

IN THE  
PUBLIC PROCUREMENT APPEALS  
APPEAL CASE NO. 26 OF 2015-16

BETWEEN

M/S TANZANIA BUILDING WORKS LTD.....APPELLANT

AND

ARUSHA INTERNATIONAL CONFERENCE CENTRE..... 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. Ms. Florida R. Mapunda            | - | Ag. Secretary |

SECRETARIAT

- |                           |   |               |
|---------------------------|---|---------------|
| 1. Ms. Violet S. Limilabo | - | Legal Officer |
| 2. Mr. Hamis O. Tika      | - | Legal Officer |

FOR THE APPELLANT

- |                      |   |                   |
|----------------------|---|-------------------|
| 1. Mr. Lodia Million | - | Contracts Manager |
| 2. Mr. Haji Litete   | - | Advocate- Mzizima |

- Associated Advocates
3. Mr. Geoffrey Luhomo - Advocate- Mzizima
- Associated Advocates
4. Mr. Peter Gasper - Quantity Surveyor

FOR THE RESPONDENT

1. Mr. Eliakim Samwel - Head Procurement  
Management Unit
2. Mr. James Ngenda - Procurement and  
Logistics Officer
3. Mr. Muhiba Chakupewa - Senior Legal and  
Security Officer

This decision was scheduled for delivery today 23<sup>rd</sup> March 2016 and we proceed to do so.

The Appeal was lodged by M/s TANZANIA BUILDING WORKS LTD (hereinafter referred to as "the Appellant") against the ARUSHA INTERNATIONAL CONFERENCE CENTRE known by its acronym AICC (hereinafter referred to as "the Respondent").

The Appeal is in respect of Tender No. PA/075/HQ/2015/16/W/04 for Construction of Exhibition Facility at AICC Complex (hereinafter referred to as "the Tender").

The Respondent vide its letter with reference No. AP075/HQ/2015/2016/W/04/30 dated 17<sup>th</sup> November 2015, invited pre-qualified tenderers to participate in the disputed Tender.

The deadline for submission of tenders was set for 21<sup>st</sup> December 2015, whereby seven (7) tenders were received and on the opening date, the respective read out prices were as listed below.

S/No.	Tenderer's name	Quoted price in Tshs. (VAT Inclusive)
1.	M/s BH Ladwa Ltd.	2,920,725,498.00
2.	M/s Holtan Builders Ltd.	3,540,558,485.00
3.	M/s Tanzania Building Works Ltd.	2,743,713,720.00
4.	M/s Hainan International Ltd.	2,842,228,995.00

5.	M/s Group Six International Ltd.	3,406,650,427.84
6.	M/s Holtan (E.A) Ltd.	4,201,004,114.00
7.	M/s Catic International Engineering (T) Ltd.	3,059,663,359.00

The tenders were subjected to evaluation which was conducted into three stages namely; preliminary, arithmetic correction of errors and post qualification. During the preliminary evaluation three tenders were disqualified for non compliance while the remaining four tenders were found to be substantially responsive and were subjected to arithmetic correction of errors. In the process of making arithmetic corrections, the Appellant's tender was ranked first followed by M/s Hainan International Ltd.

The Appellant's tender was subjected to post qualification conducted through physical visitation of the Appellant's previous clients and consultants for purposes of verifying Appellant's capabilities. In that process, the Appellant was established to have poor performance of previous executed contracts and that the Appellant had withheld information on his litigation history. In the course of his previous

contracts, the Appellant had a case with Mbeya City Council. The Evaluation Committee therefore disqualified the Appellant and recommended award of the Tender to the second lowest evaluated tenderer M/s Hainan International Ltd. at a contract price of TZS. 2, 842,228,995.00.

The Tender Board at its meeting held on 4<sup>th</sup> February 2016, approved the recommendation subject to post qualification which was duly conducted and a report submitted to the Tender Board meeting held on 12<sup>th</sup> February 2016. The recommendations for the award to M/s Hainan International Ltd was duly approved.

On 15<sup>th</sup> February 2016, the Respondent notified all tenderers of its intention to award the Tender to M/s Hainan International Ltd at a contract price of TZS. 2,842,228,995.00. By the said letter each tenderer was informed on the reasons for its disqualification.

On his part, the Appellant did not agree with reasons founded on his poor performance on previous projects and failure to disclose his litigation history at the pre-qualification stage. The Appellant through his letter with Ref. No. TBW/TNT/PA075/HQ/2015/16/W/04/2016 dated 16<sup>th</sup> February 2016, applied for administrative review to the Respondent's Accounting Officer challenging his disqualification. On 22<sup>nd</sup> February 2016, the Respondent dismissed the Appellant's complaints for lack of merits. Aggrieved, on 29<sup>th</sup> February 2016, the

Appellant filed this Appeal to the Public Procurement Appeals Authority (hereinafter referred to as "Appeals Authority").

Upon receiving notification of the Appeal the Respondent raised three points of preliminary Objections (hereinafter referred to as "P.O.") to wit,

- i) that the administrative review lodged to the Respondent was not copied to PPRA,
- ii) the administrative review lodged to the Respondent was time barred,
- iii) that the administrative review lodged to the Respondent did not show any law breached by the Respondent.

Before embarking on the merits of the substantive appeal, the members of the Appeals Authority were obliged to resolve the P.O's. In that regard, there was one contentious issue and that was whether the Appeal is properly before it.

#### RESPONDENT'S SUBMISSIONS ON THE P.O.

During the hearing of the P.O. the Respondent withdrew the first P. O. and he proceeded to address grounds two and three of the P.O. as follows;

Addressing the issues that the application for administrative review was time barred, the Respondent submitted that, the application for administrative review had to be filed within twenty eight days (28) from the date the Appellant became aware of the circumstances giving rise to the complaint. The Appellant became aware of conditionally pre-qualified applicants from 21<sup>st</sup> December 2015 which was the date of the opening of the tenders. All bidders had been provided with a list of prequalified and conditionally prequalified bidders. The Appellant was supposed to lodge a complaint regarding that issue within twenty eight days pursuant to Reg. 105 (1) of the Public Procurement Regulation, 2013 (hereinafter referred to as "GN. No. 446/2013"). At best the Appellant should have called for clarification on the matter, which he did not.

On the third P.O. the Respondent argued that, the Appellant's application for administrative review did not mention any provisions or regulation that had been breached by the Respondent contrary to the requirement of Regulations 105 (3) of GN. No. 446/2013.

#### APPELLANT'S REPLIES ON THE P.O.

In reply to the above submissions, the Appellant asserted that he had become aware of conditionally pre-qualified applicants on 21<sup>st</sup> December 2015. He submitted that he did not find it necessary to

lodge any complaint since Clause 2 of the Invitation To Tender had indicated that the tender was issued specifically and strictly to pre-qualified tenderers.

Responding to allegations that his application for administrative review did not mention any law or regulations breached by the Respondent, the Appellant argued that much as he had not cited any provisions of the law or regulations so breached, the Appellant insisted that the Respondent erred in law for including non pre-qualified applicants in the tender process. Furthermore, the Appellant submitted that the Respondent contravened Clause 34.2 of the Tender Document by conducting post qualification while the same ought not to have been conducted as they had been previously pre-qualified.

#### ANALYSIS OF THE P.O. BY THE APPEALS AUTHORITY

After the Respondent withdrew the first P.O. the Appeals Authority remained with two P.O's. to be determined which is basically whether the Appeal is properly before it.

In resolving the above issue the Appeals Authority revisited Section 96 (4) of the Act and Regulation 105 (2) of GN. No. 446/2013 which read as follows:-

96 (4) "The accounting officer shall not entertain a complaint or dispute unless it is submitted within twenty eight days from the date the tenderer submitting it became aware of the circumstances giving rise to the complaint or dispute or when that tenderer should have become aware of those circumstances, whichever is earlier". (Emphasis added)

105 (1) "any application for administrative review shall be submitted in writing or electronically to the accounting officer of a procuring entity and a copy shall be served to the Authority within twenty eight days of the tenderer becoming or should have become aware of the circumstances giving rise to the complaint or dispute". (Emphasis added)

The above quoted provisions require a tenderer to lodge complaint or dispute to the Accounting Officer within twenty eight days from the date he became or should have become aware of the circumstances giving rise to the complaint or dispute. The Appeals Authority observed that the invitation letter dated 17<sup>th</sup> November 2015 issued to the Appellant was attached with a list of four prequalified tenderers and another four conditionally pre-qualified tenderers; M/s Hainan International Ltd inclusive. Also the Minutes of the Tender opening

ceremony held on 21<sup>st</sup> December 2015, show that the Appellant attended and the record is silent in respect to conditionally pre-qualified applicants who submitted tenders and their bid prices read out. From the above observations the Appellant had knowledge of inclusion of conditionally pre-qualified tenderers in the tender process from 21<sup>st</sup> December 2015 but decided not to submit his complaint to the Respondent until they received a letter of notice of intention to award on 15<sup>th</sup> February 2016. The Appellant lodged his complaint to the Respondent on 16<sup>th</sup> February 2016 which is far outside the allowed period.

The Appeals Authority is of the firm view that, the Appellant forfeited his right to lodge complaint provided under Section 96 (4) and Regulation 105 (1) on the matter arising from the date of tender opening. That being said the Appeals Authority concurs with the Respondent that complaint relating to inclusion of conditionally pre-qualified tenderer in the tender process was time barred as it ought to have been raised within 28 days from 21<sup>st</sup> December 2015, thus the Appeals Authority would not determine it.

The Appeals Authority further considered the Respondent's P. O. that the administrative review lodged to them did not show provisions of the law or its regulations alleged to have been breached or omitted.

In resolving the P.O. the Appeal Authority revisited Regulation 105 (3) (b) of GN. No. 446/2013 and it reads as follows:

Reg.105 (3) "the application for administrative review shall contain-

(b) details of the provisions of the Act, Regulations or provisions that have been breached or omitted"

The above provisions entails that an application for administrative review should not only cover provisions of the Act or Regulations but also include details of provisions of the Tender Document breached or omitted by the Respondent. Furthermore, the Appeals Authority observed that item v and viii of the Appellant's letter of application for administrative review specifically mentioned Clause 2 of the Invitation to Tender and Clause 34.2 of the Instructions To Bidders (hereinafter referred to as "ITB"). From the above facts, the Appeals Authority is of the view that, the Respondent's P.O. was glossed over. The details of the application for administrative review are self-explanatory.

Therefore, the Appeals Authority is satisfied that, save for complaints relating to post qualification, the Appeals Authority dismisses the P.O.

Having determined the P.O. as shown above, the Appeals Authority proceeded to determine the appeal on its merits.

## SUBMISSIONS BY THE APPELLANT

In this Appeal, although the Appellant had raised two grounds of appeal, it should be noted that the first ground relates to inclusion of conditionally pre-qualified tenderers in the evaluation process for which the Appellant has been held to blame. Therefore, the Appeals Authority would confine itself to one ground, and that is post qualification that led to Appellant's disqualification.

The Appellant's grounds of appeal have been put as follows:-

That the Appellant had quoted the lowest price compared to other tenderers and the Engineers estimate was TZS. 2.754 Billion which was within the Appellant's quoted price.

That Respondent subjected the Appellant to post-qualification which was nowhere indicated in the Tender Document.

That, the Respondent contravened the Act and its Regulations by disqualifying the Appellant on the ground that they had concealed litigation history and its performance on previous executed projects which was not accepted by the Respondent.

During the hearing, the Appellant informed the Appeals Authority that Clause 34.2 of the Tender Document stated clearly that post qualification was not supposed to be conducted as it was not covered in the Bid Data Sheet. Therefore the post qualification conducted was

irrelevant or unnecessary. Further, the alleged poor performance of previous works was attributable to clients' delay in effecting payments. He denied any allegations on litigation history alluded to him.

Finally the Appellant prayed for the following reliefs;

- a) an order directing the Respondent to suspend the intended award of the Tender M/s Hainan International Ltd;
- b) An order directing the Respondent to award the Tender to the Appellant since he was the lowest tenderer; or in the alternative to nullify the tender process and order for retendering;
- c) Order the Respondent to pay costs and incidental expenses to the tendering process and legal costs for this Appeal to the tune of TZS.150,000,000;
- d) Interest at a commercial rate of 21% on the above referred amount from the date of dispute to the date of final settlement;  
and
- e) Any other reliefs as the Honourable Appeals Authority may deem fit and just grant.

## REPLIES BY THE RESPONDENT

Respondent's replies to the ground of Appeals may be summarized as follows:-

That, while indeed the Appellant had the lowest evaluated tender, during post qualification, it was noted that the Appellant had short comings which were not observed during pre-qualification stage. Those included non-disclosure of litigation history. In this respect, the Respondent referred to a civil case between the Appellant and Mbeya City Council, Mbeya High Court, which ended in termination of the contract in 2014 and delay on completion of the respective project.

Furthermore, the Respondent argued that conducting post qualification is a prerequisite under the Act, vide Section 53 (4) (5) and Regulation 124 of GN. No. 446/2013. Thus, even if the Tender Document was silent on post qualification the same has to be conducted as per the requirement of the law. According to the Respondent, post qualification was relevant since the entire projects consulted by the Respondent related to works similar to the project under Appeal.

Finally the Respondent prayed for the following reliefs;

- a) Dismissal of the Appeal;
- b) Order the Respondent to proceed with the award decision;

- c) Order the Appellant to pay costs for this Appeal amounting to TZS. 50,000,000.00 being for legal fees and incidental costs; and
- d) Any other relief the honourable Authority deems fit and just to grant

## ANALYSIS BY THE APPEALS AUTHORITY

In determining this appeal, the Appeal Authority is of the view that there are two triable issues namely;

- 1) Whether the Appellant was fairly disqualified; and
- 2) What reliefs, if any, are the parties entitled to.

### 1. Whether the Appellant was fairly disqualified

In resolving this issue the Appeals Authority revisited the documents submitted before it vis-a-vis the applicable law and observed that, the Appellant was disqualified during the post qualification after the Evaluation Committee observed that the Appellant had poor performance on the previous executed contracts and he had not disclosed his litigation history with Mbeya City Council.

To ascertain whether the Appellant's disqualification was justified, the Appeals Authority revisited Clauses 34. 2 of the Tender Document and

observed that post qualification was to be conducted if pre-qualification was not undertaken. The clause reads-

34.2 "if pre-qualification was not undertaken, post qualification shall be performed".

The above provision prohibits post qualification to be conducted if pre-qualification was undertaken. In this tender pre-qualification had been conducted and that is why the Appellant disputes the Respondent's act of conducting post qualification.

However, as it will be noted, Clauses 34.2 and 34.4 of the Tender Document require the Respondent to satisfy itself whether the tenderer who is shown to have submitted the lowest price has the necessary capability to perform the contract. In addition, a procuring entity has the right to seek independent references. The said provisions read-

34.2 " the Procuring Entity will determine to its satisfaction whether the tenderer that is selected as having submitted the lowest evaluated responsive Tender is qualified to perform the contract satisfactorily, in accordance with the criteria listed in ITT sub-Clause 12.3".

34. 4 " a Procuring Entity may seek independent references of a Tenderer and the results of reference checks may be used in determining award of the contract".

The Appeals Authority observed further that, the Appellant's tender was post qualified on the same criteria provided in the pre-qualification stage as was provided under Clauses 4.8 and 4.14 of GITA which relates to contracts of similar nature and litigation history. During post qualification the Respondent realized that the Appellant had poor performance on some of the previous executed contracts. Also they had concealed information relating to litigation history by filing Form No. 8, indicating that they had never been involved in any litigation during the past five years. The said form was signed by the Appellant on 13<sup>th</sup> October 2015 during the submission of pre-qualification document while in reality there was a civil matter in Mbeya High Court, Commercial Division, before Makaramba, J. whereby Mbeya City Council by virtue of the Ruling which was delivered on 16<sup>th</sup> May 2014 was allowed to evict the Appellant from the construction site. From the above observation the Appeals Authority is of the view that the Respondent's act of conducting post qualification complied with the requirement of the law as per Sections 53 (4) (5) of the Act and Regulations 124 and 224 (8) (b) of GN. No. 446/2013, which provide as follows-

S.53 (4) "A procuring entity shall require a tenderer who has

Submitted a lowest evaluated tender in the case of procurement or highest evaluated tender in the case of disposal by tender to demonstrate again its qualifications before the award of contract is confirmed".

(5) The criteria and procedures to be used in sub section (4) shall be the same as those used in the Pre-qualification proceedings set out in Section 52 of this Act and shall be specified in the tendering documents prepared by the procuring entity. (Emphasis Added).

R. 124 "the verification of the information provided in the submission for pre-qualification shall be confirmed through a post- qualification process before the notice of intention to award the tender is communicated to the tenderers, and award may be denied to a tenderer who is assessed to have no capability or resources to successfully perform the contract" (Emphasis added)

R. 224 " where a tenderer has been pre-qualified, a full post qualification may not be necessary, but the pre-qualified information submitted shall be verified

and an award may be denied to the lowest evaluated tenderer if he is judged to no longer meet the pre-qualification requirements and criteria, the procuring entity shall consider:

(b) "any information which has become available since the pre-qualification submission, which, in the procuring entity's judgment, materially affects the capability of the tenderer to perform the contract".

The Appeals Authority is of the further view that the Appellant's act of concealing information relating to his litigation history contravened the requirement of Regulation 9 (7) (e) and (f) of GN No. 446/2013 which also entitles the Respondent to disqualify him from the tender process. The said provision is reproduced hereunder and runs-

9 (7) A natural person, company or firm shall not be eligible for award of contract if-

(e) the person, company or firm is found guilty of serious misrepresentation with regard to information required for participation in an invitation to tender or to submit proposals;

(f) the person, company or firm is in breach of contract with the procuring entity or other procuring entity".

In view of the above observations, it is the Appeals Authority's considered view that the post qualification conducted was proper and the Appellant's disqualification basing on poor performance and litigation history was fair.

Accordingly, the Appeals Authority's conclusion with regard to the first issue is that the Appellant was fairly disqualified.

2. What reliefs, if any, are the parties entitled to.

Taking cognizance of the findings on the 1<sup>st</sup> issue above, the Appeal is dismissed. All prayers by the Appellant fail forthwith. The Appeals Authority thus upholds the Respondent's prayer and the appeal is dismissed for lack of merits.

Regarding the second prayer of proceeding with the award decision. The prayer is granted.

On the third prayer of costs amounting to TZS. 50,000,000. The Appeals Authority does not have jurisdiction to order the Appellant pay costs to the Respondent in case his Appeal is dismissed. Therefore, each party to bear its own costs.

The 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 the Respondent this 23<sup>rd</sup> March, 2016.

VINCENT K.D. LYIMO, J. (RTD)  
CHAIRMAN