

IN THE PUBLIC PROCUREMENT APPEALS AUTHORITY

APPEAL NO. 26 OF 2020-21

BETWEEN

M/S ADVENT CONSTRUCTION LIMITED.....APPELLANT

AND

**MINISTRY OF EDUCATION, SCIENCE
AND TECHNOLOGY.....1ST RESPONDENT**

CRJE (EAST AFRICA) LIMITED.....2ND RESPONDENT

DECISION

CORAM

- | | |
|-------------------------------------|-----------------|
| 1. Hon. Justice (rtd) Souda Mjasiri | - Chairperson |
| 2. Adv. Rosan Mbwambo | - Member |
| 3. Mr. Rhoben Nkori | - Member |
| 4. Ms. Florida Mapunda | - Ag. Secretary |

SECRETARIAT

- | | |
|------------------------|------------------------|
| 1. Ms. Agnes Sayi | - Senior Legal Officer |
| 2. Ms. Violet Limilabo | - Legal Officer |



FOR THE APPELLANT

1. Mr. Hassan Mussa - Advocate - Woods Law Consultancy
2. Mr. Ajith Shyam Prasad - Senior Estimator
3. Mr. Ashutosh Zog - Executive Chairman

FOR THE 1ST RESPONDENT

1. Ms. Hirtrudice J. Jisenge - Director, Procurement and Supplies
2. Mr. Oscar Ngenzi - Legal Officer
3. Mr. Dr. Noel Mbonde - Director, Technical and Vocational Education and Training
4. Mr. Roma Mtawa - Procurement Officer for ESPJ Project

FOR THE 2ND RESPONDENT

1. Mr. Peter Kanya - Advocate Aymak Attorneys
2. Mr. Rico Adolf - Advocate, Aymak Attorneys
2. Mr. Zhou Zejun - Director, CRJE (East Africa) Ltd
3. Mr. Xu Yubao - Manager, CRJE (East Africa) Ltd
5. Mr. Godlisten Ben - Legal Officer, Aymak Attorneys

The Appeal was lodged by **M/S Advent Construction Limited** (hereinafter referred to as "**the Appellant**") against the **Ministry of Education, Science and Technology** (hereinafter referred to as "**the 1st Respondent**") and **M/S CRJE (East Africa) Limited** (hereinafter referred to as **the 2nd Respondent**).



The Appeal is in respect of Tender No. ME/-024/2020-2021/HQ/W/02 for Proposed Construction of Dodoma Technical College Phase I at Nala-Dodoma City Council in Dodoma Region (hereinafter referred to as "**the Tender**").

According to the documents submitted to the Public Procurement Appeals Authority (hereinafter referred to as "**the Appeals Authority**") the background of this Appeal may be summarized as follows: -

The Tender was conducted using International Competitive Tendering method specified in the Public Procurement Act, No. 7 of 2011 as amended (hereinafter referred to as "**the Act**") and the Public Procurement Regulations, GN. No. 446 of 2013 and GN. No. 333 of 2016 (hereinafter referred to as "**the Regulations**").

The Respondent through the Daily News newspaper dated 18th August 2020, invited qualified tenderers to submit their tenders. The deadline for submission was set for 15th September 2020. However, it was later on extended up to 29th September 2020. Eighteen (18) tenderers submitted their tenders.

Tenders were then subjected to evaluation which was conducted into two stages namely; preliminary and detailed evaluation. At the preliminary evaluation stage nine (9) tenders were disqualified for being non responsive to the requirements of the Tender Document. The remaining nine (9) tenders were subjected to detailed evaluation. At that particular stage tenders were checked for arithmetic correction of errors.



Thereafter tenders were ranked according to the respective corrected prices. After completion of the evaluation process the Evaluation Committee recommended award of the Tender to M/S CRJE (East Africa) Ltd at the contract price of Tanzanian Shillings Seventeen Billion Nine Hundred Forty Two Million Eight Hundred Thirty Thousand Seven Hundred and One Twenty Two Cents (17,942,830,701.22) only VAT inclusive.

The Tender Board at its meeting held on 6th November 2020, approved the award as recommended by the Evaluation Committee, subject to post-qualification and successful negotiations. Post-Qualification was conducted in November 2020 and negotiations took place on 15th February 2021. During negotiations the 2nd Respondent reduced the contract price from TZS 17,942,830,701.22 to Tanzanians Shillings Seventeen Billion Nine Hundred Million (17,900,000,000/=) only VAT inclusive. On 22nd February 2021, the Respondent's Tender Board approved the Post qualification and negotiations reports and award recommendations to M/S CRJE (East Africa) Ltd, the 2nd Respondent.

On 10th March 2021, the 1st Respondent issued the Notice of Intention to award the Tender to all tenderers who participated in the Tender. The Notice informed the tenderers that award has been proposed to the 2nd Respondent at the contract price of TZS 17,900,000,000/= only VAT inclusive. The Notice also informed the Appellant that it was ranked the fourth with a quoted price of Tanzanian Shillings Nineteen Billion Two Hundred Ninety Six Million One Hundred Forty Six Thousand Five

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Hundred Sixty Seven and Fifteen Cents (19,296,146,567.15) only VAT inclusive compared with the price quoted by the proposed bidder of TZS 17,900,000,000/=.

Dissatisfied, on 17th March 2021, the Appellant applied for administrative review to the 1st Respondent challenging the award proposed to the 2nd Respondent. The basis for challenging the award proposal was that the 2nd Respondent is a sister company of M/S China Railway First Group which has been blacklisted by the World Bank and both are wholly owned by M/S China Railway Group Limited.

On 18th March 2021, the 1st Respondent issued the decision by dismissing the Appellant's application for review. The said letter was received by the Appellant on 23rd March 2021 by e-mail.

Aggrieved further, on 30th March 2021, the Appellant filed this Appeal to the Appeals Authority.

SUBMISSIONS BY THE APPELLANT

The grounds of appeal as stated in the Appellant's Statement of Appeal as well as oral submissions during the hearing may be summarized as follows: -

1. That, the Appellant filed this Appeal on 30th March 2021 upon being dissatisfied with the 1st Respondent's intention to award the Tender to the 2nd Respondent whose sister company has been debarred by the World Bank from September 2019 to September 2021. The 2nd Respondent is owned by M/S China Railway Construction Engineering



Group which owns 950 shares and M/S Shenzhen Investment Company which owns 50 shares. M/S China Railway Construction Engineering Group Company Ltd is wholly owned by M/S China Railway Group Ltd. M/S China Railway Group Ltd also owns M/S China Railway First Group which has been debarred by the World Bank from September 2019 to September 2021.

The learned counsel for the Appellant submitted further that, the 2nd Respondent and M/S China Railway First Group are related as both originate from M/S China Railway Group Ltd. Therefore any profit or loss attained by any of the company which directly or indirectly relates to M/S China Railway Group Ltd affects the rights of the other. M/S China Railway First Group was blacklisted by the World Bank. This blacklisting does not only affect the blacklisted company but also the parent company, M/S China Railway Group Ltd as well as other related companies including the 2nd Respondent.

2. That, according to the counsel for the Appellant, the 2nd Respondent was ineligible to participate and to be recommended for award of the Tender as Clause 3.8 (e) of the Instructions To Tenderers (ITT) states clearly that tenderers which are debarred or blacklisted are ineligible to participate in the Tender. Counsel added further that, Regulation 101 of the Regulations prohibit the procuring entity from awarding the tender to an ineligible firm. Since the 2nd Respondent is related to M/S China Railway First Group which has been blacklisted, the 1st Respondent ought not to have recommended the 2nd Respondent for



award of the Tender. Thus, the 1st Respondent's act in this regard contravened the aforementioned Regulation 101 and Clause 3.8 of the

III.

3. That, the World Bank procedures on the scope of sanctioning of firms prescribe that the period of ineligibility of the sanctioned firm extends to any firm directly or indirectly controlled by the sanctioned firm and its affiliates. Thus, the 2nd Respondent being an affiliate of the blacklisted company ought not to have been recommended for award of the Tender as it is affected by the blacklisting of M/S China Railway First Group.
4. Finally, the Appellant prayed for the following orders:-
 - i. A declaration that the 2nd Respondent is ineligible to participate in the disputed Tender;
 - ii. The evaluation process to be repeated afresh; and
 - iii. The letter of intention to award issued on 10th March 2021 be recalled.

REPLY BY THE 1ST RESPONDENT

The 1st Respondent's reply to the Appellant's grounds of Appeal as well as oral submissions during the hearing may be summarized as follows:-

1. That, the 1st Respondent conducted the Tender process in compliance with the law and its Regulations. Evaluation process was conducted as per the criteria provided for in the Tender Document vis-à-vis bids



submitted by tenderers. The 1st Respondent added that, at the time of evaluation it failed to establish that M/S China Railway First Group, the blacklisted firm was amongst the shareholders of the 2nd Respondent's company.

2. That, after receipt of the Appellant's application for administrative review, the 1st Respondent went through the World Bank's official website from September 2019 to September 2021 to ascertain if the 2nd Respondent was among the blacklisted firms. Having perused all the names it was settled that the 2nd Respondent was not among the blacklisted firms as alleged by the Appellant.
3. That, the World bank procedures on the scope of sanctioning of firms prescribe that the period of ineligibility of the sanctioned firms extends to any firm directly or indirectly controlled by the sanctioned firm and affiliate. There was no proof that the 2nd Respondent is controlled by or affiliated to M/S China Railway First Group, the blacklisted firm. Thus, the 1st Respondent after satisfying itself that the 2nd Respondent complied with all tender requirements recommended it for award of the Tender.
4. That, pursuant to Section 62(1) and (7) of the Act, as amended the Public Procurement Regulatory Authority has mandate to debar a firm and to issue a list of all debarred firms. The 1st Respondent went through the list of the debarred firms and found that the 2nd Respondent is not among the debarred firms in Africa or by the World Bank.



5. Finally, the 1st Respondent prayed for the following orders:-
- i. That, the eligibility of the proposed bidder be determined against the Appellant's claims; and
 - ii. The Appeals Authority to determine the matter.

REPLY BY THE 2ND RESPONDENT

The 2nd Respondent's reply to the Appellant's grounds of Appeal as well as oral submissions during the hearing may be summarized as follows:-

1. That, the 2nd Respondent has never been debarred by the World Bank in any tendering process and as of to date, the 2nd Respondent is executing several World Bank funded projects in Tanzania.
2. That, neither the 2nd Respondent's affiliates nor its subsidiaries have been debarred by the World Bank, thus the Appellant's assertion is unsubstantiated, unfounded and marred with ill will and intent.
3. That, the 2nd Respondent is not a sister company of M/S China Railway First Group. It is a subsidiary of M/S China Railway Construction Engineering Group which is totally independent and not related to M/S China Railway First Group. The alleged sanctions on M/S China Railway First Group cannot be extended or applied to M/S China Railway Construction Engineering Group as a shareholder for the 2nd Respondent.
4. That, the 2nd Respondent is a Private Company limited by shares and registered in Tanzania under the Companies Act No. 12 of 2002. The



2nd Respondent has two shareholders; namely, M/S China Railway Construction Engineering Group which owns 950 ordinary shares and M/S Shenzhen Investment Company which owns 50 ordinary shares. The 2nd Respondent's counsel added that, the registered shareholder of the 2nd Respondent is not M/S China Railway First Group as asserted by the Appellant. The registered shareholders of the 2nd Respondent are neither affiliates nor subsidiaries of the M/S China Railway First Group.

5. That, the publication of the blacklisted firms by the World Bank did not in any way mention the 2nd Respondent, M/S China Railway Construction Engineering Group, M/S Shenzhen Investment Company or any of the affiliated companies of the 2nd Respondent.

The 2nd Respondent's Counsel submitted further that, Paragraphs 9.04 and 10.01(a) of the World Bank Procedure on Sanctions Proceedings and Settlement in Bank Financed Projects states clearly that when an affiliate or subsidiary is included in the sanctions it would be so stated. The list of the blacklisted firms provided by the World Bank in September 2019 indicates clearly that the sanction has been imposed to M/S China Railway First Group. No indication that the said sanction has been extended to its affiliates or subsidiaries.

The counsel added that, the Appellant has misconceived the applicability of the blacklisting sanction. For instance, M/S China Railway Group Ltd owns thousands of companies in the world, thus if one of its companies is blacklisted it cannot be said that the rest of the



companies are also affected. Sanctions would only apply to the blacklisted firm and its affiliates if so specified. Therefore, the 2nd Respondent was not blacklisted and it is neither an affiliate nor a subsidiary of M/S China Railway First Group. Thus, the 2nd Respondent is eligible and qualifies for the award as it complied with the Tender requirements.

6. With regard to Regulation 101 of the Regulations, the 2nd Respondent submitted that much as it prohibits the procuring entity from awarding the tender to blacklisted firms; the 2nd Respondent has never been blacklisted.

7. That, the 1st Respondent is legally obliged to award the Tender to the 2nd Respondent since it was the first ranked tenderer during the evaluation process; hence eligible to be awarded the Tender.

8. Finally, the 2nd Respondent prayed for the following orders:-

- i. Dismissal of the Appeal;
- ii. The 1st Respondent be allowed to award the Tender to the 2nd Respondent; and
- iii. The Appellant to pay the Respondent's cost.

In his brief rejoinder the learned counsel for the Appellant insisted that, the 2nd Respondent cannot deny that it has a relationship with M/S China Railway First Group since both are connected to M/S China Railway Group Limited. According to the Appellant, the major shareholder of the



Appellant is M/S China Railway Construction Engineering Group Company Ltd which is wholly owned by M/S China Railway Group Limited which also owns the blacklisted firm M/S China Railway First Group. Thus, the 2nd Respondent is an affiliate of the blacklisted firm, therefore not qualifying for the award of the Tender.

Counsel for the Appellant further challenged the World Bank Procedure on Sanctions Proceedings and Settlement in Bank Financed Projects cited by the 2nd Respondent on the ground that it was not stated specifically if the relied procedures amended or repealed World Bank procedures on the debarment. According to the World Bank procedures for debarment once a firm is debarred even affiliates or subsidiaries are affected. Thus, the 2nd Respondent is affected by the blacklisting of M/S China Railway First Group which is an affiliate. Thus, the award proposed to it should be nullified.

ANALYSIS BY THE APPEALS AUTHORITY

During the hearing of the Appeal parties agreed on the following issues which were approved by the Members of the Appeals Authority: -

- 1. Whether award of the Tender to the 2nd Respondent is proper in law; and**
- 2. What reliefs, if any, are the parties entitled to**



Having identified the issues, the Appeals Authority proceeded to determine them as hereunder: -

1. Whether award of the Tender to the 2nd Respondent is proper in law;

In resolving this issue, the Appeals Authority considered the Appellant's contention that the 2nd Respondent does not qualify for the award of the Tender as its affiliate; M/S China Railway First Group has been blacklisted by the World Bank from September 2019 to September 2021. According to the Appellant the two firms are related, thus a sanction imposed to M/S China Railway First Group also affects the 2nd Respondent. On the other hand both Respondents denied that M/S China Railway First Group had any relationship with the 2nd Respondent.

The Appeals Authority revisited the World Bank website and observed that M/S China Railway First Group has been blacklisted from participating in the World Bank funded projects for the period of eighteen (18) months from 17th September 2019 to 16th September 2021.

In order to ascertain if the blacklisting of M/S China Railway First Group also applies to the 2nd Respondent the Appeals Authority reviewed the Appeal record and observed that the 2nd Respondent is a company registered in Tanzania with a Certificate of Incorporation No. 39536 issued on 23rd June 2000. According to the extract from the Registrar of Companies the 2nd Respondent has two shareholders; namely, M/S China Railway Construction Engineering Group Company Limited with 950



shares and M/S Shenzhen Investment Company with 50 shares. The 2nd Respondent's major shareholder, M/S China Railway Construction Engineering Group Company Limited is also registered with Business Registration and Licensing Agency (BRELA) as a foreign company. During the hearing the 2nd Respondent's representative pointed out that M/S China Railway Construction Engineering Group Company Limited is wholly owned by M/S China Railway Group Limited.

In view of the record of Appeal and the search conducted from BRELA it was noted that M/S China Railway First Group is not registered in Tanzania. Thus its shareholders were not known. During the hearing Members of the Appeals Authority required the Appellant to substantiate the relationship which exists between the 2nd Respondent and M/S China Railway First Group. In response thereof, the Appellant submitted that in the Website of M/S China Railway Group Limited it has been indicated clearly that the company owns M/S China Railway First Group and M/S China Railway Construction Engineering Group Company Limited which is the major shareholder of the 2nd Respondent.

The Appellant added that, since the 2nd Respondent originates from the same root with M/S China Railway First Group; proceeds attained by each of the subsidiary benefit all. Thus, even the blacklisting sanction issued against M/S China Railway First Group also affects all subsidiaries and affiliates including the 2nd Respondent. The Appellant conceded that no official search was conducted from BRELA or any other relevant authority in order to establish the relationship between the 2nd

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Respondent and M/S China Railway First Group. The Appellant therefore failed to establish that M/S China Railway First Group is an affiliate of the 2nd Respondent.

The Appeals Authority revisited Paragraphs 4.01, 9.04 and 10.01(a) of the **World Bank Procedure on Sanctions Proceedings and Settlement in Bank Financed Projects** issued on 28th June 2016 and which became effective on 1st July 2016 relied upon by the 2nd Respondent. The provisions read as follows:-

4.01 "Issuance of Notice of Sanctions Proceedings

*(c) Recommendation of Appropriate Sanction. The SDO shall recommend in the Notice an appropriate sanction to be imposed on each Respondent, selected from range of possible sanctions identified in sub-paragraph 9.01 with due consideration of the factors set forth in sub-paragraph 9.02. **The SDO may also recommend the imposition of sanctions on affiliates of the Respondent in accordance with sub-paragraph 9.04.***

9.04 Scope of Sanctions

*(b) Imposition of Sanctions on affiliates. When a sanction is imposed on a Respondent, **appropriate sanctions may also be imposed on any affiliate of the Respondent.** if the SDO temporarily suspends and/ or recommends the imposition of a sanction on an affiliate of*



the Respondent that controls or is under common control with the Respondent, the SDO shall provide such affiliates with a copy of the relevant Notice in accordance with the provisions of sub-paragraph 11.04. Such affiliates shall have procedural rights hereunder equivalent to those of the Respondent, except that any Preliminary Explanation, Explanation, Response or other formal submission shall be consolidated with that of the Respondent unless the SDO or the Sanctions Board, as the case may be, determines, as a matter of discretion, to permit an independent submission.

10.01 Disclosure to the Public

a) Disclosure of Sanctions. Information concerning the identity of each sanctioned party and the sanction imposed shall be publicly disclosed."

(Emphasis Added)

The above quoted provisions clearly entail that if an affiliate or a subsidiary is to be blacklisted the same is to be accorded an opportunity to be heard. Furthermore, at the end of sanction proceedings particulars of the sanctioned firm and the sanction imposed should be publicly disclosed.

The Appeals Authority revisited the list of the blacklisted firms in the World Bank website and observed that firms which have been blacklisted together with their affiliates or subsidiaries were disclosed. If the

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sanction does not extend to affiliates, only the names of the blacklisted firms appear.

In the World Bank's list of blacklisted firms issued on September 2019, the name of M/S China Railway First Group appears on its own and there is no indication that its affiliates or subsidiaries have also been sanctioned. Based on the record of Appeal and the World Bank's procedures on sanctions proceedings the Appeals Authority is of the settled view that, the ban imposed on M/S China Railway First Group does not extend to the 2nd Respondent.

The Appeals Authority deemed it proper to point out that, if the 2nd Respondent would have been blacklisted by the World Bank its ban would automatically disqualify it from being eligible to participate and be awarded any public tender. This is in accordance with Section 62(2) (a) and (b) of the Act and Regulation 101(3) of the Regulations which provide as follows:-

Section 62(2) " A tenderer who has been blacklisted and barred from taking part in public procurement by a foreign country, international organization or other foreign institutions shall be automatically be blacklisted from participating in public procurement in the United Republic –

(a) In the case of fraud and corruption, for such period as is debarred by that foreign country, international



organization or foreign institution plus a further period of ten years.

(b) In the case other than fraud or corruption, for such period as is debarred by that foreign country, international organization or foreign institution plus a further period of five years."

Regulation 101(3)"Where a tenderer is debarred under the provisions of these regulations, any person who, at the time of debarment, was concerned with the management of the affairs of the debarred company or firm as director, partner, agent or an officer, shall be barred from participating in public procurement or disposal by tender for the same period."

From the above findings it is crystal clear that the blacklisting of M/S China Railway First Group does not extend to the 2nd Respondent. Therefore, the 2nd Respondent is eligible and qualifies for the award of the Tender.

Given the circumstances, the Appeals Authority concludes the first issue in the affirmative that award of the Tender to the 2nd Respondent is proper in law.

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

Taking cognizance of the above findings that the award of the Tender to the 2nd Respondent is proper in law, the Appeals Authority hereby dismiss the Appeal. The 1st Respondent is allowed to proceed with the Tender process. Each party is to bear its own costs.

It is so ordered.

This Decision is binding 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 10th day of May 2021.

HON. JUSTICE (RTD) SAUDA MJASIRI



.....

CHAIRPERSON

MEMBERS:

1. ADV. ROSAN MBWAMBO.....

2. MR. RHOBEN NKORI.....