

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

**APPEAL CASE NO 27 OF 2015-16  
BETWEEN**

**M/S ERNIE ENTERPRISES (T) LTD.....1<sup>ST</sup> APPELLANT**

**M/S JECCS CONSTRUCTION  
AND SUPPLIES LTD .....2<sup>ND</sup> APPELLANT**

**AND**

**TANZANIA INSTITUTE OF ACCOUNTANCY.....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: Executive Secretary |

**SECRETARIAT**

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

**FOR THE 1<sup>ST</sup> APPELLANT**

- |                          |   |                    |
|--------------------------|---|--------------------|
| 1. Mr. Ernest Mbangula   | - | Managing Director  |
| 2. Mr. Jospers Mwandunga | - | Technical Director |

## **FOR THE 2<sup>ND</sup> APPELLANT**

1. Mr. Julius Neema - Managing Director

## **FOR THE RESPONDENT**

2. Mr. B.M Mayunga - Legal Officer
3. Mr. Dickson I. Biya - Supplies Officer
4. Mr. Edmund T. Sabutoke - Quantity Surveyor

This decision was scheduled for delivery today 01<sup>st</sup> April 2016 and we proceed to do so.

The Appeal was lodged by the M/S Ernie Enterprises (T) Ltd (hereinafter referred to as "**1<sup>st</sup> the Appellant**") and M/S JECCS Construction and Supplies Ltd. (hereinafter referred to as "**the 2<sup>nd</sup>Appellant**") against the Tanzania Institute of Accountancy, commonly known by its acronym **TIA** (hereinafter referred to as "**the Respondent**"). The 2<sup>nd</sup> Appellant joined this Appeal after being notified by the Public Procurement Appeals Authority (hereinafter called "**the Appeals Authority**"). The notification of all tenderers who participated in the bidding process is a legal prerequisite.

The Appeal is in respect of Tender No. PA/094/2015/2016/W/23 for Proposed Construction of Classroom Block at Tanzania Institute of Accountancy Mbeya Campus (hereinafter referred to as "**the tender**").

After going through the record of proceedings submitted to the Appeals Authority as well as oral submissions, the facts of the Appeal may be summarized as follows:

The Respondent invited bidders to participate in the above tender through an advertisement in the Daily News newspaper dated 5<sup>th</sup> November 2015. The deadline for submission of the tenders was on 25<sup>th</sup> November 2015 whereby thirteen (13) bidders submitted their respective tenders.

The tenders were subjected to evaluation which was conducted in two stages namely; Preliminary and Detailed Evaluation. During the Preliminary Evaluation stage, two (2) tenders were disqualified for being non-responsive. The remaining eleven (11) tenders were subjected to detailed evaluation which was conducted in two stages namely; technical evaluation and cost analysis. During technical evaluation, six tenders, the Appellants' inclusive, were disqualified for being non responsive to the technical requirements. The remaining five (5) tenders were subjected to correction of arithmetic errors. Four bidders whose tenders were found with arithmetic errors were notified and all accepted the corrections so made. After the correction of arithmetic errors the tenders were ranked and M/s Home Africa Investment Corporation Ltd. was found to be the lowest evaluated tenderer and was recommended for award.

The Tender Board at its meeting held on 15<sup>th</sup> January 2016 approved the award of tender to M/s Home Africa Investment Corporation Ltd. at a contract price of TZS 574,282,227.72 VAT Inclusive.

On 11<sup>th</sup> February 2015, the Respondent notified all tenderers of its intention to award the tender to M/s Home Africa Investment Corporation Ltd. By the same letter, both Appellants were given the reasons for the disqualification; lack of adequate working capital and lack of evidence to prove other available lines of credit.

Dissatisfied, the 1<sup>st</sup> Appellant applied for administrative review by the Respondent's Accounting Officer. In his letter Ref. No. TIA/EE/GEN dated 23<sup>rd</sup> February 2016, the 1<sup>st</sup> Appellant was challenging the Respondent's intention to award to the proposed successful bidder asserting that the said bidder was a foreign firm which was ineligible to participate in the tender that had been reserved exclusively for local contractors.

On 3<sup>rd</sup> March 2016, the Respondent through its letter with reference No. BC.36/205/01/011 rejected and dismissed the application on the ground

that M/s Home Africa Investment Corporation Ltd. is a local company duly incorporated in Tanzania.

Aggrieved, on 10<sup>th</sup> March 2016, the 1<sup>st</sup> Appellant lodged his Appeal to the Appeals Authority and the 2<sup>nd</sup> Appellant joined in after being notified as earlier shown above.

### **SUBMISSIONS BY THE 1<sup>st</sup> APPELLANT**

The 1<sup>st</sup> Appellant listed two main grounds of Appeal which could be stated as follows-

First, that the Respondent erred in law for awarding the tender to M/s Home Africa Investment Corporation Ltd. which is a foreign firm. He submitted that according to the Tender Document the tender was exclusively reserved for local contractors. He stated that under Clause 7 of the Invitation for Tender, bidders were to submit bid security in the form of Tender Securing Declaration, meaning that the tender was reserved for local contractors. And that according to Regulation 27 of the Public Procurement Regulations, GN 446 of 2013 (hereinafter referred to as “**GN 446 of 2013**”) bid securing declaration is only applicable when the value does not exceed the threshold for exclusive preference. Furthermore, the proposed successful tenderer, M/s Home Africa Investment Corporation Ltd. had been registered by the Contractors Registration Board (hereinafter referred to as “**CRB**”) as a foreign contractor. Thus, the proposed successful bidder does not deserve to be awarded the tender.

Second, that the Respondent having failed to treat the proposed successful bidder as a foreign company wrongly entertained the tender submitted by M/s Chongqing International Construction Corporation, a foreign firm which ought to have been disqualified at the Preliminary Evaluation stage. The tender was reserved exclusively for local contractors and foreign bidders should not have benefited from the available privileges.

Finally the 1<sup>st</sup> Appellant prayed for the following reliefs;

- Re-start the tender process to eligible tenderers only;
- Respondent be ordered to pay Appeal fees and any costs to be incurred; and
- Take any other orders deemed necessary

### **SUBMISSIONS BY THE 2<sup>ND</sup> APPELLANT**

Briefly stated, the 2<sup>nd</sup> Appellant joined issues with the 1<sup>st</sup> Appellant and submitted that the Respondent erred in law for not reserving the tender to local contractors. In expanding on his submissions, the 2<sup>nd</sup> Appellant stated that Clause 2 of the Invitation for Tender had stipulated that the project will be financed exclusively by the Government of Tanzania and according to Section 55(1) of the Public Procurement Act No. 7 of 2011 (hereinafter referred to as “**the Act**”), all works, goods, consultancy and non-consultancy services exclusively financed by a public body with a value not exceeding the threshold specified in the Ninth Schedule of GN 446 of 2013 should be reserved exclusively for local firms or persons. As the disputed tender is being financed exclusively by the Respondent, the tender process ought to have been reserved for local contractors.

Reverting to the intention to award the contract to M/s Home Africa Investment Corporation Ltd, the 2<sup>nd</sup> Appellant stated that the said firm has been registered as a foreign contractor by CRB and since the value of the disputed tender process does not exceed the threshold specified in the ninth schedule of GN No 446 of 2013, M/s Home Africa Investment Corporation Ltd. should not be considered for the award of the contract.

Consequently, the 2<sup>nd</sup> Appellant prayed for the following reliefs:-

- The Respondent be ordered to re-evaluate the tenders in observance of the law;
- The Respondent be ordered to pay Appeal filing fees; and
- The Authority take any other action deemed appropriate.

## **REPLIES BY THE RESPONDENT**

In response to the issues raised by the Appellants, learned counsel for the Respondent strenuously submitted that section 54(2) of the Act allows tenderers to participate in the procurement proceedings without regard to their nationality, except where they are so limited by the procuring entity. The learned counsel said that the disputed tender was open to both local and foreign bidders. He submitted that since national preferences had not been stipulated in the Tender Data Sheet (hereinafter referred to as “**TDS**”) they were not applicable.

Addressing the Members of the Authority on the nationality of the proposed successful tenderer i.e. M/s Home Africa Investment Corporation Ltd. and M/s Chongqing International Construction Corporation respectively, the learned counsel insisted that the former is a local company registered under the Companies Act, 2012 by Certificate of Incorporation No.102796. In respect to the latter, the learned counsel objected to any mention of that bidder on the grounds it was a new complaint which ought to have been raised by the Appellant when he lodged his application for administrative review to the Respondent’s Accounting Officer. In any event, as the companies are registered locally they were eligible to participate in the tender process.

Therefore, the Respondent prayed for dismissal of the Appeal for lack of merits.

## **ANALYSIS BY THE APPEALS AUTHORITY**

In this Appeal there were two triable issues namely-

- **Whether intention to award the contract to the proposed successful tenderer was proper in law,**
- **To what reliefs, if any, are the parties entitled**

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

**1. Whether intention to award the contract to the proposed successful tenderer was proper in law**

As already indicated herein above, the main contention by the two Appellants is that the tender under dispute was exclusive of foreign firms.

In order to establish whether that view could be supported, the Appeals Authority found it necessary to consider both the advertisement as appearing in the newspapers, the TDS and the Procurement Journal issued by the Public Procurement Regulatory Authority (PPRA).

First, the Appeals Authority observed that the tender was floated under the National Competitive Bidding scheme, as contained under the Act and its Regulations. According to Regulation 34 of GN No 446 of 2013 procuring entities are allowed to grant margins of preference to local firms as against foreign companies as prescribed in the ninth and thirteenth schedules of GN No. 446 of 2016. The wording of Regulation 34(b) shows that foreign firms are not prohibited to participate in the national competitive tendering, but procuring entities are required to grant a margin of preference as per Regulations 38 and 151(4) of GN No 446 of 2013. The said regulations require procuring entities to grant ten per centum (10%) margins of preference when cost comparison is carried out in a national competitive bidding where foreign firms have participated. In view of the above finding, the Appeals Authority is of the firm view that the Appellants must have wrongly construed the controlling provisions of the Act and its Regulations in respect to the manner of granting preferential treatment to local bidders.

The Appeals Authority considered the Respondent's arguments in respect to Section 54(2) of the Act that in order for the preference scheme to be applicable, the same has to be stated in the Tender Document. The Appeals Authority considered the above arguments together with the effect of Clause

22 of the TDS in which the Respondent indicated “Domestic Preference NOT APPLICABLE.”

The Appeals Authority observed that Section 54(2) provides for a general guidance on the applicability of the preference scheme. However, specific provision which mandatorily requires procuring entities to grant a margin of preference is Section 55(1) of the Act if conditions stated therein are complied with and the tender under Appeal complied with the said condition.

Apart from that, the Respondent clearly indicated under Clauses 7 of the Invitation for Tender, 17(3) of the ITT and 13 of the TDS that the applicable bid security is Bid Securing Declaration. By virtue of Regulation 27 of GN No. 446 of 2013, Bid Securing Declaration should be applied when the value of procurement does not exceed the threshold for exclusive preference. In the instant appeal, the contract price for award of this tender is TZS 574,282,227.72 which is far below the amount specified in the schedule. While the Respondent was therefore right to use bid Securing Declaration under Regulation 27 of GN No 446 of 2013, he was blatantly wrong for refusing to grant to the local bidders the respective margin of preference.

Having so found, the Members of the Appeals Authority deem it unnecessary to dwell at length on the issue of nationality of the proposed successful bidder. It suffices to point out that documentary evidence submitted during the tender process indicate conclusively that the proposed successful bidder, is in fact a foreign firm duly registered and incorporated here in Tanzania. There is in place a Certificate of Incorporation issued under the Companies Act and a Certificate of Registration issued by the CRB dated July 2014 in which the said firm is categorized as a foreign company.

According to Section 51(3) of the Act, a foreign tenderer is required to be registered by appropriate professional statutory bodies after being awarded the tender. The appropriate statutory body referred to herein is CRB. The

proposed successful tenderer has attached to his bid a certificate which shows that it had already been registered by CRB probably after it won other tenders, and the certificate has been attached to this tender to prove its compliance with the laws of the land.

The Appeals Authority rejects the Respondent's argument that a Certificate of Incorporation *per se* is sufficient proof that an entity is a local company. It should be noted that the determining factor between a local and foreign company is founded in the shareholding structure as contained in the respective Memorandum and Articles of Association. The said documents were not attached in the successful tenderer's bid; hence, it was not possible to know the status of a company being foreign or local based on the Certificate of Incorporation alone.

The Appeals Authority revisited, the Invitation for Tender and the Tender Document and noted that the proposed project was to be funded exclusively by the Respondent. In view of that, the Appeals Authority revisited Section 55 (1) of the Act read together with Regulation 39(1) of GN No 446 of 2013 which provide as follows-

S.55(1) **“Where financial resources are exclusively provided by a Tanzanian public body, each procurement of works, goods or services that has a value not exceeding a threshold specified in the Regulations shall be reserved exclusively for local persons or firms.”**

Reg. 39(1) “The procurement of works, goods, consultancy or non consultancy services with a value not exceeding the amount prescribed in the ninth and thirteenth schedules to these Regulations, **shall be reserved exclusively for local persons or firms who meets the requirements of section 51 of the Act.**” (Emphasis supplied)

The above quoted provisions entail that, in order for a tender to be reserved exclusively for local firms or persons the proposed project has to be funded by a public body and its value should not exceed the threshold specified in the ninth and thirteenth schedules which is Tanzania Shillings ten billion (TZS 10,000,000,000/-).

The proposed amount for award of this tender is TZS 574,282,227.72. It is the Appeals Authority's considered view that, for this amount of money, and as there were foreign bidders participating, the Respondent ought to have granted the necessary margin of preference to eligible local contractors as required by the law. As clearly elaborated herein above, by virtue of Clause 22 of the TDS, the Respondent did not apply the principle of exclusive preference enshrined in the law by refusing to grant the allowable margin of preference of ten per centum to local bidders.

Accordingly, the Appeals Authority's conclusion with regard to the first issue is that, the proposed award to the successful tenderer is not proper in law.

With regard to the Appellant's contention regarding M/s Chongqing International Construction Corporation, the Appeals Authority cannot entertain the said complaint since it is a new ground of appeal that was not raised to the Accounting Officer when the 1<sup>st</sup> Appellant applied for administrative review.

**1. To what relief(s), if any, are parties entitled to;**

In resolving this issue, the Appeals Authority took cognizance of its findings on the first issue that Respondent erred in law for his refusal to grant margin of preference to local bidders as required by the law. Consequently, the intention to award the contract to the proposed successful bidder is hereby quashed and set aside. The Appeals Authority upholds the prayers by the Appellants by ordering the Respondent to conduct re-evaluation of the tenders from the price comparison stage in compliance with the law.

Regarding the Appellants' prayers for compensation for Appeal filing fees, the Appeals Authority grants the same on the following breakdown-

- 1<sup>st</sup> Appellant – TZS 200,000/-
- 2<sup>nd</sup> Appellant – TZS 150,000/-

**Total TZS 350,000/-**

In the final analysis, the Appeals Authority rejects the Respondent's prayers and the appeal is allowed.

It is so ordered.

The Right of Judicial Review as per Section 101 of the PPA/2011 has been explained to parties.

This Decision is delivered in the presence of the Appellants and in the absence of the Respondent this 1<sup>st</sup> April 2016.

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