

**IN THE  
PUBLIC PROCUREMENT APPEALS AUTHORITY**

**APPEAL CASE NO. 93 OF 2011**

**BETWEEN**

**NYAMGURUMA ENTERPRISES CO. LTD ..... APPELLANT**

**AND**

**REGIONAL MANAGER TANROADS-ARUSHA ..RESPONDENT**

**RULING**

**CORAM:**

- |                                       |                      |
|---------------------------------------|----------------------|
| <b>1. Hon. A.G. Bubeshi, J. (rtd)</b> | <b>- Chairperson</b> |
| <b>2. Eng. F.T. Marmo</b>             | <b>- Member</b>      |
| <b>3. Eng. K.M. Msita</b>             | <b>- Member</b>      |
| <b>4. Mrs. N.S.N. Inyangete</b>       | <b>- Member</b>      |
| <b>5. Mr. H.S. Madoffe</b>            | <b>- Member</b>      |
| <b>6. Mrs. R.A. Lulabuka</b>          | <b>- Member</b>      |
| <b>7. Ms. E.J. Manyesha</b>           | <b>- Member</b>      |
| <b>8. Ms. B.G. Malambugi</b>          | <b>- Secretary</b>   |

**SECRETARIAT:**

- |                               |                                      |
|-------------------------------|--------------------------------------|
| <b>1. Ms. E. V.A. Nyagawa</b> | <b>- Principal Legal<br/>Officer</b> |
| <b>2. Ms. F. R. Mapunda</b>   | <b>- Legal Officer</b>               |

**FOR THE APPELLANT:**

1. Mr. Alfred Ntahondi – Technician
2. Mr. Zachariah Naftal – Accounts Clerk
3. Mr. Allen G. Lutalo -

**FOR THE RESPONDENT**

1. Mr. Justinian Byabato – Legal Counsel
2. Eng. Albert Kent – Head of Engineering (TANROADS Arusha)
3. M. Geoffrey Edward – Ag. Head –PMU
4. Ms. Naomi O. Bugenyi – Procurement Specialist
5. Gurisha Y. Mwanga – Legal Officer

**INTERESTED PARTY - M/S ELERAI  
CONSTRUCTION CO. LTD**

Mr. Chrisant Aloyce Urio - Accountant

The appeal at hand was lodged by **M/s NYAMGURUMA ENTERPRISES CO. LTD** (hereinafter to be referred to as **“the Appellant”**) against **REGIONAL MANAGER TANROADS - ARUSHA** (hereinafter to be referred to as **“the Respondent”**).

The said Appeal is in respect of Tender No. AE/100/10-11/AR/TEN/W/30 for Periodic Maintenance, Routine/Recurrent Maintenance, Bridge Preventive Works and Rehabilitation of Mto wa Mbu Loliondo Road.

According to the documents submitted to the Authority, the facts of the Appeal may be summarized as follows:

The Respondent advertised tender for Periodic Maintenance, Routine/Recurrent Maintenance Bridge Preventive Works and Rehabilitation of Mto wa Mbu-Loliondo Road vide the Daily News and Habari Leo newspapers of 26<sup>th</sup> and 27<sup>th</sup> July, 2010.

The tender opening took place on 26<sup>th</sup> August, 2010, whereby ten tenders were received as listed herein below:

	<b>Name of Tenderer</b>	<b>Bid Prices (TSHS)</b>
1.	M/s Geminix Ltd	550,917,000/=
2.	M/s J.P Traders Ltd	592,821,000/=
3.	M/s Nyanguruma EnterprisesLtd	521,474,000/=
4.	M/s Audacity Intercom Ltd	714,294,000/=
5.	M/s Nowu Engineering Ltd	547,000,000/=
6.	M/s Builders and Limeworks Ltd	613,791,000/=
7.	M/s Luneco Investment Ltd	563,532,000/=
8.	M/s Dynotec Engineering Ltd	564,090,000/=
9.	M/s Stance Techn. & Civil Engineers Ltd	572,812,000/=
10.	M/s Elerai Construction Co. Ltd	537,583,000/=

1.1 The said tenders were evaluated and the award was recommended in favour of the Appellant.

1.2 The Tender Board requested for post-qualification to be done in respect of the Appellant whereby letters were sent to some of the Appellant's previous clients.

1.2.1 Having received responses from some of the employers, the Tender Board deliberated on the matter on 15<sup>th</sup> September, 2010 and concluded that the Appellant did not have the capacity to execute such a contract. Thus, it rejected the

recommendation of the Evaluation Committee and ordered that the next lowest evaluated tenderer, namely, M/s Elerai Construction Co. Ltd be post-qualified.

1.3 Post-qualification of M/s Elerai Construction Co. Ltd, revealed that the firm has experience as a prime contractor, owned the required equipment and possessed qualified personnel. Hence, the Evaluation Committee recommended the said tenderer to be awarded the tender.

1.4 On 11<sup>th</sup> October, 2010, the Tender Board approved the award to M/s Elerai Construction Co. Ltd at a contract sum of Tshs. 537,583,000/-.

1.5 On 28<sup>th</sup> October, 2010, the Appellant claimed to have received telephone calls, from the Respondent's office requiring them to provide their fax number so that the letter of intent for award of contract could be faxed to them. The Appellant waited for one week but owing to poor communication the said letter was not received as expected. That fact prompted the

Appellant's Managing Director to travel to Arusha to pursue the matter. However, upon seeing the Regional Manager the Appellant was informed that there was no such letter.

1.6 On 18<sup>th</sup> November, 2010, the Appellant wrote a letter referenced NEC/TANDS/ARS/010/01 to the Respondent, requesting for copies of Evaluation Reports for three tenders they had participated as they believed that they had won one of the three tenders.

1.7 On 25<sup>th</sup> November, 2010, the Respondent *vide* letter referenced TNR/RM/AR/PR/8/222 informed the Appellant that, evaluation reports are confidential and could not be disclosed to contractors or any other person who was not involved officially in the proceedings or decision making process. Moreover, the Appellant was informed that, the post-qualification carried out revealed that they were not capable of performing the contract successfully. Hence, their tender was not accepted despite being the lowest evaluated.

- 1.8 On 10<sup>th</sup> December, 2010, the Appellant wrote another letter referenced NEC/TNR/AR/10/03 to the Respondent disputing the reasons for their disqualification and insisted that they were entitled to the copies of the Evaluation Reports and requested for the same.
- 1.9 On 20<sup>th</sup> December, 2010, the Respondent *vide* letter referenced TNR/RM/AR/PR/8/307 informed the Appellant that their tender was not successful and that the award had been made to M/s Elerai Construction Co. Ltd.
- 1.10 On 23<sup>rd</sup> December, 2010, the Appellant *vide* letter referenced NEC/PPRA/010/03 applied for administrative review to the Public Procurement Regulatory Authority (hereinafter to be referred to as "**PPRA**"). PPRA advised them to lodge an appeal to the Public Procurement Appeals Authority (hereinafter to be referred to as "**the Authority**") as the procurement contract had already entered into force.

1.11 On 31<sup>st</sup> December, 2010, the Appellant lodged an appeal to the Authority.

## **2.0 SUBMISSIONS BY THE APPELLANT**

The Appellant's arguments deduced from the documents availed to the Authority may be summarized as follows:

2.1 That, the Appellant's tender had complied with the specifications provided for in the Tender Document.

2.2 That, the telephone calls from the Respondent's office to the Appellant on 28<sup>th</sup> October, 2010, requiring the latter to provide a fax number so that a letter of intent to award could be faxed to them, indicated that the Respondent had intended to award the said tender to the Appellant but for unknown reasons the said process was not finalized.



- 2.3 That, the Respondent had denied the Appellant the right of being given copies of the Evaluation Reports despite several reminders.
- 2.4 That, the tender results had not been communicated to the Appellant up to the time when the Appeal was lodged while the Successful Tenderer was already on site. Such conduct reflects the Respondent's non adherence to the conditions of the Tender Document.
- 2.5 That, the Appellant suspects the prevalence of corruption in the process pertaining to the award of the tender to the second lowest tenderer.
- 2.6 That, the successful tenderer, namely, M/s Elerai Construction Co. Ltd. had submitted the Performance Guarantee after the expiry of the time stipulated in the Tender Document. Furthermore, the said tenderer is a building contractor as opposed to being a civil works

contractor, which would have made them eligible for this tender.

2.7 The Appellant therefore prayed that, the Respondent be ordered to pay damages equivalent to 15% of the contract price.

### **3.0 SUBMISSIONS BY THE RESPONDENT**

The Respondent's Written Replies contained two Preliminary Objections, to wit:

- a) the Appeal to this Authority is in violation of the mandatory procedures prescribed by the law; and
- b) the Regional Manager, TANROADS, Arusha has no legal capacity to be sued.

Without prejudice to the Preliminary Objection raised, the Respondent's submissions may be summarized as follows:

3.1 That, the communication of the tender results was properly done in accordance with Sections 31(5) and 55(3) of the Public Procurement Act of 2004, Cap 410 (hereinafter to be referred to as

**"the Act"**). Furthermore, notification of the tender results to unsuccessful tenderers was communicated after the Successful Tenderer had furnished the performance security.

3.2 That, the Appellant was duly informed that evaluation reports are confidential and the law does not allow disclosure of such information pursuant to Regulation 99(1) of GN No. 97/2005.

3.2 That, the Appellant's persistence in requesting for the Evaluation Reports despite being informed that they are confidential contravened Regulation 99(2) of GN No. 97/2005.

3.3 That, at the time the Respondent informed the Appellant the reasons for their disqualification, the Successful Tenderer had already furnished the requisite performance security as per Clause 39.3 of Instruction to Tenderers (hereinafter to be referred to as **"ITT"**).

- 3.4 That, the tender results were communicated to the Appellant vide letter referenced TNR/RM/AR/PR/8/307 dated 20<sup>th</sup> December, 2010. This was done following the submission of performance security by the successful tenderer on 24<sup>th</sup> November, 2010.
- 3.5 That, the tender had already been awarded to the Successful Tenderer and the execution thereof is in progress.
- 3.6 That, the Appellant had lodged this Appeal prematurely as they were obliged to lodge a complaint to the procuring entity, that is, the Regional Manager TANROADS Arusha as per Section 80(1) of the Act read together with Clauses 45-47 of the ITT. The Appellant neither applied for administrative review to the procuring entity nor to PPRA; instead, the Appellant filed their Appeal directly to this Authority without exhausting first the aforementioned review levels.

3.7 That, the Appeal be rejected for failure to comply with the procedural requirements pertaining to administrative review as stipulated under the Act.

3.8 The Respondent therefore prayed for dismissal of the Appeal with costs.

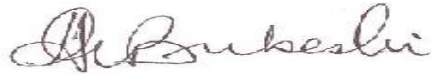
### **ANALYSIS BY THE AUTHORITY**

The Authority set the hearing date, time and place which was duly communicated to the parties in accordance with Rule 14(1) of the Public Procurement Appeals, Rules, 2005 GN. No. 205/2005 (hereinafter to be referred to as "**GN. No. 205/2005**"). On the hearing date the Respondent arrived on time but hearing could not commence owing to the Appellant's failure to appear at 10.00a.m. as scheduled. The Secretariat contacted him through telephone whereby he requested for an extension of one hour as he was caught up in a traffic jam on his way to the scheduled venue. The Members of the Authority waited for the Appellant for two hours and at

12.00 they deliberated on the way forward and reached a consensus that the Appeal be dismissed for the Appellant's failure to appear. However, when they asked the Respondent to appear before them so that the ruling could be delivered, the Appellant suddenly arrived. The Authority proceeded to inform the parties that, the notice of the hearing was duly communicated to them, the Appellant inclusive. The Appellant being the initiator of the Appeal at hand, was duty bound to ensure that he is present at the scheduled time to prosecute his case. Since the Appellant had failed to appear on time and made the Members of the Authority as well as the Respondent to wait for two hours, the Authority could not accept such conduct and therefore dismissed the Appeal for lack of prosecution, pursuant to Rule 17 of GN. No. 205/2005, which provides as follows:






**“Where the respondent appears and the appellant does not appear when the appeal is called for hearing the Public Procurement Appeals Authority shall make an order dismissing the appeal.”** (Emphasis added)

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



.....  
JUDGE (rtd) A. BUBESHI  
**CHAIRPERSON**

**MEMBERS:**

1. ENG. K.M. MSITA ..... 
2. ENG. F. T. MARMO..... 
3. MRS. N.S.N. INYANGETE..... 
4. MRS. R. A. LULABUKA..... 
5. MR. H. S. MADOFFE..... 
6. MRS. E.J. MANYESHA ..... 