

IN THE  
PUBLIC PROCUREMENT APPEALS AUTHORITY  
AT DAR ES SALAAM

APPEAL CASE NO. 41 OF 2014-15.

M/S TECHNOFAB ENGINEERING LIMITED (As lead partner  
in the TECHNOFAB-GAMMON JOINT VENTURE).....APPELLANT  
VERSUS  
DAR ES SALAAM WATER AND SEWERAGE  
AUTHORITY.....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          | - 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 APPELLANT

1. Mr. Ngasa Didi -Advocate, Law Castles Advocates
2. Mr. F.M.Kwelukila -Advocate, Law Castles Advocates
3. Mr. Peter Ngasa -Advocate, Law Castles Advocates
4. Mr. Jayant Kumar - PC Project Manager

## FOR THE RESPONDENT.

1. Mr. Sais Kyejo -Chairman, Tender Board
2. Mr. Seni Malima -Advocate, K &M Advocates
3. Ms. Joyce Masele -Advocate, K &M Advocates
4. Mrs. Florence Yamati - Corporate Secretary
5. Ms. Hellen Lubogo - Ag. Procurement Manager
6. Ms. Neema N.Mugasa - Legal Officer
7. Eng. James Mallya - Member, Evaluation Committee
8. Mr. Silvanus Kinyaiya - Procurement Officer

This decision was scheduled for delivery today 11<sup>th</sup> May 2015 and we proceed to do so.

The Appeal at hand was lodged by M/s TECHNOFAB ENGINEERING-GAMMON JOINT VENTURE (hereinafter referred to as "the Appellant") against the DAR ES SALAAM WATER AND SEWERAGE AUTHORITY commonly known by its acronym, DAWASA (hereinafter referred to as "the Respondent").

The said Appeal is in respect of Tender No. AE/033/2013-14/W/NC/07 for Rehabilitation of Chalinze Water Treatment Plant, Supply and Installation of Secondary and Tertiary Distribution Network and Construction of Reservoirs in Chalinze Villages (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"), as well as the oral submissions by the parties during hearing, the facts of the Appeal may be summarized as follows:

The Respondent vide the Daily News newspaper dated 6<sup>th</sup> May 2014, issued an advertisement inviting international tenderers to submit their pre-qualification documents so as to enable it to pre-qualify tenderers who would be eligible to participate in the above tender. Consequently, six tenderers were prequalified and on 13<sup>th</sup> October 2014 the Respondent invited them to tender for

the project. Incidentally, the project was being financed by a loan from the Exim-Bank of India and all prequalified bidders are from India. The said tender was conducted through restricted tendering procedures as specified in the Public Procurement Regulations, Government Notice No. 446 of 2013 (hereinafter referred to as "GN. 446 of 2013").

As at the deadline for the submission of tenders, i.e. 18<sup>th</sup> December 2014, only five tenders including that of the Appellant were received and were opened. The read out bid prices were as follows -

S/N	Name of the Firm	Read out prices in USD
1.	Overseas Infrastructure Alliance–Pratibha Ltd Consortium	Option 1. DI. Pipes - 39,991,259.03 Option2. Steel Pipes - 42,341,808.80
2.	Angelique International–Vishwa JV	Option1.DI Pipes 50,716,263.54 Option 2 Steel Pipes 51,695,678.54
3.	Offshore Infrastructure Ltd –SPML-JV	55,991,718.00
4.	Jain Irrigation Systems –Gannon Dunkley& Co. Ltd- JV	59,884,174.00

5.	Technofab Engineering Ltd-Gammon India Ltd- JV	33,890,333
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Soon after the tender opening ceremony, all five tenders were subjected to evaluation which was conducted in three stages namely preliminary, detailed and technical scrutiny.

At the preliminary evaluation stage, two tenders were disqualified for various reasons. Those were the Appellant's tender and another by the name Jain Irrigation Systems – Gannon Dunkley & Co. Ltd. Specifically, the Appellant's tender was disqualified after the Respondent's Evaluation Committee found out that M/s Gammon India Ltd. one of the Appellant's Joint Venture partner in Technofab-Gammon India Ltd., had been blacklisted on 13<sup>th</sup> October 2013, by the State Urban Development and Housing Department (UDHD) of Bihar State (India) for failure to complete a Water Supply Project in the State capital despite being given extra time to do so. Jain Irrigation Systems-Gannon Dunkley & Co. Ltd. was disqualified because their tender security did not contain the name of their consortium.

Following the elimination of the two tenders mentioned above, the remaining three tenders were subjected to detailed evaluation

and thereafter ranking. Under detailed evaluation, the Evaluation Committee conducted arithmetic correction of errors followed by ranking. The tender by M/s Overseas Infrastructure Alliance (India) pvt Ltd - Pratibha Industries Ltd. Consortium was ranked first and was therefore found to be the lowest evaluated tender.

Thereafter, the Evaluation Committee conducted a detailed scrutiny of the lowest evaluated tender. The committee recommended award of the tender to M/s Overseas Infrastructure Alliance (India) Pvt. Ltd. at a contract price of USD 41,573,722.09 as the company was established as being capable of executing the said contract.

The Tender Board at its meeting held on 27<sup>th</sup> January 2015, deliberated on the recommendations by the evaluation committee and approved the award of contract as recommended by the Evaluation Committee.

On 16<sup>th</sup> March 2015, the Respondent vide his letters Ref. No. DAWASA/PR/4/DNW/72/05-07 respectively notified all tenderers who had participated in the tender proceedings of its intention to award the tender to the successful tenderer M/s Overseas Infrastructure Alliance (India) pvt Ltd-Pratibha Industries Ltd Consortium.

On 24<sup>th</sup> March 2015, the Appellant lodged complaints with the Respondent's Accounting Officer disputing the proposed award of the contract on two grounds that -

- its tender price was lower than the price proposed by the successful tenderer; and
- that according to the procurement method used by the Respondent, the Appellant should have been awarded the tender, taking into account that they had been executing two major projects in Tanzania and were familiar with terrain and costs structures of the country.

In response to the above complaints, on 27<sup>th</sup> March 2015 the Respondent's Accounting Officer informed the Appellant the reasons for the disqualification of their tender – that at the preliminary evaluation stage it became known that its Joint Venture partner- M/s Gammon India Ltd. had been debarred from participating in tender processes by State Urban Development and Housing Department (UDHD) of Bihar State (India) and that in terms of Section 62(2) of the Public Procurement Act, 2011 (hereinafter referred to as "the Act"), Technofab-Gammon Joint Venture was also automatically disqualified.

Being dissatisfied by the Respondent's decision, on 13<sup>th</sup> April 2015, the Appellant lodged their Appeal to this Appeals Authority.

### SUBMISSIONS BY THE APPELLANT

Addressing the Members of the Appeals Authority on the issue of debarment of M/s Gammon India Ltd., the learned counsel for the Appellant insisted that no such debarment was in place. He said that Technofab Engineering of India was an electro-mechanical company specialized in the water industry. It has projects in Africa and in Tanzania; it was engaged in Bukoba and Sumbawanga urban water projects. He pointed out that under the JV with Gammon; Technofab Engineering was the lead partner. Giving highlights on what he termed a "commercial dispute" involving M/s. Gammon and Geomiller in a project in the state of Bihar Northern India, counsel for the Appellant stated that in 2010 and 2011, the state of Bihar under took to implement a water project and participating tenderers were required to set up a special Joint Venture vehicle which would undertake to design, build, operate the infrastructure. He said that Gammon was a mere shareholder in Bihar Urban Infrastructure Development Corporation of India -"BUIDCO" and that the JV which was created as a special purpose vehicle to

carry out the said construction was called Patna Water Distribution Network Pvt. Ltd ("PATNA"). According to the learned counsel, during the implementation of the project, there were delays in the handing over of the sites. Counsel insisted that any information on the alleged debarment was not true or correct since the two companies are completely different. He complained that the Respondent did not enquire from the Appellant facts about the alleged debarment and asserted that any information on the debarment was not true or correct. He asserted that although the Respondent had been given an update on the existing dispute between the Appellant and the State Urban Development and Housing Department (UDHD) of Bihar State (India) he could not consider it. The Appellant states that M/s Patna Water Supply Distribution Network Pvt. Limited (in which Gammon is a partner) has a commercial dispute with Bihar Urban Infrastructure Development Corporation of India and that it is still under arbitration.

In support of his arguments, the learned counsel denied that the provisions of Section 62(2) of the Act were applicable to the present situation and submitted that the Respondent had failed to follow the procedures regulating blacklisting and debarment of tenderers provided for under the Act and GN 446 of 2013, specifically Regulations 94 to 96 inclusive namely -

- i. There is no notice of debarment issued to Gammon by the Public Procurement Regulatory Authority (PPRA) as required under Regulation 96(1);
- ii. Gammon was not invited by PPRA to show cause as required by Regulation 96(3); and
- iii. Gammon was not served with debarment decision by PPRA as required by Regulation 96(4).

In that regard, it was submitted that the Respondent had not only contravened principles of natural justice for being an investigator and a judge but also had violated legal procedures prescribed under Regulations 94, 95 and 96 of GN.446 of 2013 regarding blacklisting.

It was further submitted that in concluding or deciding that the State Urban Development and Housing Department (UDHD) of Bihar State (India) had debarred Gammon; the Respondent had acted beyond the powers vested onto the procuring entities under Section 83 of the Act, since Gammon did not commit any of the events provided under the section. The purported debarment of Gammon by the Respondent was outside the scope of Section 83 of the Act, that the decision taken by the Respondent was ultra-

vires the laws as those powers have been vested in the PPRA and not the Respondent.

Finally, the Appellant prayed for the following orders;

- a. The Respondent to be ordered to stay the intended award of the contract to the proposed successful tenderer;
- b. Declaration that Gammon India Limited has not been barred. Alternatively, the Respondent be ordered to comply with debarment procedures stated under the law;
- c. The Appellant be awarded the tender;
- d. The Respondent be ordered to pay cost of this Appeal.

#### REPLIES BY THE RESPONDENT

In response to the above submissions, the Respondent had this to say:

That, all the relevant procedures for the processing of the tender in dispute had been followed. The Respondent pointed out that according to Section 62(2) of the Act a tenderer who has been blacklisted by a foreign country from participating in tender processes is automatically debarred from participating in the public Procurement processes in the United Republic of Tanzania.

The Respondent stated that during the very early stages of the evaluation process of the tender under dispute, it came to the knowledge of the Evaluation Committee that the Appellant's partner in the Joint Venture (JV) had been debarred from participating in the tender processes by Bihar Urban Infrastructure Development Corporation Ltd India (BUIDCo) and there was ample proof to that effect. He said that in order to verify the above information, the Respondent had to carry out due diligence by requiring information on the Appellant's status through Tanzania High Commission in India. The High Commissioner confirmed that the Appellant's partner had been blacklisted by BUIDCo as far back as October 2013.

Further, the Respondent stated that according to the Instructions to Bidders, hereinafter referred to as "the ITT") the Appellant was required to have declared the information on the pending litigation between Gammon/Geomiller and Patna for purposes of transparency, a matter it had failed to comply with.

Regarding the fact of debarment, the Respondent insisted that the employer had no reason to initiate debarment proceedings as prescribed under Regulations 94, 95 and 96 of GN.446 of 2013.

The Respondent said that the Appellant had already been debarred BUIDCo as far back as October 2013. BUIDCo is a foreign institution and as long as the fact of debarment has not been disproved, in terms of the provisions of sec. 62(2) of the Act, the Appellant's partner automatically remained blacklisted and debarred from participating in public procurement in the United Republic of Tanzania. Therefore the Appellant was fairly disqualified in terms of Section 62(2) and (9) of the Act.

Further, the Respondent disputed to have acted beyond its powers but insisted to have acted within the scope of Section 62(2) and (9) of the Act to disqualify the Appellant. The Respondent submitted that any reference to Regulations 93 to 96 inclusive is a serious misconception of the law since those provisions of the law do not apply to the current situation. He elaborated and stated that following the information of debarment of the Appellant's partner, there was no way the Evaluation Committee could proceed to consider the respective tender as clearly stipulated under Section 62 (9) of the Act, which prohibits Procuring entities from engaging a tenderer who has been blacklisted from participating in public procurement proceedings. The Appellant was found ineligible to participate in the procurement process during the preliminary evaluation of

tenderers which assessed tenderers' eligibility as provided under Clause 27.1(a) and 34.1 of ITT.

Finally, the Respondent prayed for the following orders;

- i. Appeal to be dismissed with costs.
- ii. A declaration that the decision to disqualify the Appellant was proper and lawful.
- iii. A declaration that M/s Gammon India has been barred and blacklisted.
- iv. Any other relief as the Appeals Authority may deem appropriate to grant in the circumstances.

#### ANALYSIS BY THE APPEALS AUTHORITY

In determining this Appeal, the Appeals Authority perused the tender proceedings, the various documents submitted to it as well as oral submission by both parties at the hearing. Having done so, it is of the view that there are two main issues calling for determination and these are:-

1. Whether the Appellant's disqualification based on debarment by a foreign Institution was justified.

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

We will begin with the first issue.

1. Whether the Appellant's disqualification based on debarment by a foreign Institution was justified.

As discernable from the facts of this Appeal, the main issue is the justification of the Respondent's act to disqualify the Appellant during the evaluation of tenders on the ground of blacklisting. As indicated in these proceedings, the Appellant relentlessly disputes to have been blacklisted by BUIDCo. And the Appellant's counsel was very cautious not to admit that Gammon had in fact been disbarred from participating in tendering processes by any firm. He wanted the Members of this Authority to believe that there was a mere commercial dispute between Gammon and BUIDCo of India which had nothing to do with Technofab-Gammon JV. In his submissions, the learned counsel wanted the Members of the Appeals Authority to believe that Gammon was a mere shareholder in BUIDCo and that the special purpose vehicle which had been created to implement the project-Patna Water Distribution Network Pvt. Ltd (PATNA) had indeed failed to execute the works, hence the alleged commercial dispute.

In resolving the issue regarding disbarment, this Appeals Authority noted that indeed Appellant was disqualified at the preliminary evaluation stage as rightly submitted by the Respondent.

The Appeals Authority revisited Clauses 3.7 (e) and 27.1 of the ITT together with Section 62(2) of the Act relied upon by the Respondent and observed that, Clause 27.1(a) of ITT provided for the mandatory determination of tenderers' responsiveness to eligibility criteria defined under Clause 3 of the ITT. The Appeals Authority further revisited Clause 3 referred to above and observed that Clauses 3.1 to 3.6 provided for the general conditions which tenderers were under obligation to comply with, while Clause 3.7 provided for the situations/ conditions which would consider a firm to be ineligible for award of the contract. One of those conditions was that provided under Clause 3.7(e) which provided in no uncertain terms that tenderers participating in the tender under appeal should not have been debarred from participating in the tender processes in terms of Sections 62(2) and 84(7) of the Act. Section 62(2) of the Act provided for an automatic disqualification of a tenderer who had been blacklisted by a foreign firm, country or Institution.

At this juncture we must point out that there has been serious misconception by the Appellant on the applicability of Sec. 62(2) of the Act. The appellant has insisted that the Respondent ought to have followed the procedure laid out under Regulations 94,95 and 96 inclusive on disbarment. However, the issue at hand related to disbarment of one of the JV partners which took effect in October 2013. It is disturbing when the Appellant's counsel submitted that the information received from the Tanzania High Commission may not be relied upon as true or correct. However, in the Appellant's rejoinder, paragraph 2.2.3, the Appellant has himself shown that BUIDCo had in fact written to PATNA and Gammon in October 2013 debarring both from participating in public tenders.

The Respondent informed the Members of the Appeals Authority that upon realizing that the Appellant's partner had been blacklisted by a foreign firm, due diligence to verify the correctness of the information was conducted through the assistance of Tanzania High Commission in India. Indeed, BUIDCo by its letter Ref. No. BUIDCo/S10-01/Yo-11/12/CAM/-8-151 dated 2<sup>nd</sup> January 2015, confirmed to the Respondent that it (Bihar Urban Infrastructure Development Corporation Limited) had

disbarred the Appellant's partner and the said letter in part reads as follows;

*Sub: Information regarding M/s Gammon India pvt, Ltd. Under Patna Water Supply Project.*

*Ref. Your letter –DAWASA/PR/4/DAC/61, dated 09.01.2015*

*Dear Sir,*

*This is to inform you that Gammon India & Geomiller Consortium were executing the Patna Water Supply Project" costing INR-548.83 crore. Only 10% of work could be completed even after the date of completion was over. Hence the contract has been terminated on 24.07.2014 and security money has been forfeited.*

*The consortium partners (i) Gammon India pvt, Ltd & (ii) Geomiller & co.pvt. Ltd has been debarred on 18.10.2013 from taking part in any future Bid/ tender (Emphasis Added)*

When the Members of the Appeals Authority drew the Appellant's attention to the above letter, the Appellant re-iterated his position that their partner was not blacklisted but rather that there was a dispute with the debarring institution (Bihar Urban Infrastructure Development Corporation Limited) which is currently under arbitration. To substantiate its arguments, the Appellant

submitted a copy of a letter from Buidco, Ref. No. BUIDCo/SIU-1/Yo-11/2012 (part-5)-573 dated 18<sup>th</sup> October 2013. The letter reads in part as follows -

"Date: 18.10.13

To  
Mr. M.U.Shah,  
Managing Director,  
Patna Water Supply Distribution Network pvt. Ltd.  
Gammon Geo Miller Consortium,  
Gammon House, Veer Savarkar Marg,  
Prabhadevi, Mumbai-400025

Sub: About debarring from participating in tenders of Buidco's Projects till further notice.

Sir,

The construction of Patna Water Supply was awarded to M/s Gammon Geo Miller Consortium vide BUIDCo work order no. BUIDCo/ Yo 30/10 (Part VI)-15 dated 27.02.12. Patna Water Supply Project is being implemented by Patna Water Supply Distribution Network Pvt. Ltd (SPV)

1. The date of start of the work is 28.03.2012 and the date of completion of work is 27.03.2014. After passing of 18 months (75%) of time the work completed is only 4.20%...
2. .... N.A.
3. .... N.A.
4. .... N.A.
5. .... N.A.
6. .... N/A
7. From the above facts it seems that you are not capable of/not taking ample interest to complete the work. As per direction you are informed that in the light of your dissatisfactory progress in the last 18 months and your disinterest in completing the remaining work of the project you are debarred till further notice from participating in the tender process of the projects of Bihar Urban Infrastructure Development Corporation, Patna (Buidco).

Govt. of Bihar undertaking".

It can be observed that the submissions by the Appellant in respect to the fact of disbarment are misleading. First, it is not the Respondent which disbarred the Appellant's partner in the JV. Second, the letters speak of themselves. While the six Indian prequalified bidders (Appellant included) were invited by the Respondent to submit their tenders in October 2014, the Appellant's partner - Gammon India pvt, Ltd had been debarred with effect from 18.10.2013, a matter which the Appellant has persistently attempted to deny if not to hide. And it is no wonder that Gammon India pvt has distanced itself from this Appeal. From the documents availed to this Appeals Authority in respect to the disbarment of Gammon India pvt Ltd and Geomiller and Co pvt Ltd.; it was imperative for Gammon India pvt to respond to the assertions by the Respondent.

Last but not least, the Appeals Authority wishes to address the Appellant's three contentions that the Respondent

- a. had no powers to blacklist the Appellant;
- b. did not follow the blacklisting procedures provided under the Act;

- c. Respondent had violated principles of natural justice by denying the Appellant the right to be heard by the Respondent or PPRA.

In his submissions, the learned counsel for the appellant relied heavily on the provisions of Regulations 94, 95 and 96 of GN.446. He invited this Authority to believe that the disbarment proceedings had been initiated and conducted by the Respondent, and that is why he alleged contravention of the principles of natural justice. We have already stated that the above regulations are simply not applicable to the present Appeal. The Respondent or PPRA did not initiate or conduct disbarment proceedings. The procedures stipulated under those regulations would have become operational if and only if the blacklisting process was initiated by the Respondent or PPRA. In this matter, neither the Respondent nor the PPRA was dealing with blacklisting proceedings as contented by the Appellant.

It will be observed that the disqualification of M/s Technofab at the preliminary stages of the procurement process was by automatic application of Section. 62(2) of the Act. Simply stated, neither the Respondent nor PPRA were privy to the disbarment proceedings involving M/s Gammon Geo Miller Consortium and

BUIDCo. The Respondent was dealing with the procurement proceedings to obtain a reliable bidder who would execute the project. That's why the wording of Section 62(2) of the Act does not follow the channels provided for under Section 62(3) and (4) herein below, which the Appellant so wished to be adhered to. For purposes of clarity, the Appeals' Authority reproduces the cited provisions as hereunder;

- S.62 (1) The Authority shall have powers to blacklist a tenderer for a specified time from participating in public procurement proceedings and notify all procuring entities on such actions.
- (2) A tenderer who has been blacklisted and barred from taking part in public procurement by a foreign country, international organization or other foreign institutions shall automatically be blacklisted from participating in public procurement in the United Republic- ...
- (3) A tenderer shall be debarred and blacklisted from participating in public procurement or disposal proceedings if ...

- (4) The Authority may debar and blacklist a tenderer from participating in public procurement on other grounds as may be deemed necessary by the Authority.
- (5) Subject to sub sections (3) and (4), the procedure for debarment shall be stipulated in the Regulations.

From the above cited provisions, the Appeals Authority is of the firm view that the procedures provided for under Regulations referred above would have been applicable if at all the blacklisting process was to be initiated under Sub-Sections (3) and (4) by the Respondent or PPRA as categorically provided by the law. It is on these premises that, Section 62(5) of the Act excludes applicability of the said procedures if blacklisting falls within the ambit of Section 62 (2) of the Act. Therefore, the Appellant's contention regarding this matter lacks legal support. Accordingly, the Appeals Authority's conclusion with regard to the first issue is that the Appellant's disqualification based on debarment by a foreign Institution was justified.

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

To start with, the Appeals Authority took cognizance of its findings on the first issue and observed that indeed the Appellant's partner M/s Gammon India Limited was blacklisted in India. Accordingly, the consortium had failed at the initial stages of the evaluation and did not deserve to be considered for the next stages before award of the tender. Technically, the Appellant was disqualified for being non responsive to the Tender Document. The orders for prayers sought by the Appellant cannot issue.

With regard to the Respondent's prayers contained in their submissions, the Appeals Authority upholds them save for the prayer for cost since the law does not confer them such a right. The right to claim for the compensation under Section 97(5) (f) is solely the tenderers' rights and not procuring entities.

On the basis of the aforesaid conclusions, the Appeals Authority dismisses the Appeal for lack of merits and orders each party to bear its own costs.

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

This Decision is delivered in the presence of the Appellant and his counsel and the Respondent and his counsel this 11<sup>th</sup> May, 2015.



JUDGE (rtd) V.K.D. LYIMO

CHAIRMAN

MEMBERS:

1. MRS. R. A. LULABUKA .....
  2. ENG. A. J. MWAMANGA.....
  3. MR. L. P. ACCARO .....
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