

**IN THE PUBLIC PROCUREMENT APPEALS AUTHORITY**

**APPEAL CASE NO. 16 OF 2023-24**

**BETWEEN**

**M/S OCTOPUS ENGINEERING LIMITED.....APPELLANT**

**AND**

**TANZANIA RURAL URBAN ROADS**

**AGENCY – MARA REGIONAL OFFICE.....RESPONDENT**

**DECISION**

**CORAM**

1. Hon. Justice (rtd) Sauda Mjasiri - Chairperson
2. Adv. Rosan Mbwambo - Member
3. Eng. Stephen Makigo - Member
4. Mr. James Sando - Secretary

**SECRETARIAT**

1. Ms. Florida Mapunda - Deputy Executive Secretary
2. Ms. Violet Limilabo - Senior Legal Officer

**FOR THE APPELLANT**

1. Mr. Dickson Tugara - Advocate - Lawvet Legal Consultants
2. Mr. Leonard Nyamsangya - Managing Director
3. Mr. Nicholas Nyamsangia - Project Manager - ICT



## **FOR THE RESPONDENT**

1. Mr. Abdallah Makulo - State Attorney - OSG
2. Mr. Speratus Chrisant - Principal Legal Officer - TARURA
3. Mr. Joseph Mkwizu - Ag. Regional Manager - TARURA
4. Mr. Hamadi Munisi - Engineer - TARURA
5. Mr. George Mushomi - Engineer - TARURA

This Appeal was lodged by **M/S Octopus Engineering Ltd** (hereinafter referred to as "**the Appellant**") against the **Tanzania Rural Urban Roads Agency – Mara Regional Office** (hereinafter referred to as "**the Respondent**"). The Appeal is in respect of Tender No. S10/012/2023/2024/W/89 for Supply, Installation and Maintenance of Street Lights for Mara Region (Bunda DC 14Nos, Butiama DC 10Nos, Musoma MC 55Nos, Rorya DC 8Nos, Serengeti DC 8Nos, Tarime TC 40Nos and Tarime DC 10Nos) (hereinafter referred to as "**the Tender**").

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

The Tender was conducted through National Competitive Tendering Method as 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 as amended (hereinafter referred to as "**the Regulations**").



On 27<sup>th</sup> July 2023, the Respondent through the National e-Procurement System of Tanzania (NeST) invited tenderers to participate in the Tender. The deadline for submission of tenders was set on 10<sup>th</sup> August 2023. On the deadline, the Respondent received ten tenders including that of the Appellant.

The received tenders were subjected to evaluation. After completion of the evaluation process, the evaluation committee recommended award of the Tender to M/S Otonde Construction & General Supplies Ltd. The proposed contract price was Tanzania Shillings Five Hundred Sixty Nine Million Nine Hundred Sixty Thousand only (TZS 569,960,000.00) VAT exclusive. The Tender Board deliberated and approved the award recommendations at its meeting held on 18<sup>th</sup> and 19<sup>th</sup> August 2023.

On 21<sup>st</sup> August 2023, the Respondent issued the Notice of Intention to award which informed tenderers that it intends to award the Tender to M/S Otonde Construction & General Supplies Ltd. The approved contract price was Tanzania Shillings Five Hundred Sixty Nine Million Nine Hundred Sixty Thousand only (TZS 569,960,000.00) VAT exclusive. In addition, the Notice informed the Appellant that its tender was disqualified for failure to submit financial statements.

Dissatisfied with the reason given for its disqualification, on 25<sup>th</sup> August 2023, the Appellant applied for administrative review to the Respondent. Its application being unsuccessful, the Appellant claimed that the Respondent did not issue its decision as required by law. Therefore, on 11<sup>th</sup> September 2023, the Appellant filed this Appeal to the Appeals Authority.



When the matter was called on for hearing, the following issues were framed, namely: -

**1.0 Whether the disqualification of the Appellant's tender was justified; and**

**2.0 What reliefs, if any, are the parties entitled to?**

### **SUBMISSIONS BY THE APPELLANT**

The Appellant's submissions were made by Mr. Dickson Tugara, learned Advocate. He commenced his submissions on the first issue by stating that, the Appellant was one of the tenderers which participated in the Tender. The Appellant contended to have successfully submitted all the documents as required on this Tender. Thus, the Appellant disputes its disqualification as stated in the Notice of Intention to award dated 21<sup>st</sup> August 2023.

The learned counsel submitted that the Notice of Intention to award stated that the Appellant was disqualified for failure to submit financial statements. The learned counsel submitted further that the Tender was floated through NeST. According to NeST, a tenderer is not able to proceed to the next stage if the required information was not filled. The learned counsel contended that the Appellant filled in all the required information, including attaching the financial statements. The system allowed the Appellant to move to all the stages until it submitted all the required information. After completion, the system indicated that the submission was successful and congratulated the Appellant.

Handwritten signature and initials in blue ink.

The learned counsel stated that the Appellant reviewed its account on NeST and observed that it indicated that the financial statements were successfully submitted. However, having opened its account on NeST after the Tender results were issued, the system indicated that the financial statements were not submitted. Thus, the Appellant concluded that there was a challenge with the system.

The learned counsel submitted that the Tender Document required tenderers to comply with annual turnover requirement. The NeST system indicated that the Appellant had submitted the annual turnover as required by the Tender Document. The Appellant contended that according to NeST the average annual turnover was calculated from financial statements. Thus, if the financial statements were not attached, NeST could not have calculated the average annual turnover. In addition, since the Appellant complied with the average annual turnover requirement, it is evident that the financial statements were also submitted, the learned counsel contended.

The learned counsel stated further that, if the Respondent encountered challenges in assessing the Appellant's financial statements, it could only treat the anomaly as a minor deviation as per Regulation 207(2)(b) of the Regulations. The Respondent should not have disqualified the Appellant's tender in this regard.

The learned counsel concluded his submissions on the first issue by stating that the Appellant's financial statements were also available on NeST. The learned counsel stated that when filling the information for this Tender, the Appellant selected the relevant years and the financial statements were



automatically uploaded on the relevant slot. In addition, the Appellant's financial statements were physically submitted to the Respondent's office on 28<sup>th</sup> August 2023. Thus, the Appellant complied with the financial statements requirement.

On the second issue, the Appellant prayed for the following reliefs: -

- i. The Appeals Authority to conduct NeST audit trail so as to ascertain if the Appellant's financial statements were attached;
- ii. If the Appellant's financial statements would be found available on NeST, the Respondent should be ordered to re - evaluate the tenders; and
- iii. If it would be found that the Appellant's financial statements were not available on NeST, the Appellant's financial position should be assessed from the average annual turnover.

### **REPLY BY THE RESPONDENT**

The Respondent's submissions were made by Mr. Abdallah Makulo, learned State Attorney from the Office of the Solicitor General. He commenced his submissions by adopting the written Statement of Reply. He contended that the Statement of Reply is adopted as per the principle laid down in the case of *James Funke Gwagilo versus Attorney General*, (2004) T.L.R, 161 where the court stated that parties should be bound by their own pleadings.

On the first issue, the learned State Attorney submitted that the Respondent floated the disputed Tender through NeST. The Appellant was among the tenderers who participated in the Tender. During the



evaluation process, the Appellant's tender was found to be non-responsive for failure to submit financial statements. According to Item 3 of Section IV - Qualification and Evaluation Criteria, submission of the financial statements was a fundamental requirement of the Tender. The learned State Attorney contended that the purpose for such a requirement was to assess the financial status of tenderers in order to confirm their capability to execute the intended project. Thus, all tenderers were required to comply with such a requirement.

The learned State Attorney submitted that the evaluation process was conducted in accordance with Sections 40(7), 72(1) of the Act and Regulation 203(1) of the Regulations. The referred provisions require the evaluation committee when evaluating tenders to act independently and evaluate the tenders in accordance with the terms and conditions provided in the Tender Document. The learned State Attorney elaborated that Section 72(1) of the Act contained the word shall. This means in accordance with Section 53(2) of the Interpretation of Laws Act, Cap 1, R.E 2019, evaluation has to be conducted strictly in accordance with the criteria provided in the Tender Document.

The learned State Attorney submitted that Item 3 of Section IV - Qualification and Evaluation Criteria required tenderers to comply with the financial statements' requirement. During the evaluation process, the Respondent observed that at the slot in NeST where the Appellant was required to attach the financial statements, the same was not attached and the slot was empty. The system indicated that "*General justification: No financial record submitted.*" The learned State Attorney stated further that

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since submission of the financial statements was among the major requirements of the Tender, the Appellant's failure to comply with such a criterion led its tender to be rejected.

The learned State Attorney contended that the Appellant's non-compliance with the financial statements requirement amounted to a material deviation. Thus, the Appellant's tender was rejected pursuant to Regulation 204(2)(k) of the Regulations for having a major deviation to the requirement of the Tender. The learned State Attorney added that the Appellant's tender was rejected pursuant to Regulation 206(2) of the Regulations which requires a non-responsive tender to be rejected and should not subsequently be made responsive by correction or withdrawal of the deviations.

In support of his argument the learned State Attorney cited the cases of ***M/S SGS Tanzania Superintendence Company Limited versus Tanzania Bureau of Standards***, Appeal Case No. 25 of 2021-2022 and ***M/S Amikan Ventures Limited versus Tanzania Electrical Mechanical and Electronics Services Agency***, Appeal Case No. 29 of 2022 – 2023. In both cases, the Appeals Authority stated clearly that if a tenderer fails to submit any of the documents specified in the Tender Document, its tender should be rejected.

The learned State Attorney concluded his submissions on the first issue by stating that, tenders were evaluated based on the documents submitted through NeST as a special mode of submitting tenders. Thus, any document submitted outside the system could not be presumed to have been available and be considered for evaluation of tenders. Therefore, the





Respondent's decision of disqualifying the Appellant's tender was justified and complied with the requirements of the law.

In response to the Appellant's prayers, the Respondent stated that:-

- i. Based on the accuracy of the NeST, a prayer that the system audit trail be conducted should be rejected as from the record of the submitted documents it is certain that the Appellant's financial statements were not attached to its tender.
- ii. Regarding a prayer for re-evaluation of tenders, the learned State Attorney stated that the evaluation of tenders was conducted based on the documents attached on the NeST. Therefore, re - evaluation of tenders should not be allowed, as NeST clearly indicated that that the Appellant's financial statements were not attached.

On the second issue, the Respondent prayed for the following remedies: -

- i) Appeal be dismissed with costs for lack of merits;
- ii) The Respondent be allowed to proceed with the Tender process; and
- iii) Any other relief the Appeals Authority may deem fit to grant.

### **ANALYSIS BY THE APPEALS AUTHORITY**

#### **1.0 Whether the disqualification of the Appellant's tender was justified**

According to the record of Appeal, the Appellant was disqualified for failure to submit financial statements as required by Item 3 of Section IV- Qualification and Evaluation Criteria. The Appeals Authority reviewed Item

3 of Section IV - Qualification and Evaluation Criteria which reads as follows: -

**"3. Financial Situation and Performance**

*Financial Statements*

***Audited balance sheets or, if not required by the laws of the Tenderer's country, other financial statements acceptable to the PE, for mentioned duration shall be submitted and must demonstrate the current soundness of the Tenderer's financial position and indicate its prospective long-term profitability. (In case of Joint Venture, compliance requirements are: Each Member – Must Meet requirements).***

***Financial Statement Start Date 2021-01-01***

***Financial Statement End Date 2022- 12- 31"***

(Emphasis Added)

The above quoted provision states in clear terms that in demonstrating financial soundness tenderers were required to attach to their tenders the financial statements starting from 1<sup>st</sup> January 2021 to 31<sup>st</sup> December 2022.

In ascertaining if the Appellant complied with the above quoted requirement, the Appeals Authority reviewed the Appellant's tender on NeST. It observed that at the slot where tenderers were required to upload financial statements for the specified years, the system indicated that "*financial statements record is not submitted please contact PPRA, if this document is mandatory*". That is to say, according to NeST financial statements were not submitted. The Respondent was required to contact

the Public Procurement Regulatory Authority (PPRA) if the documents were mandatory.

The record of Appeal indicated that the Respondent contacted PPRA through email dated 31<sup>st</sup> July 2023. The Respondent informed PPRA about the challenges encountered during evaluation of tenders. The Respondent stated that during evaluation of tenders some tenderers' documents were sometimes found missing and after a while they became available. Thus, such a challenge led some tenderers to be disqualified from the Tender process for non-submission of the documents which were later on found available on NeST. The Respondent claimed to have not received any response from PPRA regarding the encountered challenge.

The Appeals Authority through a letter with Ref. No. PPAA/APPEALS/16/10/2023-24 dated 17<sup>th</sup> October 2023 requested PPRA to review NeST in order to verify if the Appellant submitted financial statements as per the Tender requirements. In response thereof, PPRA through a letter with Ref. No. EA.8/59/01/"D"/17 dated 19<sup>th</sup> October 2023 informed the Appeals Authority that NeST shows that the Appellant had participated in several tenders including the one under Appeal. PPRA stated further that when submitting documents relating to this Tender, the Appellant's tender "*was affected by a technical issue stemming from slow network connectivity on the user side.... This technical fault led to the system incorrectly storing tenderer details such as financial statements and key personnel within the user interface, without properly transmitting them to system servers*". The problem of slow network connectivity manifested between 17<sup>th</sup> July 2023 and 11<sup>th</sup> August 2023. The period within which the

problem of network connectivity existed was the time for preparation and submission of the Tender under Appeal. PPRA indicated that the challenge has now been fixed whereby NeST development team had introduced a double check process. This ensures that all information under each criterion is successfully submitted to NeST servers before the finalization of submission of tenders.

In view of the PPRA's findings on NeST as summarized herein above, the Appeals Authority is of the settled view that the availability of the financial statements on NeST window on the Appellant's side and the same information not being seen on the Respondent's side was due to technical fault on NeST.

In that regard the Appeals Authority finds the disqualification of the Appellant to be not proper as the Respondent's failure to see the Appellant's financial statements when evaluating tenders was not caused by the non-submission of the documents but rather by a technical fault on NeST.

Given the circumstances the Appeals Authority concludes the first issue in the negative that the disqualification of the Appellant's tender was not justified.

## **2.0 What reliefs, if any, are the parties entitled to?**

Taking cognizance of the above findings that the disqualification of the Appellant's tender was not justified, the Appeal is hereby allowed. In view of the technical fault on NeST which affected the Tender, the Appeals

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Authority hereby orders the Respondent to re-start the Tender process in observance of the law. We make no order as to 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 20<sup>th</sup> day of October 2023.

**HON. JUSTICE (rtd) SAUDA MJASIRI**



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**CHAIRPERSON**

**MEMBERS: -**

**1. ADV. ROSAN MBWAMBO**.....



**2. ENG. STEPHEN MAKIGO**.....



