

IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY
AT DAR ES SALAAM
APPEAL CASE NO. 08 OF 2015-16

BETWEEN

M/S NYALINGA INVESTMENT CO. LTD. IN JV WITH WANKA &
SONS ENGINEERING CO LTD.....APPELLANT

AND

MPANDA DISTRICT COUNCIL.....RESPONDENT

DECISION

CORAM

- | | |
|------------------------------|---------------|
| 1. Ms. Monica P. Otaru | - Chairperson |
| 2. Mrs. Rosemary A. Lulabuka | - Member |
| 3. Eng. Aloys J. Mwamanga | - Member |
| 4. Mr. Ole-Mbille Kissioki | - Secretary |

SECRETARIAT

- | | |
|---------------------------|--------------------------|
| 1. Mrs. Toni S. Mbilinyi | -Principal Legal Officer |
| 2. Ms. Violet S. Limilabo | -Legal Officer |
| 3. Mr. Hamis O. Tika | -Legal Officer |

FOR THE APPELLANT

- | | |
|----------------------|---------------------------|
| 1. Mr. Shukuru Elias | - Managing Director |
| 2. Mr. Kissamo Elias | - Advocate, AKK Attorneys |

FOR THE RESPONDENT

1. Mr. Malifimbo L. Malifimbo - Ag. Head, Procurement Management Unit
2. Mr. Leo Respicius - District Works Engineer
3. Mr. Malaka M. Morisho - District Solicitor

FOR THE OBSERVER

Mr. Elezer Kileo – Legal Counsel, Pivotech Co. Ltd

This Decision was scheduled for delivery today 13th November 2015, and we proceed to deliver it.

The Appeal was lodged by NYALINGA INVESTMENT CO. LTD. in Joint Venture (JV) with WANKA & SONS ENGINEERING CO. LTD (hereinafter referred to as “the Appellant” against MPANDA DISTRICT COUNCIL (hereinafter referred to as “the Respondent”).

The said Appeal is in respect of Tender No. LGA.099/2014/2015/W/IRR/03 for Construction of Headwork at Iloba Irrigation Scheme in Mpanda District Council (hereinafter referred to as “the Tender”).

According to the documents submitted to the Public Procurement Appeals Authority (hereinafter referred to as “the Appeals Authority”), and respective oral submissions of the parties, the facts of the Appeal may be summarized as follows:

The Respondent vide Majira Newspaper dated 14th May 2015 and through their Notice Board, invited tenderers to submit tenders. Deadline for submission was 3rd June 2015, whereby eight tenders were received from the following firms and the read out prices were as follows:-

S/No.	Tenderers Name
1.	M/s Amacon Tanzania Ltd.
2.	M/s Green Top Enterprises Co. Ltd.
3.	M/s Conspec Co. Ltd.
4.	M/s Nyamasiriri General Promotion
5.	M/s Chase Investment Group
6.	M/s Pivotech Co. Ltd
7.	M/s Upendo Group Co. Ltd
8.	M/s Nyalinga Investment Co. Ltd

The tenders were then subjected to evaluation which was conducted in three stages. namely; preliminary, detailed and post qualification. At the preliminary evaluation, tenders were checked for substantial responsiveness and compliance with eligibility criteria. At that stage six tenders, the Appellant inclusive, were found to be non-responsive for failure to comply with the requirements of the Tender Document. The remaining two tenders by M/s Conspec Co. Ltd and M/s Pivotech Co. Ltd. were subjected to detailed evaluation.

During detailed evaluation, tenders were checked for arithmetic errors whereby the tender by M/s Conspec Co. Ltd was found with errors which were corrected and sum of each bill item of both tenders were compared

with engineer's estimate bill items for purpose of establishing how the tenders were realistic in terms of risks. At that stage, the tender submitted by M/s Conspec Co. Ltd was ranked first thus subjected to post qualification. It was however disqualified for failure to meet some of the requirements of the Tender Document; hence the second ranked M/s Pivotech Co. Ltd was post qualified and found to be substantially responsive and therefore recommended for award of the Tender at the Contract Price of TZS. 538,231,650.00. At the end of evaluation process, the Evaluation Committee recommended award of the Tender to M/s Pivotech Co. Ltd at a Contract Price of the recommendation was approved by the Tender Board on 18th August 2015.

The Respondent vide a letter with Ref. No. KTV/MDC.F.20/7/Vol.VIII/94 dated 26th August 2015, informed the Appellant its intention to award the Tender to M/s Pivotech Co. Ltd. The said letter was sent on 11th September 2015 and received by the Appellant on the same day.

On 23rd September 2015, dissatisfied with the Respondent's intention to award the Tender, the Appellant wrote a complaint letter to the Respondent among other things sought for grounds of his disqualification.

On 28th September 2015, the Respondent informed the Appellant the grounds for disqualification, which are a submission of receipt voucher from Contractors Registration Board (CRB) instead of Certificate of Registration of the JV, and attachment of a Certificate of Civil Engineering Class VI instead of Class V and above, contrary to instructions.

Aggrieved by the grounds of his disqualification, the Appellant applied for administrative review on 1st October 2015 but before the decision was issued, the Appellant lodged this Appeal on 7th October 2015.

During the hearing, the Appeals Authority on its own motion and basing on the facts had first to satisfy itself if the Appeal was proper before it. In so doing and after a brief hearing, it was satisfied that the Appeal arose from the letter of 28th September 2015, by the Respondent's Accounting Officer, which provides at the last Paragraph that, *"Based on the above explanation, we regret to inform you that your complaints are hereby rejected forthwith"*. The Appeal is therefore not a result of the letter of 1st October 2015, referred above. The Appeals Authority proceeded with the Appeal on merits.

SUBMISSIONS BY THE APPELLANT

The Appellant raised four grounds of Appeal which may be summarised as follows:-

1. That, he had submitted all documents including Certificate of Registration from CRB;
2. That, his tender meets the requirement of Civil Engineering Class V and above;
3. That, the Respondent intends to award the Tender to a tenderer who did not submit a registered Power of Attorney at the time of tender opening contrary to the requirement of the Tender Document; and

4. That, his complaint to the Respondent was submitted within time in compliance with the law.

Arguing on the first ground of Appeal, counsel for the Appellant submitted that the tender submitted by his client complied with eligibility criteria under Clause 3 of Instructions To Bidders (hereinafter referred to as "ITB") and Clause 3 (a) of the Bid Data Sheet (hereinafter referred to as "BDS". That the Appellant submitted his tender as a JV with a Memorandum of Understanding (MoU) to CRB for recognition of the JV. He submitted further that, the individual firms in the JV submitted their Certificate from CRB but the JV Certificate from CRB was not submitted since it would be issued after award of the contract; thus by submitting CRB Certificate of individual firms, the Appellant complied with the requirements.

On the second ground of Appeal, the Appellant stated that, by submitting their tender as a JV of Class VI automatically meets the requirement of Class V and above provided under Clause 8 (a) of the BDS.

On the third ground of Appeal, the Appellant argued that, the proposed successful tenderer did not comply with the requirement of Clause 27.6 of the ITB and Clause 8 (e) of the BDS for failure to submit a registered Power of Attorney. Further to that, the Respondent admitted in his Reply that, during the tender opening M/s Pivottech Co. Ltd that, they had attached a Power of Attorney with a receipt for application for its registration, hence they deserved to be disqualified for non compliance with the Tender Document.

Finally the Appellant prayed for the following remedies:

1. The Appellant to be awarded the contract;
2. Costs of transport and accommodation at the tune of TZS. 1,500,000.00; and
3. Any other relief the Appeals Authority deems fit to grant.

REPLY BY THE RESPONDENT

The Respondent's arguments as deduced from their documents may be summarised as follows:

1. That, the Appellant was fairly disqualified for failure to submit a Certificate of Registration of the Joint Venture from CRB instead they had attached a receipt showing payment for application forms for the JV, contrary to the requirement of the Tender Document.
2. The Respondent submitted further that, the Appellant did not attach minutes of the Board of Directors of each firm to prove that they had agreed to the formation of the JV as per Clause 3 (b) of the BDS.
3. That, M/s Pivotech Co. Ltd had attached registration receipt of the Power of Attorney since the same was still in process of registration.

Finally the Respondent prayed for dismissal of the Appeal for lack of merits.

ANALYSIS BY THE APPEALS AUTHORITY

It should be noted from the outset that, the Appeals Authority could not determine the Appellant's complaints against the proposed successful tenderer M/s Pivotech Co. Ltd. since this complaint was not raised to the Respondent's Accounting Officer on 23rd September 2015, it is therefore an afterthought which cannot be entertained at this stage. Thus, allowing such a complaint at the appellate level would deny the Respondent right to review it at the contrary to the requirement of Section 88 (5) of the Act read as follows:-

"the Appeals Authority shall have original jurisdiction to hear and determine complaints against procuring entities where a procurement or disposal of contract is already in force and Appeals arising from the administrative decisions made by the accounting officer".
(Emphasis added)

The parties agreed on the following triable issues;

- 1.0 Whether the Appellant was fairly disqualified; and
- 2.0 What reliefs, if any, are the parties entitled to.

Having identified issues in dispute the Appeals Authority proceeded to resolve them as follows;

- 1.0 Whether the Appellant was fairly disqualified;

In resolving this issue, the Appeals Authority considered the Appellant's contention that, they were disqualified for failure to attach a Certificate of Registration of the JV from CRB, a requirement which was complied with in

the Appellant's tender. Thus the Respondents act to reject their tender was unfair and in contravention of the law.

To ascertain whether the Appellant's disqualification based on the above ground was justified, the Appeals Authority reviewed the Tender Documents as well as the applicable law. In so doing, it was observed that, Clause 3.1 of the ITB and Clause 3 of the BDS provide for eligibility of tenders. For purpose of clarity the said Clauses are reproduced hereunder:-

Clause 3.1 of the ITB

"A tenderer may be a natural person, private Entity, government - owned Entity, subject to ITT sub-Clause 3.4 or any combination of them with a formal intent to enter an agreement or under an existing agreement in the form of a joint venture, consortium, or association. In the case of a joint venture, consortium, or association unless otherwise specified in the Tender Data Sheet, all parties shall be jointly and severally liable for the execution of the contract in accordance with the contract terms...

Clause 3 of the BDS

"State the nature of the parties (if joint venture, consortium, or association) Applicable

Maximum number of members in the joint venture, consortium or association shall be not more than two company and should submit:-

- (a) Certificate of registration from CRB
- (b) Minutes of agreement from board of Directors of each company agreeing the joint venture, consortium or association".

From the above quoted provisions, tenderers were allowed to tender as a JV, apart from that, they were also required to submit a certificate of registration from CRB of the said JV.

During the hearing the Appellant insisted that they had complied with the above provisions; since they had attached Certificate of Registration from CRB of individual firms in the JV. Further to that they had attached a receipt voucher for the application forms for the JV together with the MoU. The Appeals Authority concurs with the Respondent that, failure to attach a Certificate of Registration of the JV and in the absence of the confirmation letter from CRB, it was difficult to ascertain whether the Appellant had complied with such a requirement. The Appeals Authority is of the settled view that, the Respondent's Act to disqualify the Appellant tender was in conformity with Section 72 (1) of the Public Procurement Act No. 7 of 2011 (hereinafter referred to as "the Act"), Regulations 203 (1) and 204 (1) of the Public Procurement Regulations GN. No. 446 of 2013 which provides as follows:-

Sec.72 (1)

"the basis for tender evaluation and selection of the successful tenderer shall be clearly specified in the Tender Document".

Reg. 203

"the tender evaluation shall be consistent with the terms and conditions prescribed in the tender documents and such evaluation shall be carried out using the criteria explicitly stated in the tender documents".

Reg. 204 (1)

“All tenders shall be checked for substantial responsiveness to the commercial terms and conditions of the tendering documents”.
(Emphasis Supplied).

Regarding the Appellant’s contention that they had complied with the requirement of Class V and above by teaming up as JV of Class VI, automatically, they were capable to perform works of Class V and above.

To substantiate the Appellant’s contention, the Appeals Authority reviewed the Tender Document and observed that Clause 2 of the Invitation to Tender, and Clause 11.1 (h) of the ITB modified by Clause 8 of the BDS provided for such requirement. For purposes of clarity the said Clauses are reproduced and read as follows:-

Clause 2

“The Mpanda District Council now invites sealed tenders from eligible contractors registered or capable of being registered in CLASS V AND ABOVE for Carrying out the activities as indicated in the table below”...

Clause 11.1 ITB

“The tender prepared by the Tenderer shall constitute the following components:

h) Any other document required in the Tender Data Sheet.

“Clause 8 BDS. Other information or materials required to be completed and submitted by bidders:

a) Only Tenderers registered as Civil Engineering Class V AND ABOVE with the Contractors Registration Board (CRB) are eligible”

The Appeals Authority further revisited the Appellant's tender and observed that each individual firm in the JV had attached Certificates of Registration from CRB of Class VI as it was witnessed that both firms in the JV were registered as CIVIL WORKS CONTRACTOR CLASS VI with Registration No. C6/1163/1012 and C60773/10/09.

In addition to the above findings, it was observed in the first contention that, the Appellant did not submit the Certificate of Registration of the JV from CRB which could have proved that they had been upgraded from Class VI to Class V for a particular project. Therefore, the Respondent was proper to disqualify the Appellant for failure to comply with the requirements of Clauses 2, 11.1 and 8 of the Tender Document.

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

2.0 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 the parties as hereunder;

The Appeals Authority considered the Appellant's prayer that, the Tender be awarded to them. The Appeals Authority has established in the first issue that the Appellant was fairly disqualified, therefore, it is not entitled to be awarded the Tender.

With regard to prayer for costs of transport and accommodation to the tune of TZS. 1,500,000.00, the Appeal's Authority finds that, the same can not be granted for lack of merits.

Regarding the Respondent's prayer that the Appeal be dismissed for lack of merits, the Appeal's Authority grants this prayer, therefore the Appeal is dismissed for lack of merits.

The decision of this Authority is binding upon the parties and may be executed in any court of competent jurisdiction in terms of Section 97 (8) of the Act.

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

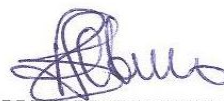
This Decision is delivered in the presence of the Appellant and the Respondent, this 13th day of November, 2015.



MS. MONICA P. OTARU
CHAIRPERSON

MEMBERS:

1. MRS. ROSEMARY A. LULABUKA



2. ENG. ALOYS. J. MWAMANGA

