

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

**APPEAL CASE NO. 84 OF 2010**

**BETWEEN**

**IMPRESA COSTRUZIONI  
GIUSSEPE MALTAURO  
SPA AND H. YOUNG AND  
COMPANY (E.A) LTD ..... APPELLANT**

**AND**

**TANZANIA NATIONAL  
ROADS AGENCY.....RESPONDENT**

**DECISION**

**CORAM:**

- |                                |               |
|--------------------------------|---------------|
| 1. Hon. A.G. Bubeshi, J. (rtd) | - Chairperson |
| 2. Mrs. N.S.N. Inyangete       | - Member      |
| 3. Mrs. R. Mang'anya           | - Member      |
| 4. Ms. B.G. Malambugi          | - Secretary   |

**SECRETARIAT:**

- |                       |                           |
|-----------------------|---------------------------|
| 1. Ms. E.V.A. Nyagawa | - Principal Legal Officer |
| 2. Ms. F. R. Mapunda  | - Legal Officer           |
| 3. Eng. J. Malongo    | - Review Expert from CRB  |

## **FOR THE APPELLANT:**

1. Mr. Orlando Cappelari – Area Manager
2. Mr. Sikandar Dar – Administration Officer
3. Mr. Irfan Dinan – Legal Consultant (ADCA – Veritas Law Group)
4. Mr. Adronicus Byamungu – Advocate ADCA Veritas Law Group

## **FOR THE RESPONDENT**

1. Mr. Kenan Komba – Legal Counsel
2. Mr. Justinian Byabyato – Legal Counsel
3. Mr. Musiba Chilato – Ag. Head Goods and Works
4. Mr. Frank J. Mwakisonga – Project Engineer

## **OTHER PARTIES**

Mr. Giovanni Guidoni – Project Manager Nyanza Roads Works Co. Ltd.

This decision was scheduled for delivery today 9<sup>th</sup> November, 2010, and we proceed to deliver it.

The appeal at hand was lodged by **M/s IMPRESA COSTRUZIONI GIUSSEPE MALTAURO SPA AND H. YOUNG AND COMPANY (E.A) LTD** (hereinafter to be referred to as **“the Appellant”**) against **TANZANIA NATIONAL ROADS AGENCY** commonly known as **TANROADS** (hereinafter to be referred to as **“the Respondent”**).

The said Appeal is in respect of Tender No. AE/001/2009-10/HQ/W/44 for Rehabilitation of Nyanguge-Musoma Road: Lot 2 Mwanza-Mara Boarder-Musoma Section (85.5 Km) (hereinafter to be referred to as **“the Tender”**).

According to the documents submitted to the Authority as well as oral submissions by parties, the facts of the Appeal may be summarized as follows:

The Respondent advertised the tender for Rehabilitation of Nyanguge-Musoma Road: Lot 2 Mwanza-Mara Boarder-Musoma Section (85.5 Km) *vide* The Guardian newspaper of 22<sup>nd</sup> February, 2010.

The tender opening took place on 9<sup>th</sup> April, 2010, whereby seven tenderers took part in the tender process as listed in the Table below:

<b>S/N</b>	<b>Name of Tenderer</b>	<b>Bid Price Tshs</b>	
		<b>Alternative 1</b>	<b>Alternative 2</b>
1.	M/s Nyanza Road Works Ltd (Tanzania)	105,745,295,068.51	108,490,764,401.85
2.	M/s Jiangxi Geo-Engineering (Group) Corporation (China)	173,995,236,274.32	177,350,869,161.59
3.	M/s Jinsung Construction Co. Ltd (Korea)	123,970,235,292.00	127,187,539,835.00
4.	M/s Maltauro-H Young JV	93,482,320,985.28	96,230,637,228.35
5.	M/s Sichuan Road & Bridge (Group) Co. Ltd (China)	113,585,521,431.00	(Amount not indicated)
6.	M/s Hainan International Ltd (China)	103,997,834,229	(Amount not indicated)
7.	M/s China Henan International Cooperation Group Co. Ltd (Chico) - (China)	97,674,983,956.43	100,747,492,559.46

The seven tenders were evaluated and the award was made in favour of M/s China Henan International

Cooperation Group Co. Ltd (Chico) at the corrected contract sum of Tshs. 85,368,632,720.12.

On 10<sup>th</sup> August, 2010, the Appellant received a letter from the Respondent referenced TRD/GEN/222/01/42 dated 9<sup>th</sup> August, 2010, informing them that their tender was unsuccessful.

On 6<sup>th</sup> September, 2010, the Appellant submitted an application for administrative review to the Respondent inquiring about the following;

- why the tender was not awarded to the tenderer offering the lowest evaluated cost;
- why the results were not published; and
- why information about the successful tenderer were not disclosed to the Appellant.

The same letter of 6<sup>th</sup> September, 2010, was copied to the Public Procurement Regulatory Authority (hereinafter to be referred to as "**PPRA**")

On 15<sup>th</sup> September, 2010, the Respondent replied to the Appellant's application for administrative review *vide* letter referenced TRD/GEN/222/01/43 informing them that their tender was rejected at the Preliminary Examination stage as they had submitted a non responsive Bid Security.

On 20<sup>th</sup> September, 2010, the Appellant received a letter from PPRA referenced PPRA/AE/001/"D"/68 dated 17<sup>th</sup> September, 2010, advising them to appeal to the Public Procurement Appeals Authority (hereinafter to be referred to as "**the Authority**") as the contract had already entered into force.

On 30<sup>th</sup> September, 2010, the Appellant lodged an Appeal to this Authority.

## **SUBMISSIONS BY THE APPELLANT**

The Appellant's documentary, oral submissions as well as responses from questions raised by the Members of the Authority during the hearing may be summarized as follows:

The Respondent's submissions were two fold:

### **i) The Alleged Non Responsiveness of the Bid Security**

That, a bid security is required as form of protection or indemnity to ensure that the tenderer has financial ability to perform its obligation under the bidding document and contract if selected as a successful tenderer.

That, the issuance of Bid Security solely in the name of the lead partner was an oversight that was capable of being corrected without touching on the substance of the tender as per Regulation 90(11)(b) of the of Public Procurement (Goods, Works, Non-consultant services and

disposal of public assets by tender) GN No. 97 of 2005 (herein after to be referred to as "**GN No. 97/2005**").

That, the tender security was sufficient in amount and adequately served the purpose for which it was required, that is to secure tenderer's obligation under the tender.

That, the Public Procurement Act, Cap. 410 (hereinafter to be referred to as "**the Act**") requires application of fair, competitive, transparent, non discriminatory and value for money procurement standards and practices coupled with potential savings that would have accrued to the Government of Tanzania and its taxpaying citizens by considering the Appellant's bid as responsive. The Respondent acted inequitably by prematurely determining that the Appellant's Bid Security was non-responsive.

**ii) The Tender was not awarded to the lowest evaluated bidder**

That, Section 59(1) of the Act, stipulates that public works tenders shall be awarded to the tender offering the



lowest evaluated costs. The Appellant's bid indicated contract price of Tshs. 93,482,320,985.28 or Euro 51,966,380.00. The successful tenderer's contract price was Tshs. 103,997,834,299 or Euro 57,811,904.07, meaning the Appellant's bid was at least 10 billion shillings less than that of the successful tenderer.

That, the Bid Invitation clearly sets forth other evaluation factors, the Appellant's lead partner M/s Impresa Costruzioni Giuseppe Maltauro SPA has significant experience, qualifications and adequate manpower, technical and financial resources as evidenced by various projects that they are currently executing in Tanzania for the Respondent. The Appellant's other joint venture partner; H. Young and Company (East Africa Ltd) is one of the East Africa's leading construction groups with design and manufacturing activities relating to all sectors including road construction. Thus the Appellant clearly met or exceeded the tender's evaluation factors.

That, the awarding of the contract to M/s China Henan International Cooperation Group Co. Ltd (Chico) was inconsistent with Section 6(a) of the Act.

That, the Appellant is uncertain if the Respondent complied with its obligations under Section 84 of the Act with respect to suspension of procurement proceedings. Accordingly, the Authority is requested to investigate the Respondent's compliance with this requirement.

That, Regulation 97(12) of GN No. 97/2005 lists numerous media through which the results of tender awards shall be published including PPRA's website. However a review of the tenders portal of that website on 27<sup>th</sup> September, 2010 failed to find any listing of the tender results. Also the Appellant has never seen any public notification concerning award of tender to the successful tenderer.

That, Regulation 97(14) of GN No. 97/2005, requires the name of the successful tenderer, their tender price and all prices tendered be disclosed to tenderers. However, to

date the Respondent has not given such information to the Appellant.

### **iii) Reliefs**

Finally, the Appellant prayed for the following reliefs;

- i) A declaration that the Appellant's Bid Security issued in the name of the lead partner was an oversight that was curable without touching the substance of the tender.
- ii) A declaration that the Appellant's bid was substantially responsive to the tender requirements.
- iii) Suspension of the contract awarded under the tender was consistent with Section 84(3) of the Act.
- iv) Declaration that the award of the contract to the alleged successful tenderer was in violation of the Act and its Regulations.
- v) Declaration that the Appellant was the successful tenderer.
- vi) General damages of USD 6,000,000.00

vii) Legal fees in the amount of USD 11,800.00 and costs in the amount of USD 65.00 and Tshs. 200,000/-

## **REPLIES BY THE RESPONDENT**

The Respondent's written replies contained a Preliminary Objection that the Appellant's legal personality was not disclosed in the Statement of Appeal and, thus the Appeal before the Public Procurement Appeals Authority was not maintainable.

The Respondent therefore prayed that the Appeal be dismissed in its entirety with costs for want of the Appellant's legal personality.

However, during the hearing the Respondent prayed for withdrawal of the said objection and the prayer was granted by the Authority.

The Respondent's documentary, oral submissions as well as responses from questions raised by the Members of

the Authority during the hearing may be summarized as hereunder:

That, the Appellant was notified of the tender results through a letter dated 9<sup>th</sup> August, 2010, and the reasons for their disqualification was given *vide* letter dated 15<sup>th</sup> September, 2010.

That, the tender had been awarded to M/s China Henan International Cooperation Group Co. Ltd (Chico) at the contract sum of Tshs. 85,368,632,720.12, and the contract was signed on 30<sup>th</sup> July, 2010.

That, signing of the contract marked the end of the tendering process thus ousting the powers of the Accounting Officer to entertain the application for review lodged by the Appellant. In that regard the Respondent was not bound to reply to the Appellant's letter of 6<sup>th</sup> September, 2010. Further, it was sufficient for the Appellant to know that the tender results would be disclosed to them after submission of Performance Security by the successful tenderer.

That, the tender process was conducted in line with the Public Procurement Act and its Regulations and cannot be faulted at this stage.

That, with regard to the non Responsiveness of the Appellant's tender, the Respondent submitted that;

- i) The intention of furnishing Bid Security is to prevent the tenderer from withdrawing their bid during the bid validity period and it becomes a security if the tenderer fails to sign the contract. Essentially this means that the Bid Security protects the procuring entity from the time of bidding to the time of furnishing performance security. In order to be properly protected the procuring entity has to make sure that the Bid Security complies with Clause 19.8 of the Instruction To Bidders (hereinafter to be referred to as "**ITB**").

- ii) Clause 19.8 of the ITB requires the bid security to be in the name of the Joint Venture (hereinafter to be referred to as "**JV**") that submits it. If the JV has not been legally constituted into a legally enforceable JV at the time of bidding, the bid security is required to be in the name of all future partners as named in the letter of intent referred to in Clause 41 of the ITB.
  
- iii) The tenderer as reflected in the JV Agreement is Maltauro–H Young JV. However, the bid security was submitted in the form of a Bank Guarantee, and the name of the tenderer was described as Impresa Construzioni Guiseppe Maltauro SPA.
  
- iv) The act of the Appellant submitting the bid security in the name of Impresa Construzioni Guiseppe Maltauro SPA instead of Maltauro–H Young JV is a material deviation in terms of Clauses 28.1(a) and 29.2(a) and (b) of the ITB.

- v) The submission of the bid security in the name of one partner of the JV while Clause 19.8 of the ITB required that it be in the name of the JV, if accepted, would be inconsistent with the Tender Document.
  
- vi) The submission of the bid security in the name of one partner of the JV as presented by the Appellant contravened Clause 19.8 of the ITB. Thus, if accepted would limit the employer's (Respondent) right to realize the secured amount from the Bank on the reasons that JV was not known to that Bank.
  
- vii) Also Clause 19.8 of the ITB required the bid security to be in the name of the JV, so if the said anomaly is rectified it would unfairly affect the competitive position of the other tenderers who submitted substantially responsive bids.



- viii) The mere fact that the tender security was sufficient in amount as contended by the Appellant does not exonerate them from complying with specific instructions under Clause 19.8 of the ITB and this argument cannot be taken as an excuse for non compliance with the solicitation document.
- ix) Section 6(a) of the Act cited by the Appellant is not relevant to this appeal as it relates to the objectives of the PPA. The proper provision would have been Section 43 of the Act. Nonetheless the envisaged standards can be achieved having complied with other provisions of the law which set specifications and criteria. The Respondent had complied with Section 43 as inserted in the ITB.

That, with regard to the allegation that the tender was not awarded to the lowest tenderer, the Respondent submitted that;

- a) According to Regulation 59(1) of GN No. 97/2005 the lowest evaluated cost entails many variables which finally culminate into responsiveness.
- b) The evaluation of tenders in this tender process involved two steps, namely, preliminary evaluation (verification, eligibility, bid security, completeness of the bid and substantial responsiveness) and detailed evaluation (correction of arithmetic errors and post qualification).
- c) The Appellant was not eliminated prematurely as they were not alone but included other tenderers, namely, M/s Sichuan Road and Bridge (Group) Co. Ltd and M/s Hainan International Ltd were disqualified as well.
- d) The suspension of the procurement process is not an automatic process.

- e) There is no specific time scale set under Regulation 97(12) of GN. No. 97/2005 does not specify the time within which the tender results should be published. What was required was to publish the same once the successful tenderer furnishes performance security.
- f) The powers of the Authority to grant remedies are provided under Section 82(4) of the Act.
- g) The Appellant's prayer that their bid security be declared valid is unfounded as it lacks legal basis. Also the prayer that the contract be suspended is not maintainable because the contract has already entered into force and their application for administrative review was not timely presented before the PPRA and there was no decision by the Chief Executive Officer.

With respect to the reliefs prayed for by the Appellant, the Respondent stated as follows;

- (i) That, the general damages prayed for are not quantifiable as they are substantially subject to the discretion of the adjudicating authority.
- (ii) That, the prayers for compensation are unfounded as they contain costs purported to have been incurred in matters which are not before this Authority, and the claims of USD 65.00 and Tshs. 200,000/- are not supported by any documentary evidence.

Finally, the Respondent's prayed for dismissal of the Appeal with costs.

### **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 based on the following issues:

- **Whether the Appellant was unfairly disqualified**
- **Whether the award to the successful tenderer was proper at law**
- **To what reliefs, if any, are the parties entitled to.**

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

### **1.0 Whether the Appellant was unfairly disqualified**

In its endeavour to ascertain whether the disqualification of the Appellant was justified, the Authority, reviewed the documents submitted and the contesting oral submissions by parties *vis-a-vis* the applicable law and the Tender Document. In the course of so doing, the Authority deems it prudent to start by revisiting the parties' arguments on this point.

The Authority revisited the Appellant's submissions that, they were prematurely and unfairly disqualified as the issuance of Bid Security in the disputed tender solely in the name of the lead partner was an oversight that was capable of being corrected without touching on the substance of the tender, consistent with Regulation 90(11)(b) of GN. No.97/2005. The Appellant further submitted that, the tender security was sufficient in amount and adequately served the purpose for which it was required, that is to secure tenderer's obligations under the Tender. Hence the Respondent acted contrary to the requirements of the Act which requires application of fair, competitive, transparent, non discriminatory and value for money procurement standards and practices during the procurement process.

In reply the Respondent submitted that, the Appellant failed to comply with Clause 19.8 of the ITB which requires the Bid Security to be in the name of the JV that submits it, and where the JV has not been legally constituted at the time of bidding, the Bid Security was required to be in the name of all future partners as

named in the letter of intent. To the contrary, the Appellant submitted a Bid Security in the name of **Impresa Costruzioni Giuseppe Maltauro SPA** instead of **Maltauro-H Young JV**. This omission was found to be contrary to the requirement of Clause 19.8 of the ITB. Hence the Appellant's tender was found to be non responsive at the Preliminary Evaluation Stage. Furthermore had the Respondent treated the said deviation as a minor deviation it would have affected the rights of the other tenderers in the process and would limit the employer's right to realize the secured amount from the Bank on the reason that the JV is not known to that Bank.

In order to ascertain the validity of the parties' arguments the Authority revisited Clause 19.8 of the ITB which was relied upon by the Respondent. The said Clause provides **for the modality of submission of Bid Security for JV's**. For purposes of clarity the Authority reproduces the said Clause as hereunder;

**“The Bid Security or the Bid Securing Declaration of a JVA shall be in the name of the JVA that submits the bid. If the JVA has not been legally constituted into a legally enforceable JVA at the time of bidding, the Bid Security or Bid Securing Declaration shall be in the names of all future partners as named in the letter of intent referred to in ITB”** (Emphasis added)

Upon perusal of the documents submitted the Authority noted that, one of the attachments submitted in the Appellant’s tender was the JV Agreement which indicated clearly that the JV was between a document titled:

**“JOINT VENTURE AGREEMENT**

**Rehabilitation of Nyanguge – Musoma Road; Lot 2:Mwanza/Mara Border- Musoma Section(85.5km)  
(Tender No. AE/001/2009-10/HQ/W/44)”**

The agreement was entered into on 6th April, 2010.



"This agreement was between **IMPRESSA COSTRUZIONI GIUSEPPE MALTAURO** (hereinafter referred to as MALTAURO with registered office at Viale dell'Industria 42, 36100 Vicenza Italy) and **H.YOUNG & Co. (East Africa) Ltd** (hereinafter referred to as H YOUNG) with registered office at Funzi Road , Industrial area , P.O. Box 30118 -00100 GPO Nairobi, Kenya."

Furthermore, Item 2 of page 2 of the agreement, indicated that;

**"The Joint Venture shall be known as MALTAURO-H YOUNG JV"**

Further, Item 4 of the same JV Agreement provides specifically that the leader of the JV will be "**Maltauro**". However, during the hearing the Appellant submitted that, there was no Joint Venture Agreement in existence at the time of submitting the bid and that the agreement submitted merely showed the parties' intention to enter into a joint venture agreement hence the same could not be treated as a JV.

The Authority observes that, even if the agreement submitted was construed to mean an intention to enter into a Joint Venture Agreement, the Bid Security requirement under Clause 19.8 provided two options for submission of bid security in joint venture situations. Bidders were required to submit bid security either in **the name of the JV**, if the JV was in existence at the time of submission of bids or **in the names of all future partners as named in the letter of intent** if the JV was not in existence at the time of bid submission.

The Authority is of the view that by submitting a Bid Security in the name of one partner alone, namely **“Impressa Costruzioni Giuseppe Maltauro SPA”**, the Appellant did not comply with either of the two options provided for under Clause 19.8 of the ITB.

The Authority also noted that, the Appellant’s tender was submitted in the name of M/s Maltauro-H Young JV, the JV name, meaning that the Appellant recognized the existence of the JV at the time of bid submission as it

was not possible to use the JV name if there is no legally constituted Joint Venture Agreement. Thus the Authority finds that the JV existed and was valid in accordance with the law.

Furthermore, during the hearing the Appellant conceded that the submission of Bid Security in the name of the lead partner was an oversight on their part but was of the view that it could be rectified without affecting the substance of the tender. The Authority does not agree with the Appellant that this was a minor deviation which could be rectified. The Authority is of the view that, this was one of the mandatory factors used to determine bidders' eligibility. Clauses 19.1 and 19.4 of the ITB provide specifically that the furnishing of Bid Security is mandatory and that the same had to be in compliance with the requirements of the Tender Document failure of which would result in the rejection of the bids.

The said Clauses 19.1 and 19.4 of the ITB are reproduced as hereunder;

“19.1 The Bidders **shall furnish as part of its bid** either a Bid Securing Declaration or a Bid Security as specified in the BDS.” (Emphasis added)

“19.4 If a Bid Security is specified pursuant to ITB 19.1, **any bid not accompanied by a substantially responsive Bid Security or Bid Securing Declaration shall be rejected by the Employer as non responsive.**” (Emphasis added)

The Authority also revisited Regulation 90(16) of GN No. 97/2005 which reads as follows;

“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 Supplied)

The Authority concurs with the Respondent's argument that, if the Appellant's Bid Security were accepted, the same would have affected the rights of the Respondent, in the event that the Appellant decided to withdraw their tender during the tender validity period or refused to sign the contract or failed to furnish the performance security in case they were to be the successful tenderers. It is the view of the Authority that, that decision might limit the Respondent's rights as per Clause 19.7 of the ITB which provides for the forfeiture of the secured amount from the Bank on the reasons that the JV is not known to that Bank.

The Appellant further submitted that, due to the existence of the JV the parties under the agreement are severally and jointly liable as per Clause 4.1(a) of the ITB, thus the submission of the Bid Security in the name of the lead partner would ensure that the Respondent is fully covered. The Authority is of the view that the joint liability of the parties under Clause 4.1(a) of the ITB does not exonerate the Appellant from compliance with mandatory requirements of the Tender Document. Thus

the Authority does not accept the Appellant's argument in this regard.

Therefore the Authority finds the Respondent's act of disqualifying the Appellant at the preliminary stage to be proper and in accordance with the law.

In view of the foregoing, the Authority concludes that, the Appellant's disqualification was justified.

## **2.0 Whether the award to the successful tenderer was proper at law**

In its endeavour to ascertain whether the award to the successful tenderer was proper at law, the Authority examined the Evaluation process in order to establish whether procedural requirements were adhered to in accordance with the Act and the Tender Document. In the course of so doing, the Authority's analysis centres on three points which were raised during the hearing of this appeal. The said points are as follows:

- **The tender not being awarded to the lowest evaluated tenderer.**
- **The Respondent's failure to publish the tender results.**
- **Performance Security furnished by the successful tenderer.**

Having listed the matters that arose during the hearing, the Authority proceeded to analyse them as hereunder:

- (i) The tender not being awarded to the lowest evaluated tenderer.**

In its endeavour to resolve this point, the Authority reviewed the Evaluation Report and noted that the tenders were evaluated in two stages, namely, Preliminary Evaluation and Detailed Evaluation.

During Preliminary Evaluation the tenders were checked if they had complied with the verification, eligibility, bid security, completeness and substantial responsiveness to the Tender Document. At this stage of evaluation, three tenderers were found to be non responsive, the Appellant inclusive, for failure to comply with the requirements of the Tender Document. As it has already been shown under the first issue, the Authority is satisfied that the Appellant's disqualification was justified.

The Authority noted that, during detailed evaluation four tenderers were evaluated and M/s Nyanza Road Works Ltd was found to be lowest evaluated, however when post-qualification was done M/s Nyanza Road Works Ltd was disqualified for failure to meet the minimum turn over requirement. Due to that M/s China Henan International Cooperation Group Co Ltd (Chico) was found to be second lowest and was consequently awarded the tender.

The Authority revisited the Appellant's submission that, the Respondent erred in law by not awarding the tender



to the tenderer offering the lowest evaluated costs. According to the Appellant, their tender was lower by 10 billion shillings compared to that of the successful tenderer. In reply thereof, the Respondent submitted that, the price was not the only factor for determination of responsiveness as the lowest evaluated costs entails many variables which finally culminate into responsiveness.

The Authority revisited Section 67(1) of the Act and Regulation 90(6) of GN No. 97 which provide as follows;

“S. 67(1) The procuring entity shall evaluate on a common basis tenders that have not been rejected in order to determine the cost to the procuring entity of each tender in a manner that permits a comparison to be made between tenders on the basis of the evaluated costs, **but the lowest submitted price, may not necessarily be the basis for selection for award of the contract**”. (Emphasis supplied)

**“Reg. 90(6) Prior to the detailed evaluation of tenders, the tender evaluation committee shall carry out a preliminary examination of tenders to determine whether or not each tender is substantially responsive to the requirements of the tender documents, whether the required guarantees have been provided, whether the documents have been properly signed and whether the tenders are otherwise generally in order”.** (Emphasis added)

Based on the above provisions, the Authority concurs with the Respondent that, the price offered is not the only factor for determination of responsiveness. It is a mandatory requirement of the law that tenders have to be evaluated at preliminary stage in order to check eligibility and compliance with the requirements of the Tender Document. Thereafter tenders have to be subjected to detailed evaluation so as to determine the lowest evaluated tender.

Relating the above analysis to the facts of the Appeal at hand, the Authority is satisfied that the Appellant was fairly disqualified at the preliminary stage for failure to submit a responsive Bid Security as concluded under the first issue. Hence the Appellant could not be considered for the award of the tender despite the fact that their tender price was lower by 10 billion shillings as per Section 67(1) of the Act.

In view of the above, the Authority is satisfied that the tender was awarded to the lowest evaluated tender.

**(ii) The Respondent's failure to publish the tender results**

In analyzing this point, the Authority revisited the Appellant's argument that, the tender results were not published in accordance with Regulation 97(12) of GN No. 97/2005. The Appellant further contended that, neither the name of the successful tenderer nor the contract prices were disclosed to the Appellant contrary to Regulation 97(14) of GN No. 97/2005. In reply thereof

the Respondent submitted that the tender results were to be published after the successful tenderer had submitted performance security. This was intended to ensure that in case the successful tenderer was unable to provide performance security, the procuring entity would have the option of going to the second lowest evaluated tenderer. Hence if the results are published before the performance security is furnished then that option could not be utilized.

In order to establish the validity of the arguments by parties, the Authority revisited Clause 39.1 of the ITB which provides for the modality of notification of award. According to this clause, notification of award to the successful tenderer was to be made prior to the expiration of the bid validity period. The Authority noted further that the Bid Data Sheet deleted the remaining part of Clause 39.1 of the ITB after the 2<sup>nd</sup> sentence, which dealt with notification of tender results to the unsuccessful tenderers and publication of the same. For the purposes of Clarity the Authority reproduces the said

Clause 39.1 of the ITB read together with Item 39 of the Bid Data Sheet as hereunder:

**“ITB 39.1** Prior to the expiration of the Bid Validity period the Employer shall notify the successful bidder in writing that its bid has been accepted. The notification letter (hereinafter and in the Conditions of Contract and Contract Forms called the “Letter of Acceptance”) shall specify the sum that the Employer will pay the Contractor in consideration of the execution and completion of the Works (hereinafter and in the Conditions of Contract and Contract Forms called “the Contract Price”) and the requirement for the Contractor to remedy any defects therein as prescribed by the Contract. **At the same time, the Employer shall also notify all other Bidders of the results of the bidding and shall publish in *UNDB online* and in the *dgMarket* the results identifying the bid and lot numbers and the following information:**

- (i) name of each Bidder who submitted a Bid;**
- (ii) bid prices as read out at Bid Opening;**
- (iii) name and evaluated prices of each Bid that was evaluated;**
- (iv) name of bidders whose bids were rejected and the reasons for their rejection; and**
- (v) name of the successful Bidder, and the Price it offered, as well as the duration and summary scope of the contract awarded.” (Emphasis added)**

**“BDS 39 Delete the whole text of sub clause 39.1 after the 2<sup>nd</sup> sentence.” (Emphasis added)**

Having noted that the Respondent had opted to dis-apply provisions relating to publication of the tender results and notification thereof to the unsuccessful tenderers, the Authority revisited Regulation 97(11) of GN No. 97/2005 which stipulates as follows;

**“Upon entry into force of the procurement or disposal contract and if required, the provision by the supplier, service provider, contractor or asset buyer of a security for the performance of the contract, notice of the procurement or disposal contract shall be given to other supplier, service provider, contractor or assets buyer specifying the name and address of the supplier, service provider, contractor or assets buyer that has entered into the contract and the contract price”.** (Emphasis supplied)

The above quoted regulation provides clearly that notification to unsuccessful tenderers has to be made after the successful tenderer has furnished performance security if required, so that in case of failure to submit the same the Employer could have recourse to the next lowest evaluated tenderer.

Furthermore, Regulation 97(11) of GN No. 97/2005 requires unsuccessful tenderers to be notified of the name, address and the contract price of the successful tenderer. However, in relation to this Appeal the Respondent failed to avail the said information to the Appellant despite several reminders. The Authority finds the Respondent's act to be improper and contrary to the law. Moreover, the Authority noted that, in the course of dis-applying Clause 39.1 of the ITB the Respondent forgot to equally dis-apply Clause 39.3 which requires the **“Employer to respond in writing to unsuccessful Bidder who, after notification of award in accordance with ITB 39.1, requests in writing the grounds on which its bid was not selected”**.

The Authority wonders, if the Respondent intended not to notify the unsuccessful tenderers as the Bid Data Sheet tends to suggest, how were the unsuccessful tenderers expected to become aware of the tender results.

The Authority further revisited Regulation 97(13) of GN No. 97/2005 which requires procuring entities to submit



tender results to PPRA within three days of sending an acceptance notice to the successful tenderer so that information regarding the tender award could be published. For purposes of clarity the Authority reproduces the said Regulation 97(13) of GN No.97/2005 which reads;

**“To enable information on tender award to be published and for purposes of recording and distributing statistical information, procuring entities must ensure that copies of acceptance notices suitably notated with the number of tenders received, the range of tenders and the estimate are forwarded to the Authority. Copies must be submitted to the Authority within three days of sending an acceptance notice to the supplier, service provider, contractor or asset buyer”** (Emphasis supplied)

From the evidence submitted, the Authority noted that, the letter of acceptance was sent to the successful tenderer on **27<sup>th</sup> July, 2010**, the contract was signed on

**30<sup>th</sup> July, 2010**, and the performance guarantee was submitted on **25<sup>th</sup> August, 2010**, however, the list of awarded contracts was submitted by the Respondent to PPRA on **8<sup>th</sup> October, 2010**. According to the sequence of events, the tender results were to be submitted to PPRA within three days of sending an acceptance notice to the successful tenderer as per Regulation 97(13) of GN No. 97/2005. However the same was not done by the Respondent.

The Authority considered the Respondent's argument that, the information was not sent to PPRA within time on the reasons that, in a situation where the successful tenderer refuses to sign the contract or fails to furnish performance security, the Respondent would have an option of resorting to the second lowest evaluated tender. Based on that, the Authority is of the view that even though the submission of the tender results awaited the furnishing of performance security, the same should have been sent to PPRA immediately after the successful tenderer had furnished the performance security on 25<sup>th</sup> August, 2010. Thus the submission of the tender results

to PPRA on 8<sup>th</sup> October, 2010, was completely out of time and contrary to the law.

Moreover, the Authority concurs with the Appellant that tender results are to be published in PPRA's website and in at least two newspapers of wide circulation in accordance with Regulation 97(12) of GN No. 97/2005. The Authority is of the view that, publication of the tender results in newspapers is the responsibility of the procuring entity in accordance with Regulation 97(12) of GN No. 97/2005.

In view of the foregoing the Authority concludes that the Respondent's failure to publish and disclose the name of the successful tenderer and the contract price contravened the law.

**(iii) Performance security furnished by the successful tenderer**

With regard to the submission of performance security, the Authority revisited the Respondent's stated that, the Performance Security was to be submitted within 28 days from the date of notification of award to the successful tenderer in accordance with Clause 41.1 of the ITB. The said clause states as hereunder;

**“Within twenty-eight days of the receipt of notification of award from the Employer, the successful tenderer shall furnish the Performance Security in accordance with the General Conditions of the Contract...”** (Emphasis supplied)

During the hearing the Respondent submitted that, the Successful Tenderer submitted Performance Guarantee on 25<sup>th</sup> August, 2010, however, the said Performance Guarantee required some modification which were effected and the same was re-submitted in early October, 2010. The Authority ordered the Respondent to submit the said Performance Guarantees for purposes of inspection, contrary to the Authority's expectation; the

Respondent submitted only one Performance Guarantee dated 25<sup>th</sup> August, 2010. On being asked why they did not submit Performance Guarantee dated October, 2010, they replied that it was a slip of the tongue in that; there was no such a document. The Authority is concerned that the Respondent's submission on this point is untruthful and may cause serious consequences.

In view of the foregoing, the Authority is of the considered view that, the evaluation process adhered to the requirements of the Tender Document, save for some few shortfalls pointed out above which do not affect the validity of the awarded tender.

Accordingly, the Authority's conclusion in respect of the second issue is that, the award of the tender to the successful tenderer was proper at law.

### **3.0 To what reliefs, if any, are the parties entitled to?**

Having analyzed the contentious issues in dispute, the Authority finds it prudent to consider prayers by parties.

To start with, the Authority considered the Appellant's prayers that, a declaration be made that the Bid Security was capable of being corrected without touching substance of the tender and that the Appellant was the successful tenderer. In resolving this prayer, the Authority took cognizance of its findings on the first issue, namely, that the Appellant's bid was non-responsive and the same could not be rectified as it was a major deviation. Accordingly, the Appellant cannot be declared as a successful tenderer.

The Authority considered the Appellant's 2<sup>nd</sup> and 3<sup>rd</sup> prayers, namely, the Appellant's bid be declared substantially responsive and suspension of the contract be granted as per Section 84(3) of the Act. Having established that the Appellant's tender was non-responsive, the Authority observes that, the same cannot be declared to be substantially responsive. With regard to the issue of suspension of the contract, the Authority

finds the prayer to lack merit as there are no valid reasons to do so. Hence, these prayers are equally rejected.

The Authority considered the Appellant's prayer for declaration that the award of contract to the successful tenderer was in violation of the Act. The Authority and rejects it for lack of merit.

With regard to the Appellant's prayer for payment of general damages and legal fees, the Authority finds it unjustified as their tender was non-responsive. Accordingly, the Appellant is not entitled to any compensation as they should not benefit from their own wrong doing.

Having dealt with the Appellant's prayers, the Authority considered the Respondent's prayer that the Appeal be dismissed in its entirety with costs for lack of merit. The Authority rejects the appeal and orders each party to bear their own costs.

## **Other matters that caught the attention of the Authority:**

In the course of handling this Appeal the Authority came across some pertinent matters which are worth mentioning as hereunder:

- a) During the hearing the Appellant stated that they had executed another contract with the Respondent in a Joint Venture with M/s Spencon and Stirling Company for the construction of Mandela Road. During that tender process the Respondent instructed the Appellant to increase their share holding in the Joint Venture. The Respondent's move was said to have been triggered by their trust in the Appellant compared to the other partner in the JVA. No wonder the Appellant's main argument on the default in their Bid Security was that, the defect



was curable as they had previously changed the shareholding Agreement which affected the Bid Security, at the option of the Respondent. The Authority is of the firm view that, the procurement process has to abide by the law instead of customs or usage.

- b) The Authority noted that under financial capability the tenderers were assessed for, among other things, if they had an annual turnover of USD 90.4 million. The Authority finds the magnitude of the turnover requested to be on the higher side compared to the contract sum and the duration of the contract. The Authority noted further that, the amount of the turnover required is three times higher than the average sum of the works to be executed during the year. According to Regulation 94(4) of GN No. 97/2005 the criteria for post-qualification **shall be limited to that which is necessary for the performance of the intended contract and shall not be unduly restrictive.**

Upon being asked the basis of requiring an annual turnover of USD 90.4 million the Respondent submitted that the formula was adopted from the World Bank Evaluation Guidelines as shown below:

**“85 billion (Contract sum) x 2.5/2 years (Duration)”**

However, the Respondent failed to justify the basis of using such a formula by failing to substantiate what was the figure 2.5 within that formula which was used to calculate the annual turnover of USD 90.4 million.

Therefore the Authority is of the considered view that, whilst it appreciates the requirement of annual turnover as a measure of financial capability, there is need for PPRA to come up with a formula to ensure, among other things, equitable participation of local contractors.

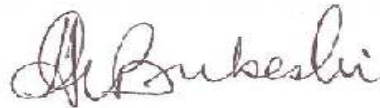
- c) The Authority noted the weaknesses of Regulation 97(13) of GN No. 97/2005, which requires submission of tender results to PPRA to be made within three days of sending notice of acceptance to the successful tenderer as it is not practicable as pointed out under issue number two.
  
- d) The Authority also noted that, during Post-qualification M/s Nyanza Road Works Ltd was disqualified and the evaluators proceeded to evaluate the second lowest tenderer without seeking the Tender Board's approval contrary to Regulation 94(7) of GN No. 97/2005.

Having considered all the facts and evidence, the Authority concludes that, the tender process adhered to the requirements of the law despite some few procedural flaws noted on the part of the Respondent which should be taken as a lesson and corrections thereof be made in future transactions.

On the basis of the aforesaid findings, the Authority **dismisses the Appeal** in its entirety and orders **each party to bear their own costs.**

Right of Judicial Review as per Section 85 of the PPA/2004 explained to parties.

Decision delivered in the presence of the Appellant and the Respondent this 9<sup>th</sup> November, 2010.



.....  
JUDGE (rtd) A. BUBESHI

**CHAIRPERSON**

**MEMBERS:**



1. MRS. N.S.N INYANGETE .....



2. MRS. R. MANG'ENYA .....

