

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

APPEAL NO. 14 OF 2017-18

BETWEEN

M/S NYAKIRANG'ANI CONSTRUCTION LIMITED.....APPELLANT

AND

BARIADI TOWN COUNCIL.....RESPONDENT

DECISION

CORAM

- | | | |
|----------------------------|---|-----------------|
| 1. Ms. Monica P. Otaru | - | Ag. Chairperson |
| 2. Eng. Francis T. Marmo | - | Member |
| 3. Eng. Aloys J. Mwamanga | - | Member |
| 4. Mr. Ole-Mbille Kissioki | - | Secretary |

SECRETARIAT

- | | | |
|------------------------|---|----------------------|
| 1. Ms. Florida Mapunda | - | Senior Legal Officer |
| 2. Ms. Violet Limilabo | - | Legal Officer |

FOR THE APPELLANT

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|-------------------------|---|---------------------|
| 1. Mr. Jeremia Mtobesya | - | Advocate, |
| 2. Mr. Nashon Nkungu | - | Advocate |
| 3. Dr. Gideon Mazara | - | Chairman NCL |
| 4. Mr. Christmas Mahuza | - | Managing Director |
| 5. Mr. Emmanuel Lupembe | - | Operational Manager |
| 6. Mr. Kusaya Wambura | - | General Manager |

FOR THE RESPONDENT

- | | | |
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| 1. Mr. Melkizedeck Himbe | - | Town Director |
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- | | | |
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| 2. Mr. Speratus Boniphace | - | Council Legal Officer |
| 3. Mr. Emmanuel Ngalula | - | Head of PMU |
| 4. Eng. Mathias Mugorozi | - | Town Engineer |
| 5. Eng. Majid Ngogole | - | Regional Engineer |
| 6. Ms. Elieth Chrisant | - | Supplies Officer |
| 7. Eng. D.B Shemangale | - | Project Consultant – PORALG |
| 8. Mr. Gilbert Mfinanga | - | SPC-ULGSP |
| 9. Eng. Brayson Fadhili | - | Town Engineer |
| 10. Mr. Christopher Mahawa | - | Member of the Tender Board |
| 11. Mr. Maganga Simon | - | AAS-LGMS RS-Simiyu |

This Decision was set for delivery today 9th October 2017, and we proceed to deliver it.

The Appeal was lodged by M/s Nyakirang'ani Construction Ltd (hereinafter referred to as "the Appellant") against Bariadi Town Council (hereinafter referred to as "the Respondent"). The Appeal is in respect of Tender No. LGA/158/2016/2017/HQ/W/03 for Construction of Modern Bus Stand and Upgrading of Nyamhimbi-Bariadi Sec-Ikulu Road (1.5Km) from Gravel to Bituminous Standard in Bariadi Town Council (hereinafter referred to as "the Tender").

From the records submitted by the parties to the Public Procurement Appeals Authority (hereinafter referred to as "the Appeals Authority"), the facts of the Appeal may be summarized as follows:-

The Respondent through the Daily News newspaper dated 13th March 2017 invited tenderers to participate in the Tender. The Tender was conducted through National Competitive Tendering pursuant to the Public Procurement Act of 2011 (as amended), (hereinafter referred to as "the Act") and the Public Procurement Regulations, G.N. No. 446 of 2013 (as amended) (hereinafter referred to as "G.N. No. 446 of 2013"). The deadline for submission of tenders was initially set for 27th March 2017 then extended to 10th April 2017, whereby three tenders were received from the following firms;

S/N	Name of a Tenderer	Read out price-TZS
1.	M/s Kings Builders Limited and Halem Construction Company Ltd JV	6,033,425,432.97
2.	M/s Nyakirang'ani Construction Limited	4,480,490,292.85
3.	M/s Jonta Investment & Rasaka Transport Civil and Building Co. Ltd JV	4,575,342,892.50

Tenders were subjected to evaluation which was conducted in three stages, namely; Preliminary, Detailed and Post-qualification. During Preliminary Evaluation, the tender by M/s Jonta Investment & Rasaka Transport Civil and Building Co. Ltd JV was found non-responsive for failure to comply with requirement of tender guarantee. The remaining two tenders were subjected to detailed evaluation whereby both tenders were found responsive. The two tenders were then subjected to correction of arithmetic errors whereby corrections were done on both tenders and the changes on prices were accepted by the tenderers. The tenders were ranked and the Appellant's tender emerged to be the lowest evaluated tender thus was subjected to Post-qualification. During Post-qualification the Appellant's tender was found to contain a number of shortfalls, thus it was disqualified and Evaluation Committee proceeded to Post-qualify the next lowest evaluated tender by M/s Kings Builders Limited and Halem Construction Company Ltd JV. The said tender was found to be responsive and was recommended for award at a corrected contract price of TZS 5,759,021639.63.

The Tender Board at its meeting held on 30th June 2017 deliberated on the recommendations of the Evaluation Committee and ordered negotiations to be conducted with the proposed successful tenderer concerning the contract price. Negotiations took place on 28th July 2017 and the contract price was reduced to TZS 4,921,902,059.94. The Tender Board, through

Circular Resolution, approved the award to the proposed successful tenderer at the negotiated contract price on 25th August 2017.

On 29th August 2017, the Respondent issued a Notice of Intention to Award which informed the Appellant that his tender was disqualified for failure to submit evidence of experience in building projects and failure to disclose an existing commitment No. LGA/160/HQ/ULGSP/W/2016/2017/02 entered with Geita Town Council. Aggrieved with the Respondent's decision, the Appellant lodged an application for administrative review to the Respondent on 4th September 2017, challenging their disqualification and award proposed to the successful tenderer.

The Respondent vide a letter with Ref. LC.315/418/2017/20, dated 6th September 2017 and received by the Appellant on 11th September 2017, rejected the Appellant's application for administrative review. Consequently, on 15th September 2017, the Appellant lodged this Appeal.

SUBMISSIONS BY THE APPELLANT

The Appellant's grounds of Appeal may be summarized as follows;

1. The Notice of Intention to Award dated 29th August 2017 addressed to the Appellant contained only 2 out of several reasons that caused their disqualification, as such the Respondent contravened the requirement of Regulation 231(4) of GN No. 446 of 2013 which requires the Notice of Intention to Award to include all reasons.
2. On non-attachment of evidence of experience in building projects the Appellant claimed that they attached all the required evidence. They further claimed that according to Clause 1.2 of Qualification Information, tenderers were required to show experience in either road works or building works but not both as asserted by the Respondent. In expounding his argument further, the Appellant submitted that, as a class one contractor, by necessary implication it indicates that they have all the necessary qualities and experience.
3. On the disclosure of existing commitments, the Appellant argued that it was shown in the same list which showed their projects.

Nevertheless, he submitted further that Clause 1.2 of Qualification Information requires tenderers in showing their previous experience to list the projects which are completed or performed beyond 70%. The Appellant complied with such a requirement as the said list was attached to their tender, thus it was unfair disqualifying them based on this reason.

4. That, the Respondent erred in law for disqualifying the Appellant's tender for their non-existence due to a change of name from M/S Nyakirang'ani Constuction Co. Ltd to NCL International Limited. In elaborating this point, they submitted that it is true that since 15th December 2014 their company name changed, however, they were unable to bid with the new name because they were still waiting for accreditation from other relevant authorities like the Contractors Registration Board (CRB).

The Appellant claimed further that Section 31(4) of the Companies Act (Cap 212 R.E 2002) clearly provides that the change of name does not change or alter rights and responsibilities which were accrued under the old name, thus they opted to bid using the old name.

5. That the disqualification based on failure to disclose litigation history is unjustifiable as they did not have any litigation against any procuring entity. He expounded further that, the alleged Commercial Case No. 277/2014 at the High Court-Commercial Division was lodged by Kigoma Ujiji Municipal Council against them as a result of their successful arbitration, thus they were not the ones lodging the case.
6. That, regarding the availability of Asphalt Mixing Plant, the Appellant submitted that, they own a paver machine which performs the same work as the Asphalt Mixing Plant. In substantiating ownership of the said equipment, they had attached TRA tax assessment report. Asserting that such equipment do not have certificate of registration.

7. That, the Appellant's tender was the lowest evaluated as a result it was subjected to Post-qualification as per Regulation 224 of GN No. 446 of 2013.
8. That, the Appellant doubts the legality of the drastic changes made on the price of the proposed successful tenderer. He submitted that during the Tender Opening the read out price of the proposed successful tenderer was about TZS 6 billion while the proposed contract price is TZS 4.9 billion. The price change of almost 1.9 billion is so huge to the extent that it raises doubt and is without due consideration of Section 4A of the Act.
9. That, the Appellant disputes the Respondent's contention that they failed to extend the bid security, maintaining that the same was extended by a letter sent to the Respondent directly from the issuing bank.

Finally the Appellant prayed for the following orders;

- i. A declaration that rejection of the tender was unlawful;
- ii. A declaration that award of the tender to the proposed successful tenderer is null and void vitiated by unfairness;
- iii. The Appeals Authority to scrutinize the circumstances for drastic change of the price of the proposed successful tenderer;
- iv. Award the Tender to the Appellant;
- v. A declaration that the grounds for the Appellant's disqualification were unlawful;
- vi. Costs of filing this Appeal;
 - Appeal filing fees
 - Legal fees TZS 10,000,000/-
 - Transport from Musoma to Dar es salaam and accommodation
- vii. Any other relief the Appeals Authority deems necessary to grant.

REPLY BY THE RESPONDENT

The Respondent's submissions in response to the grounds of the Appeal may be summarized as follows;

1. That, the Appellant lacked experience in building works; as a result his tender was disqualified. In expounding this point the Respondent submitted that Clause 1.2 of the Qualification Information and paragraph 3 of the Tender advertisement specifically required tenderers to show their experience in civil and building works. The Appellant had attached experience in road works but nothing was shown in relation to building works. Thus, his tender was rightly disqualified for non-compliance with the above named provision of the Tender Document.
2. That, the Appellant was required to disclose his current commitment as per Clause 1.2 of the Qualification Information. The said information would have enabled the Respondent to determine the bidder's working capacity with current workload and commitments. To the contrary, the Appellant did not disclose such information while he had been engaged with Geita Town Council through Contract No. LGA/160/HQ/ULGSP/W/2016/2017/02.
3. That, amongst the reasons that led to the Appellant's disqualification is the use of the name of M/s Nyakirang'ani Construction Limited in bidding while the same is not in existence. In expounding this point, the Respondent submitted that on 15th December 2014 the Appellant changed the company name from Nyakirang'ani Construction Limited to NCL International Limited pursuant to Section 32 of the Companies Act, (Cap. 212 R.E. 2002).
4. In addition to paragraph 3 above, the Respondent disputes the Appellant's argument that they could not use their new name since the same had not been accredited by other relevant authorities including CRB. Stating that once the name is changed the old name is no longer in existence and cannot belong to them. The Respondent relied on the case of *CMC Automobiles Limited Vs CMC Hughes*

Limited (Cooper Motors Corporation (Tanzania) Limited), Commercial Case No. 62 of 2006, that once a company changes its name, it can no longer use that name and it can be registered by anyone, subject to other conditions. Thus, the Appellant's disqualification is justified.

5. That, Clause 1.9 of Qualification Information requires tenderers to disclose their litigation history. The Appellant did not disclose that at the time of bidding they have been involved with Kigoma Ujiji Municipal Council in Commercial Case No. 277/2014 (still pending) due to termination of contract caused by the Appellant's failure to honor his contractual obligations. The Appellant also had a dispute with Musoma Municipal Council in Appeal No. 19/2016-2017 determined by this Appeals Authority on 14th March 2017. The Appellant did not disclose any of the litigation history which could have impacted their eligibility.
6. That, the Appellant failed to comply with Clause 19 of the BDS that modifies Clause 27(i)(b) of the ITB which requires tenderers to show availability of equipment including Asphalt Mixing Plant. The assessment report from TRA dated 2012 provided by the Appellant only indicates that the said equipment awaits clearance from relevant authorities, and nothing more. As such the Appellant cannot claim ownership of the said equipment. Thus, he failed to comply with this requirement as well.
7. On the claim that the Appellant was the lowest evaluated bidder, the Respondent cited Section 53(1), (2) and (6) of the Act which requires procuring entities to conduct due diligence for purposes of verifying experience, capability and resources to carry out the contract effectively before the award of the contract. In carrying out due diligence, the Appellant's tender was found with a number of shortfalls as pointed out herein above, as a result his tender was disqualified. Thus, the claim that the Appellant was the lowest evaluated bidder holds no water.

8. That, with regard to the change in price of the proposed successful tenderer, the Respondent submitted that the same was due to correction of errors during evaluation which was done pursuant to Clause 28 of the ITB and negotiations conducted pursuant to Section 76(2) of the Act and Regulation 225(1) of GN. No. 446 for 2013. Thus the said price reduction is legally justified.
9. That, the Appellant did not extend the Bid Security despite being requested to do so. The Appellant extended the bid validity period, but failed to extend the Bid Security. Since they did not receive any evidence of extension, they invoked Clause 17.6 of the ITB which allows procuring entity to reject the tender if a bidder fails to extend the Bid Security.

Finally, with regard to the reliefs claimed by the Appellant, the Respondent prayed as follows;

- i) That the Appellant was fairly disqualified for failure to comply with requirements of the Tender Document. Thus, a declaration that the Appellant was fairly disqualified.
- ii) A declaration that the proposed successful tenderer qualified for the same and the Respondent be allowed to continue with awarding processes.
- iii) The Appellant's prayer for scrutinizing the circumstances for change of price be disregarded since the change was done in accordance with the law.
- iv) The Appellant's prayer that they be awarded the tender cannot stand as they do not exist since 2014. Above all, it has failed to pass post qualification stage of evaluation thus this prayer be ignored.
- v) Regarding prayers as to costs, the Respondent argued that the prayers are futile since no one should benefit from his own

wrong. Instead, this Appeals Authority should dismiss the appeal and order the Appellant to compensate the Respondent the following;

- a) Payment of TZS 25,000,000/= as transport costs from Bariadi to Dar es Salaam for the Respondents representative and witnesses; and
- b) Payment of TZS 10,000,000/= as disturbance.

ANALYSIS BY THE APPEALS AUTHORITY

The Appeals Authority is of the view that the Appeal has three issues calling for determination, these are;

- Whether the Appellant's disqualification was proper in law;
- Whether the intended award to the proposed successful tenderer is justified; and
- To what reliefs, if any, are the parties entitled.

Having identified the issues, the Appeals Authority proceeded to determine them as follows;

1.0 Whether the Appellant's disqualification was proper in law

In ascertaining the validity of the Appellant's disqualification, the submissions and documentations were considered *vis-à-vis* the applicable law. In so doing, it was observed from the Tender evaluation report that the Appellant was disqualified for 5 reasons which are:

- i) Failure to show experience as prime contractor in building projects;
- ii) Failure to disclose current commitment;
- iii) Failure to disclose that their registration name was changed since December 2014;
- iv) Failure to disclose litigation history; and
- v) Failure to submit proof of ownership of Asphalt Mixing Plant.

Beginning with the third reason on the change of name, it is not in dispute that since 15th December 2014 the Appellant changed the name from Nyakirang'ani Construction Limited to NCL International Limited. This fact however, was never disclosed to the Respondent when tendering for this Tender as the Appellant claims that the change becomes effective after other authorities accredit the same.

The Appellant's argument that they were unable to use the new name in this Tender because they were yet to receive accreditation from other relevant authorities lacks legal basis. As correctly cited by the Respondent in the *CMC Automobiles Limited* case, once the name is changed by the Registrar of Companies the effect thereof is that the old name can be used by anyone as it no longer belongs to that company. Nothing like accreditation of the new name is required to make it effective.

Section 3 of the Act defines the tenderer as;

"any natural or legal person or group of such persons participating or intending to participate in procurement proceeding with a view of submitting a tender in order to conclude a contract...."

Clause 3 of the ITB provides as follows;

"A tenderer may be a natural person, private entity, government-owned entity subject to ITT Clause 3.4 or any combination of them with a formal intent to enter into an agreement or under an existing agreement in the form of joint venture, consortium or association."

The quoted provisions entail that in order for a tenderer to be eligible to participate in the tender, he must be a natural person or a legal person or a combination of both. At the time of bidding, the name Nyakirang'ani Construction Limited lacked legal personality because it no longer belonged to the Appellant. Thus, the said name could not be used for any transaction whatsoever, including the Tender.

The fact that Section 31(4) of the Companies Act relied upon by the Appellant specifically states that the rights and obligations of a company would not be affected by a change of name is not in the Appellant's favour. The wording of the said provision clearly refers to the rights and obligations; entailing that proceedings or commitments that were in-existence at the time the name was changed would continue under the old name. No new transactions or commitments can be commenced under the old name.

The Appeals Authority accepts the Respondent's submissions, thus the Appellant's disqualification on this reason was justified.

The above analyzed point suffices to dispose off of this Appeal; however, for purposes of enlightening the parties, the Appeals Authority considers other reasons that caused the Appellant's disqualification as hereunder;-

On failure to show current commitment in accordance with Clause 1.2 of the Qualification Information tenderers were mandatorily required to disclose the existing/current commitment. The Appeals Authority revisited the Appellant's bid and observed that this information was not provided.

During the hearing, the Appellant conceded to have not disclosed that information on the belief that they were required to prove their experience by showing projects which have been completed or executed by over 70%. They contended further that, the Geita Town Council project had been executed by less than 30%, thus the same could not be disclosed. Clause 1.2 of the Qualification Information has two parts; the first requires tenderers to show their experience in works of a similar nature and the second part required tenderers to disclose their current commitments. The Appellant was required to comply with both requirements under the said Clause. Thus, the Appellant's failure to comply with any of the requirement justifies his disqualification.

With regard to the Appellant's failure to disclose his litigation history, the Appeals Authority observes that such criterion was clearly provided for

under Clause 1.10 of the Qualification Information. During the hearing the Appellant conceded that they had not disclosed their litigation history because they had no any case opened by them against procuring entity which was to be disclosed.

Having reviewed the documents submitted, the Appeals Authority observed that the Appellant is involved in Kigoma Ujiji Municipal Council's Commercial Case No. 277/2014 as contended by the Respondent. Furthermore, the Appellant was involved in Appeal No. 19/2016-2017 before this Appeals Authority between them and Musoma Municipal Council. As such, the Appellant had litigations to be disclosed in his litigation history. The Appellant ought to have stated explicitly the status of the cases either by or against them as required. Thus, the Appellant's failure to disclose the litigation history rightly disqualified them.

Furthermore, on the failure to prove availability of Asphalt Mixing Plant as one of the equipment required for these projects; according to Clause 19 of the BDS which modified Clause 27.6(i)(b) of the ITB, tenderers were required to prove availability of the listed equipment. The Appellant attached a pre-assessment report of Asphalt Mixing Plant from TRA. This report does not indicate that the equipment was paid for nor owned by the Appellant. The Appeals Authority therefore concurs with the Respondent that the Appellant failed to show the availability of Asphalt Mixing Plant, thus disqualification on this reason as well was justified.

Regarding the Appellant's disqualification on failure to show experience in building works, it is observed that Clause 1.2 of the Qualification Information requires tenderers to show their experience in Road Works or Bus Stand works. The wording of the said provision gives tenderers option of showing their experience in either road works *or* bus stand works. The Appellant had shown the undoubted experience in road works. Thus, they cannot be regarded that they failed to comply with such a requirement since the Tender Document provided for options. Furthermore, Item 3 of the Invitation to Tender relied upon by the Respondent, does not depict

what was contended by the Respondent. Thus, the Appeals Authority is of the settled view that, the Appellant complied with experience requirement; hence this should not have been one of the reasons for his disqualification.

On the question of the bid security, since the same was not among the grounds for disqualification of the Appellant's tender, the same is not determined as the Respondent raised it later on as an afterthought.

It is further observed that, the Respondent did not notify the Appellant's all reasons that led to his disqualification. The Appeals Authority finds the Respondent's act in this regard in contravention of Regulation 231(4) of GN No. 446 of 2013. The said Regulation requires procuring entities to inform unsuccessful tenderers reasons for their disqualification. Further to that, Regulation 237 of GN No. 446 of 2013 requires procuring entities to inform a tenderer who submitted the lowest tender the reasons for his disqualification as approved by the Tender Board. In this Tender the Appellant was disqualified for five reasons and the same were submitted to the Tender Board. However, the Notice of Intention to Award contained only two reasons that led to their disqualification. Therefore, the Appeals Authority is of the settled view that, the Respondent had contravened the law in this regard.

Accordingly, much as the Appellant had the requisite experience and Respondent contravened the law for not informing him all the reasons that led to their disqualification, the Appeals Authority's conclusion on the first issue is that the Appellant's disqualification was proper in law as analyzed above.

2.0 Whether the intended award to the proposed successful tenderer is justified

In resolving this issue the Appeals Authority considered the Appellant's contention that the drastic change on the price quoted by the proposed successful tenderer was not proper and deemed it necessary to review the documents submitted in order to ascertain the validity of the parties' arguments. In the course of doing so, as stated earlier, the read out price

for the proposed successful tenderer was TZS 6,033,425,432.97. During evaluation, the tender of the proposed successful tenderer was found with computational errors and the same were corrected pursuant to Clause 28 of the ITB. The said corrections reduced the price of the proposed successful tenderer from the original quoted price to TZS 5,759,021,639.63. The corrected price was subjected to negotiation which was conducted pursuant to Section 76 of the Act and Regulation 225 of GN. No. 446 of 2013 and the price was further reduced to TZS 4,921,902,059.94.

Having reviewed the Respondent's process, the Appeals Authority is of the settled view that, the changes made on the price of the proposed successful tender were proper in the eyes of the law.

Therefore, since there are no further issues to be determined against the proposed successful tenderer, the Appeals Authority's conclusion on this issue is that the intended award to the proposed successful tenderer is justified.

3.0 What reliefs, if any, are the parties entitled to

Taking cognizance of the findings above, the Appeals Authority hereby dismisses the Appeal and orders the Respondent to proceed with the award of the tender in observance of the law. Each party to bear own costs.

It is so ordered.

This Decision is binding on the parties and can be enforced in accordance with Section 97(8) of the Act.

The Right of Judicial Review as per Section 101 of the Act is explained to the parties.

This Decision is delivered in the presence of the parties this 9th October 2017.

M. Otaru

Ms. MONICA P. OTARU
Ag. CHAIRPERSON

MEMBERS:

1. ENG. FRANCIS MARMO.....*F Marmo*

2. ENG. ALOYS MWAMANGA.....*A Mwamanga*