

IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY
AT DAR ES SALAAM
APPEAL CASE NO. 3 OF 2014-15

BETWEEN

M/S ADVENT CONSTRUCTION LTD.....APPELLANT

AND

**TANZANIA INSTITUTE OF
ACCOUNTANCY.....RESPONDENT**

DECISION

CORAM

- | | |
|--------------------------------------|----------------|
| 1. Hon. Augusta G. Bubeshi, J. (rtd) | -Chairperson |
| 2. Mr. Kesogukewe M. Msita | -Member |
| 3. Mr. Francis T. Marmo | -Member |
| 4. Mr. Haruni S. Madoffe | -Member |
| 5. Mr. Ole-Mbille Kissioki | -Ag. Secretary |

SECRETARIAT

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

FOR THE APPELLANT

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|----------------------|--------------------------|
| Ms. Isabel Mwangangi | - Administration Manager |
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FOR THE RESPONDENT

- | | |
|---------------------------|--|
| 1. Mr. Pius Seda | -Head of Procurement
Management Unit (HPMU) |
| 2. Mr. Said B. M. Mayunga | -Legal Officer |
| 3. Ms. Juliana Musomi | -Senior Supplies Officer |
| 4. Ms. Zaina Mbwambo | -Estate Manager |
| 5. Mr. Dickson I. Biya | - Supplies Officer |

FOR THE OBSERVER

1. Mr. Gasper Peter - Quantity Surveyor- Tanzania
Building Works Ltd
2. Mr. Hussein S. Suma -Engineer- Beijing Construction
Engineering Works Ltd

This decision was scheduled for delivery today 20th August, 2014 and we proceed to deliver it.

The Appeal at hand was lodged by **M/S ADVENT CONSTRUCTION LTD** (herein to be referred to as "**the Appellant**") against the **TANZANIA INSTITUTE OF ACCOUNTANCY** commonly known by its acronym TIA (hereinafter to be referred to as "**the Respondent**").

The said Appeal is in respect of Tender NO. PA/094/2013/2014/w/12 for Proposed Construction of Academic Block at Dar es Salaam Campus (hereinafter referred to as "**the tender**").

According to the documents submitted to the Public Procurement Appeals Authority (hereinafter referred to as "the Appeals Authority"), as well as oral submissions by the parties during the hearing, the facts of the Appeal may be summarized as follows:

The Respondent vide the Daily News of 5th May, 2014, invited tenderers to submit their tender for the tender under appeal.

The said tender was conducted through the National Competitive Tendering procedures specified in the Public Procurement Act No. 7 of 2011(hereinafter referred to as the "PPA/2011") and the Public Procurement Regulations No. 446 of 2013 (hereinafter referred to as GN. No. 446/2013).

The deadline for submission of the tender was 26th May, 2014; whereby eleven tenders were received from the following firms below:-

S/N	NAME OF THE BIDDER	QUOTED PRICE IN TSHS (VAT INCLUSIVE)
1.	M/s Group Six International Ltd	7,700,294,966.00
2.	M/s Masasi Construction Co. Ltd	8,274,385,620.00
3.	M/s United Builders Ltd	7,981,861,940.00
4.	M/s Advent Construction Ltd	7,412,099,555.00
5.	M/s Tanzania Building Works Ltd	7,390,762,676.00
6.	M/s Beijing Construction Engineering Works Ltd	7,498,325,734.00
7.	M/s Catic International	7,894,317,056.00

	Engineering (T) Ltd	
8.	M/s J.E. Construction Co. Ltd	7,884,760,000.00
9.	M/s China Railway Jiang Chang Engineering Co. Ltd	8,148,171,122.74
10.	M/s ChongQing International Construction Corporation Ltd	6,789,817,350.00
11.	M/s B.H. Ladwa Ltd	7,818,812,160.00

The tenders were then subjected to three stages of evaluation, namely; preliminary, detailed and post qualification.

During the preliminary evaluation, all tenders were found to be substantially responsive to the Tender Document.

All tenders were then subjected to detailed evaluation whereby tenders were checked to determine their technical compliance and arithmetic errors. At this stage, two tenders by M/s J.E. Construction Co. Ltd and M/s B.H. Ladwa Ltd were disqualified for

being non responsive to the Tender Document, while the remaining nine tenders were subjected to correction of errors.

The Evaluation Committee found that the tender submitted by M/s ChongQing International Construction Corporation Ltd had an arithmetic error under item B of Bill No. 3. Following correction of the said error the tender price increased from Tshs 6,789,817,350.00 to Tshs 6,881,567,070.00 VAT Inclusive. Thereafter the tenders were ranked as follows;

B/N	Name of the Bidder	Correction of Error(s)	Corrected Tender Price in Tshs	Ranking
10.	M/s ChongQing International Construction Corporation Ltd	377,784,000.00	6,881,567,070.00	1

5.	M/s Tanzania Building Works Ltd	0	7,390,762,676.00	2
4.	M/s Advent Construction Ltd	0	7,412,099,555.18	3
6.	M/s Beijing Construction Engineering (T) Ltd	0	7,498,325,734.00	4
1.	M/s Group Six International Ltd	0	7,700,294,966.00	5
7.	M/s Catic International Engineering (T) Ltd	0	7,894,317,056.00	6
3.	M/s United Builders Ltd	0	7,981,861,940.00	7

9.	M/s China Railway Jiang Chang Engineering Co. Ltd	0	8,148,171,122.74	8
2.	M/s Masasi Construction Co. Ltd	0	8,274,385,616.00	9

The Evaluation Committee therefore recommended award of the tender to M/s ChongQing International Construction Corporation Ltd at a contract price of Tshs 6,881,567,070.00.

The Tender Board at its meeting held on 6th June, 2014, approved award of the tender as recommended.

On 9th June, 2014, the Respondent vide a letter referenced BC/250/260/01/II/138, notified the Appellant their intention to award the tender to M/s ChongQing International Construction Corporation Ltd.

On 13th June, 2014, the Appellant sought for administrative review to the Respondent's Accounting Officer on the ground that;

- a) The intended successful tenderer had insufficient experience
- b) The intended successful tenderer had no competence and
- c) The Evaluation Committee had insufficient/inadequate diligence in evaluating the tender.

On 27th June, 2014, the Respondent's Accounting Officer vide a letter referenced BC.1/202/01/21, delivered his decision by dismissing the complaints for lack of merits.

Being dissatisfied with the Respondent's decision, on 11th July, 2014, the Appellant lodged their Appeal to the Public Procurement Appeals Authority (hereinafter referred to as the "**Appeals Authority**")

SUBMISSIONS BY THE APPELLANT

The Appellant's arguments as deduced from documents availed to this Authority may be summarized as follows;

That, the intended successful tenderer has insufficient experience.

That, the intended successful tenderer has no competence.

That, there was inadequate and insufficient diligence in the evaluation process.

That, the Appellant had higher qualifications than the other tenderers including the intended successful tenderer.

Finally the Appellant orally prayed for the following orders;

- a) Cancellation of award of the tender
- b) Re-evaluation of the tender by a different Evaluation Committee.

RESPONDENT'S SUBMISSIONS

The Respondent's documentary, oral submissions as well as responses from questions raised by the Members of the Authority during the hearing may be summarized as follows:

That, the tender was evaluated in compliance with Regulations 203- 223 of GN. No. 446/2013 whereby the intended successful tenderer was found with adequate experience. Further that the said successful tenderer had been awarded a tender by the Respondent for construction of Lecture Theatre at Mtwara which is going well and is at a completion stage.

That, technical evaluation revealed that the successful tenderer had competence to undertake the project. Furthermore, post qualification conducted to the successful tenderer's tender proved that, they have undertaken various related project successfully and that they are capable of executing the project.

That, the Evaluation Committee was competent and efficient enough to perform the task and that's why they conducted evaluation process within the time limit given by the Accounting Officer, which was five days only.

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

ANALYSIS BY THE AUTHORITY

It should be noted that upon receipt of the notice of hearing of the matter by the Appeals Authority, the Appellant in response thereof wrote a letter to the Appeals Authority to the effect that, they will not appear for hearing of the Appeal but they authorized the Appeals Authority to proceed with determination of the Appeal based on documents availed before the Appeals Authority. However, they sent their representative to submit on the reliefs sought. Therefore, determination of this Appeal is based on Appellant's documentary evidence, the oral submission on reliefs and documentary as well as oral submission by the Respondent.

Having gone through the documents submitted and having heard oral submissions by the Respondent, the Authority is of the view that the Appeal is centered on the following three issues:

1.0 Whether the Appellant was unfairly disqualified.

2.0 Whether the intended award of the tender to the successful tenderer was proper at law.

3.0 To what reliefs, if any, are the parties entitled to

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

1.0 Whether the Appellant was unfairly disqualified.

In resolving this issue the Appeals Authority considered the Appellant's contention that they had higher qualifications than all the other tenderers including the intended successful tenderer. Thus, they ought to have been awarded the tender.

In order to ascertain whether the Appellant's disqualification was justified, the Appeals Authority examined the Tender Document, the Evaluation Report and the Appellant's tender vis-à-vis the Applicable law. In the course of doing so, the Appeals Authority

observed that, the tenders were evaluated in three stages; namely preliminary, detailed and post qualification.

The Appellant's tender was qualified for detailed evaluation and their tender was found to be substantially responsive to the technical requirements. However, they were disqualified during ranking when their tender was ranked the third. Thus, they were not the lowest evaluated tenderer in terms of Regulation 212 (a) of GN.No. 446/2013, which reads as follows;

Reg. 212. "The successful tender shall be-

- (a) the tender with the lowest evaluated tender price in case of goods, works or services, or the highest evaluated tender price in case of revenue collection, but not necessarily the lowest or highest submitted price, subject to any margin of preference applied".

The Appeals Authority found no flaws in the evaluation exercise.

In view of the above, the Appeals Authority is of the settled view that, the Appellant was fairly disqualified.

Accordingly, the Appeals Authority's conclusion in respect of the first issue is that the Appellant was fairly disqualified.

2.0 Whether the intended award of the tender to the successful tenderer was proper at law.

In resolving this issue the Appeals Authority considered the Appellant's main contentions that, the intended successful tenderer M/s ChongQing International Construction Corporation Ltd had insufficient experience and that they were incompetent to execute the works, if awarded.

In order to ascertain the validity of the Appellant's contentions regarding this issue, the Appeals Authority reviewed the intended successful tenderer's tender, the Tender Document vis-a vis the applicable law. In the course of doing so, the Appeals Authority observed that, Clause 8 of the Bid Data Sheet (hereinafter referred to as "BDS"), provided for the information or materials to be submitted including;

- i. the minimum required annual volume of Construction work for the successful Tenderer in any of the last 2 years shall

be: Tshs. 20,000,000,000.00 this should be supported by audited financial account

- ii. the essential equipment to be made available for the contract by the successful Bidder (proposals for timely acquisition or own, lease, hire, etc) shall be:

i) 7 Ton lorry tipper	-10 No.
ii) Concrete Mixer	- 2 No
iii) Pickup	- 6 No
iv) Poker vibrator	- 4 No
v) Scaffolding	- 500m2
vi) Tile Cutting Machine	- 5 No
vii) Steel Cutting Machine	- 1 No
viii) Crane Machine	- 1 No.

- iii. A site Manager Civil/Structure Engineer (1Number) – registered with 15 years general experience in works of an equivalent nature and volume; Site Engineer (3-Number) (Structural/Civil Engineer-registered) 8 years general experience and 5years particular experience; Project Quantity Surveyor (1-Number)- Registered with 4-years experience, General Foreman (12-Number) (Civil Technician)- 20 years general experience and 8 years

particular experience and; Technician (Civil Technician) 8 years general experience and 5years particular experience, Safety Officer (1-Number)– attended OSHA Training Course.

- iv. Evidence of adequate working capital/line of credit specific for this contract should be a minimum of Tshs. 1, 500,000,000.00 based on Audited Financial Account/bankers reference.

The Appeals Authority observed that, indeed, the proposed successful tenderer's tender contained sufficient evidence of their experience in projects of similar nature. They had also attached seven contracts of similar nature which they had executed prior to this tender; and the value of the five projects amongst those attached exceeded the required threshold of Tshs 20,000,000,000.00 stated in the Tender Document. Hereunder is what they had submitted in their tender;

S/N	Project Name and Country	Name of Client	Type of Work Performed and year of Completion	Value of Contract
1.	Proposed Construction of "Chengnanjiayuan" Residential Housing Project, China	Chongqing Municipality	45 nos of 32 storey high-rised residential building with construction area of 1,100,000m ² . 12/12/2009	USD 317 Million.
2.	Chongqing "Min'an Huafu" Residential Housing Project, China	Chongqing Municipality	23 nos of 32 storey high-rised residential buildings with construction area of	USD 159 Million.

			560,000m2 within 18 months. 20/4/2010	
3	Chendu New Fukang Residential Town Project, China.	Chendu Municipality	Including complex high-rised buildings including shopping mall, residential, etc. 22/12/2011	USD 79 Million
4.	Chonqing Fusheng Housing Project	Chongqing Municipality	9 nos of 32 storey high- rised residential buildings with construction area of 200,000m2.	USD 65 Million

			5/8/2012	
5.	Proposed Construction of Harborview Residential Housing Project	Chongqing Municipality	23 nos of high-rised residential buildings with commercial buildings and external works. Total Construction area is 284,000sm. 12/12/2013	USD 40,000,000
6.	Proposed Consruction of Lecture Hall at TIA-Mtwara Campus	TIA	Two storeys reinforced concrete frame building with steel roofing structure. 14/8/2014	Tshs. 1,390,000,000.00

7.	Proposed Commercial Residential Building to be build on Plot No. 2 Block KBXVI in Tanga Raskazone Area	Safe Investment	Seven storey reinforced concrete frame building and external works. Building up area around 5000sm. 10/2/2015	Tshs. 3,800,000,000.00
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The Appeals Authority noted further that, the above projects were evaluated during the detailed evaluation stage when the Evaluation Committee was evaluating technical compliance of tenders and the proposed successful tenderer was found to be responsive to the requirement of the Tender Document.

With regard to financial capability, the Appeals Authority observed that, the proposed successful tenderer had attached four Audited Financial Statements, the latest being Audited Financial

Statement dated 25th April, 2014 with a value of USD 9,256,170.17, which greatly exceeded the required working capital of Tshs. 1,500,000,000 billion contained in the Tender Document.

The Appeals Authority further observed that, the Respondent's conduct in the disputed tender process and subsequent proposed award thereof to the successful tenderer neither contravened the Tender Document nor the Act and its Regulations. Thus, there was no wrong doing on the part of the Respondent in relation to the intended award. The Appeals Authority wishes to take judicial notice that a duly registered Class One Contractor by CRB would ordinarily have requisite competence and capability to execute such a project like the one under Appeal which to a contractor of such class would be a relatively small one.

Accordingly, the Appeals Authority's conclusion with regard to this issue is that, the intended award of the tender to the successful tenderer was proper at law.

The above findings and conclusions, notwithstanding, the Appeals Authority considered the Appellant's contention that, there was inadequate and insufficient diligence in the evaluation process of

the tender for being evaluated within nine (9) days which were not enough to evaluate the tender in question.

In order to determine the validity of the Appellants contention regarding this matter, the Appeals Authority revisited the Tender Document and the law, and observed that none of the above provide for specific a time frame within which the evaluation exercise of the tenders was to be conducted. The Appeals Authority is of the view that, determination of the time within which an evaluation is to be conducted is within the discretion and judgement of the Accounting Officer depending on the size and complexity of the tender in question and the competency and efficiency of the evaluators. Indeed in determining the quality and validity of an evaluation it is not the length within which it is carried out that counts. Rather it is whether it is professionally and comprehensively done and leaves no stone unturned. The Appeals Authority hastens to observe that there were no material shortcomings in the evaluation exercise. Furthermore, completing a task such as this within a short time may as well be a measure of efficiency and not otherwise. Thus, there was no illegality in the evaluation process and as observed before, the tender process was done in compliance with the law.

3.0 To what reliefs, if any, are the parties entitled to

Having analyzed the contentious issues in dispute, the Appeals Authority finds it prudent to consider prayers by the parties.

To start with, the Authority considered the Appellant's prayers that, the intended award of the tender to the successful tenderer be cancelled and the evaluation of the tender be done afresh by a different Evaluation Committee. The Appeals Authority rejects these prayers, because, the Appellant was fairly disqualified, and that the proposed award of the tender to the successful tenderer was properly evaluated by the Evaluation Committee. Furthermore, it is a general principle of law that, "he who alleges must prove". The Appellant in this case made many allegations without supporting proof thereof and even opted, much as it is his right, to rely on submitted documents without physical appearance thereby denying himself the opportunity to substantiate and elaborate his claims.

With regard to the prayer by the Respondent that the Appeal be dismissed for lack of merits, the Appeals Authority concurs with them as established in its analysis and hereby dismisses the Appeal in its entirety.

In view of the above findings, the Appeals Authority hereby dismisses the Appeal for lack of merits and orders each party to bear their own costs.

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

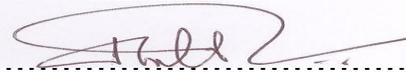
Decision delivered in the absence of the parties though notified this 20th August, 2014.

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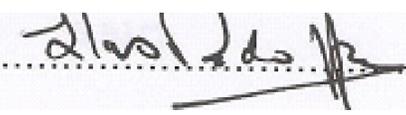
JUDGE (rtd) A. BUBESHI

CHAIRPERSON

MEMBERS:

1. MR. K. M. MSITA..........

2. MR. F. T. MARMO..........

3. MR. H. S. MADOFFE..........