysed the complexity element of the above cited projects as substantiated in successful tenderer's bid document vis a vis the complexity requirements of the tender under appeal and on the face of it, the proposed successful tenderer is a qualified contractor to execute the works.

The Authority went further to satisfy itself as to whether the 1st Appellant presented evidence of experience on works of a similar nature and complexity and noted that indeed, the Appellant had complied with such requirement. The Authority however noted that the 1st Appellant was disqualified at the price comparison stage whereby his evaluated price was Tshs. 19,078,680,232.85/= (VAT inclusive) while the successful tenderer's evaluated price was Tshs. 18,215,344,285/= (VAT inclusive).

We now turn to consider the appeal by the 2nd Appellant.

Whether the 2nd Appellant was unlawful disqualified

In resolving issues raised by the said Appellant, the Appeals Authority considered 2nd Appellant's contentions that in the preparation of the Bid Document, it submitted a properly endorsed and valid business license. It also considered allegations by the 2nd Appellant that if the license so submitted was found to be invalid, either the Respondent or his agents must have tampered with the same. Attached to the appellant's bid document was an expired business license No. 01276667 issued on 31 December 2013, clearly indicated to expire on 30 June, 2014 and during the hearing, the 2nd Appellant showed to the Members, its current business license, No.1939915 issued on 27th July 2014 and is due to expire on 30th June 2015.

Mr. Brown Kisamo who appeared for the 2nd Appellant informed the Members that he was the person who had endorsed the respective bid documents. At first, he made an attempt to disown the copy of the business license but after the same had been shown to him and calling his attention to the initials he had made therein, he openly admitted to have countersigned the same. It is normal practice that tender documents have to be submitted in properly sealed envelopes. When the 2nd Appellant alleged that his bid document was tempered with, he ought to have proved the allegations. For if that were true, it would have amounted to unlawful disqualification. As he had admitted to counter sign the disputed documents, his allegations that the Appellant's documents were tampered with was seen as an afterthought. The same officer admitted to have not complied fully with the requirements of Clauses 9 of the TDS and 12.5 of the ITT read together – on the certification of the CVs of key technical personnel.

On the balance of probabilities, this Appeals Authority is of the settled view that the copy of the expired business license had been submitted by the 2nd Appellant himself and no one else. It follows therefore that, the 2nd Appellant submitted a business licence which was not valid.

The Appeals Authority further considered the second contention as regards signing of the proposed key technical personnel CVs. In ascertaining the same, the Appeals Authority considered the provisions TDS Clause 9 (which

was complementing or supplementing Clause 12.5 of the ITT) and observed that bullet two thereof reads as follows below:

“Only CV signed in blue ink on each page by both the proposed key staff and managing director or authorized representative of the firm shall qualify for evaluation”

Having observed as above, the Appeals Authority further went through the CVs of proposed key staff of the 2nd Appellant and noted that each of the 8 CVs of the proposed key personnel bears only one signature, that is, of the authorized officer. That omission, by itself, suffices to hold that the 2nd Appellant was fairly disqualified.

The 2nd Appellant on his part relied on ITT Clause 19.3 to support his contention. The Clause states as follows-

“The original and copy or copies of the tender shall be typed or written in indelible ink and shall be signed by the tenderer or a person or persons duly authorized to sign on behalf of the tenderer ... All pages of the tender, except for un amended printed literature, shall be initialed by the person or persons signing the tender”

With due respect to the 2nd Appellant, the above cited Clause refers to initialing of the tender document and, to the extent explain therein; while

Clause 9 of the TDS, bullet two is specific to signing the CVs of the prospective key personnel.

The Appeals Authority finding is that there was a criterion of signing the CVs of prospective key personnel and that two signatures were mandatory. As already shown above, Mr. Brown Kisamo openly admitted to have wrongly endorsed or countersigned the respective document and he has himself to blame.

With regard to experience on works of similar nature and complexity to this tender, the Appeals Authority went through the 2nd Appellants list of works of a similar nature and complexity contained in their tender document, along with the accompanying certificates. It was observed that the 2nd Appellant has indicated four projects and six accompanying certificates of Completion issued by TANROADS. However, two of the six certificates attached have discrepancies between reference numbers and the TANROADS Offices which issued the certificate. For example, while the reference number of a Certificate of Completion for Rehabilitation of Songea – Lukumburu Road is TRD/TBR/W /2012/66, the Certificate was signed by the Regional Engineer of TANROADS Ruvuma and, on a second note; while the reference number of the Certificate of Completion for Periodic Maintenance Along Kasulu-Malagalasi River and Malagarasi Kibondo Trunk Road is TDR/KGM/W/2013/42, the certificate was signed by the Regional engineer of TANROADS Tabora. The two certificates raised doubts as to how Ruvuma project certificate could bear reference to a

project in Tabora and how the certificate of Completion in respect to the alleged Tabora Project could support one in Kigoma. There is evidence of foul play.

Upon being asked by the members of the Authority on the noted discrepancies, the 2nd Appellant denied knowledge of the said disputed Certificates and was quick to add that the same had not been endorsed by authorized signatory. The 2nd Appellant however did not disown the four other Certificates despite the fact that they also did not bear the signature of the authorized signatory.

Having analyzed the certificates of completion by the 2nd Appellant and considering the contradictory evidence tendered by him, the Appeals Authority is in agreement with the Respondent that indeed the Certificates were suspicious and that the said Appellant had failed to adduce proof of experience in the execution of works of similar nature and complexity.

In sum, the Appeals Authority's conclusion with regard to the second issue is that the 2nd Appellant was fairly disqualified from the award of the tender. His appeal is a fishing expedition which cannot be allowed. We finally turn to consider reliefs available to the parties, if any.

From the foregoing analysis, this Authority took cognizance of its findings in the first and second issues where it was held that the award of the tender to the proposed successful tenderer is justified and that the 2nd

Appellant was fairly disqualified. The complaint by the 2nd Appellant that his tender Document was tempered is a cry in the wilderness. Having established as such, it follows therefore that appeals are dismissed for lack of merits. Parties to bear own costs.

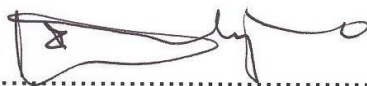
The Respondent is at liberty to proceed with subsequent steps in relation to the tender.

The Appeals Authority so orders.

The decision of this Authority is binding upon the parties and may be executed in any court of competent jurisdiction in terms of Section 97(8) of the PPA/2011.

Right of Judicial Review as per Section 101 of the PPA/2011 explained to parties.

This Decision is delivered in the presence of the Appellants and the Respondent this 24th April, 2015.



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JUDGE (Rtd) V.K.D LYIMO

CHAIRMAN

MEMBERS

1. MRS. ROSEMARY A. LULABUKA



2. MR. LOUIS P. ACCARO



3. ENG. ALOYS J. MWAMANGA

