

IN THE PUBLIC PROCUREMENT APPEALS AUTHORITY

APPEAL CASE NO. 12 OF 2022-23

BETWEEN

M/S NATURERIPE KILIMANJARO LTD.....APPELLANT

AND

AIR TANZANIA COMPANY LTD.....RESPONDENT

DECISION

CORAM

- | | |
|------------------------|-------------------|
| 1. Adv. Rosan Mbwambo | - Ag. Chairperson |
| 2. Eng. Stephen Makigo | - Member |
| 3. Dr. William Kazungu | - Member |
| 4. Ms. Florida Mapunda | - Ag. Secretary |

SECRETARIAT

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

FOR THE APPELLANT

- | | |
|--------------------------|--|
| 1. Mr. Deogratias Ringia | - Advocate- Safari Africa ARBT & Legal |
| 2. Ms. Fatma Riyami | - Managing Director |
| 3. Mr. Makame Kidege | - Finance Manager |

FOR THE RESPONDENT

1. Mr. Benedict Temba - State Attorney
2. Mr. Fredrick Kukanzibwa - Head Procurement Management Unit
(HPMU)

M/S Natureripe Kilimanjaro Ltd (hereinafter referred to as "**the Appellant**") has lodged this appeal against Air Tanzania Company Ltd commonly known by its acronym as "**ATCL**" (hereinafter referred to as "**the Respondent**"). The Appeal is in respect of Tender No. PA/100/2021-2022/HQ/G/26 for Supply of Roasted Cashewnuts under Framework Agreement (hereinafter referred to as "**the Tender**"). According to the documents submitted to the Public Procurement Appeals Authority (hereinafter referred to as "**the Appeals Authority**") background of this Appeal may be summarized 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 by GN. No. 333 of 2016 (hereinafter referred to as "**the Regulations**").

The Respondent floated the Tender on 24th May 2022 through Tanzania National e-Procurement System (TANePS). Deadline for submission of Tenders was set for 15th June 2022. On the deadline seven tenders were received including that of the Appellant.

Tenders were accordingly evaluated. After completion of the evaluation Evaluation Committee recommended award of the Tender to M/S Royal Cashewnuts at a contract price of TZS 1,935.20 (Tanzanian Shillings one



thousand nine hundred thirty five cents twenty only) per 50g packet VAT inclusive for a period of three years subject to negotiations. On 2nd August 2022, negotiations were successfully conducted. The Tender Board through a Circular Resolution No. 018 dated 3rd August 2022 approved the negotiation report.

On 15th August 2022, the Respondent issued a Notice of Intention to award the Tender to M/S Royal Cashewnuts at a contract price of TZS 1,888.00 (Tanzanian Shillings One Thousand Eight Hundred and Eighty Eight only) VAT inclusive per 50g packet. The Notice also informed the Appellant that its tender was disqualified for attaching Tanzania Bureau of Standards (TBS) certificate of quality for raw cashewnuts instead of certificate of quality for roasted cashewnuts.

Dissatisfied with the reason given for its disqualification, on 19th August 2022, the Appellant applied for administrative review to the Respondent. On 22nd August 2022, the Respondent issued its decision dismissing the Appellant's application. Aggrieved further, on 29th August 2022, the Appellant filed this Appeal.

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?

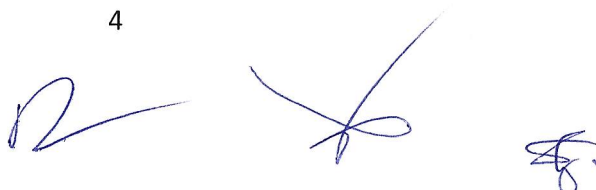


SUBMISSIONS BY THE APPELLANT

The Appellant was represented by Mr. Deogratias Ringia, learned counsel. He firstly adopted all what is stated in the statement of appeal. The learned counsel submitted that the Appellant has been supplying roasted cashewnuts to the Respondent for the past nine years to date. When the Appellant started supply of roasted cashewnuts to the Respondent, TBS had no standards for cashewnuts. The Appellant in collaboration with TBS developed standards for cashewnuts and was named as Cashew kernels which were all roasted.

The counsel submitted further that in all the nine years the Appellant has been working with the Respondent, it has been submitting TBS Certificate of quality titled TZS 739 Cashew kernels and the same was accepted as a valid certificate for supply of roasted cashewnuts. There has never been an issue of roasted or raw cashewnuts for all this time as the Appellant supplied only roasted cashewnuts, the learned counsel contended.

It was also the submission of the Appellant that Clause 13.3(b) of the Instructions to Tenderers (ITT) as modified by Clause 14 of Tender Data Sheet (TDS) required tenderers to submit TBS certificate of quality. The Appellant accordingly attached to its tender the required certificate. In the notice of intention to award it was indicated that the Appellant was disqualified because it provided a certificate of quality for raw cashewnuts instead of a certificate for roasted cashewnuts. The Appellant submitted that there was no requirement in the Tender Document that required tenderers to submit TBS certificate of quality for roasted cashewnuts. Disqualification of the Appellant for the reason

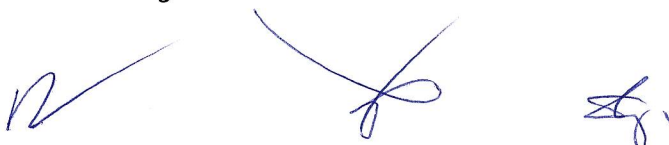


stated in the notice of intention to award is based on an alien criterion which was not provided for in the Tender Document contrary to Regulation 203 of the Regulations. It is therefore, not justified.

The learned counsel submitted further that the Respondent intends to award the Tender to a tenderer whose price is higher than the price quoted by the Appellant. According to the Appellant the proposed successful tenderer's price per a 50g packet is TZS 1,888.00 while the Appellant's price per a 50g packet is TZS 1,852.00. The Appellant asserted that there would be no value for money should the award of the Tender to the proposed successful tenderer remains undisturbed.

The Appellant submitted further that the Respondent has indicated in its statement of Reply that it asked TBS for clarification on the authenticity of the certificates of quality submitted by the Appellant and the proposed bidder. According to the Appellant there was no need for the Respondent to approach TBS for clarification. The request was subjective and was designed to seek answers that the Respondent wanted to justify disqualification of the Appellant. The Appellant added that to have equal treatment of tenderers, the Respondent ought to have verified the authenticity of certificates submitted by all tenderers and not certificates submitted by the Appellant and the proposed successful tenderer only. The learned counsel concluded his submissions insisting that the disqualification of the Appellant was not justified.

As to the reliefs the Appellant prayed for an order of the Appeals Authority declaring that the disqualification of the Appellant in the Tender process was not justified; and that the Respondent may be



ordered to re-start the Tender process in observance of the law. The Appellant also asked for costs and any other relief the Appeals Authority may deem fit and just to grant.

REPLY BY THE RESPONDENT

Mr. Benedict Temba learned state attorney appeared for the Respondent. He commenced his submissions by conceding that the Respondent has been working with the Appellant for the past nine years and that it is still providing roasted cashewnuts to the Respondent. The learned state attorney was, however, quick to point out that the fact that the Appellant has been working with Respondent for all these years does not make it different from other tenderers.

It was submitted that Regulation 4(2) of the Regulation requires the Respondent to accord tenderers equal opportunity when conducting tender process. One of eligibility criteria was for all tenderers to submit TBS certificate of quality. According to the Respondent the Tender is for supply of roasted cashewnuts, thus it was expected that any diligent tenderer would submit TBS certificate of quality relating to supply of roasted cashewnuts even though it was not explicitly stated so in the Tender Document.

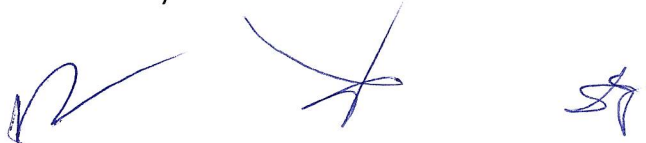
It was submitted further that since the Respondent fly within and outside the country, it was imperative to observe international standards of what it supplies to its passengers. In complying with safety standards, the Respondent required tenderers to submit TBS certificate of quality which would certify that the roasted cashewnuts to be supplied have been approved.



During evaluation the evaluation committee noted some inconsistencies in the certificates submitted by the Appellant and that of the proposed successful tenderer. According to the learned state attorney, it was necessary to verify the authenticity of the two certificates from TBS. The Respondent officially requested for verification and in response TBS confirmed that both certificates were authentic. TBS also clarified that the certificate submitted by the proposed successful tenderer is the one issued for roasted cashewnuts. Following this confirmation, the Respondent proceeded to award the Tender to the proposed successful tenderer.

The learned state attorney further submitted that TBS certificate of quality for cashew kernels submitted by the Appellant is very wide. It may be used for supply cashewnuts in different forms like raw, boiled, roasted, spiced, steamed etc. Since the Tender is for supply of roasted cashewnuts, the Appellant was required to read the requirement of Clause 14 of TDS together with all other requirements provided for in the Tender Document. The Appellant should not have read the requirement of Clause 14 of TDS in isolation of other provisions. Had the Appellant read the Tender Document as a whole, it would have understood that the certificate required under Clause 14 of TDS relates to supply of roasted cashewnuts, the learned state attorney insisted.

Regarding the proposition on prices, the Respondent submitted that the price quoted by the Appellant is slightly lower than what was quoted by the proposed successful bidder. However, the Appellant was disqualified at a preliminary evaluation stage as such the Appellant's bid did not reach the stage of price comparison.

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The learned state attorney insisted that the Appellant submitted a certificate which is not for roasted cashewnuts and therefore its disqualification was justified.

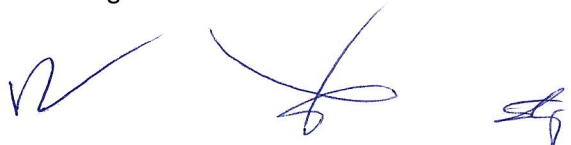
As to the reliefs the Respondent prayed for dismissal of the Appeal and an order to allow the Tender process to proceed. In the alternative, the learned state attorney prayed that should the Appeals Authority find any irregularities in the disqualification of the Appellant then for the interest of time the Appeals Authority may be pleased to order re-evaluation of the Tender instead of tendering afresh.

ANALYSIS BY THE APPEALS AUTHORITY

Whether the disqualification of the Appellant's tender was justified.

The Appellant has been disqualified because it submitted TBS certificate of quality for raw cashewnuts instead of roasted cashewnuts. The Appellant's complaint before this Appeals Authority is that there was no requirement in the Tender Document demanding tenderers to submit TBS certificate of quality for roasted cashewnuts. All what was required is to submit TBS certificate of quality of which the Appellant did. According to the Appellant it submitted TBS certificate of quality No. 739 Cashew kernels which has been used to supply roasted cashewnuts to the Respondent for the past nine years.

The Respondent on its part contended that the Tender was for supply of roasted cashewnuts. The certificate of quality should be specifically for roasted cashewnuts and not a general one like that of Cashew kernels. According to the Respondent there is no ambiguity in the Tender



Document, reading it in a whole, not in isolation like the Appellant appears to have done. Therefore, the Appellant did not submit a certificate of quality for roasted cashewnuts and was consequently disqualified.

Clause 13.3(b) of the ITT as modified by Clause 14 of TDS read as follows:-

Clause 13.3(b):

"The documentary evidence of the Tenderer's qualifications to perform the contract if its Tender is accepted shall establish to the PE's satisfaction:-

(b) the Tenderer has the financial, technical and production capability necessary to perform the contract, meets the qualification criteria specified in the TDS."

Clause 14:

"The qualification criteria required from tenderers in ITT Clause 13.3(b) is modified as follows:

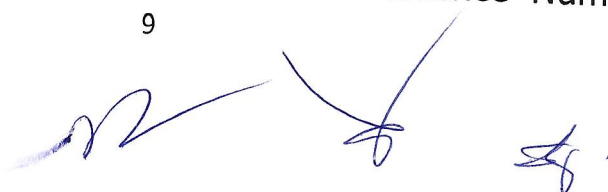
ELIGIBILITY CRITERIA

*(vii) **Tanzania Bureau of Standard certificate of Quality.**"*

(Emphasis supplied)

The above quoted clauses indicate that tenderers were required, amongst others, to submit TBS certificate of quality to comply with eligibility criteria.

To ascertain if the Appellant complied with the above requirement, the Appeals Authority reviewed the Appellant's Tender on TANePS and observed that, it attached TBS certificate with Licence Number '705

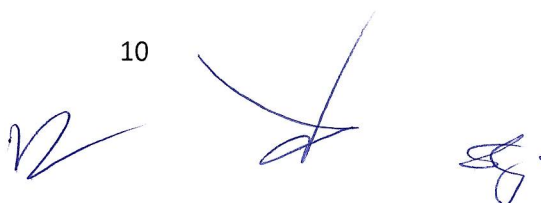


Cashew Kernels (W320, W450)', Standard and Title No 'TZS 739 Cashew kernels –Specification'. The Appeals Authority also reviewed TANEPS records as submitted by the proposed successful tenderer and noted that it submitted TBS certificate with Licence Number 4628, Standard and Title No. TZS 1535.

The Respondent through a letter dated 12th July 2022 inquired from TBS the authenticity of the submitted certificates. The Respondent letter was titled "CONFIRMATION OF CERTIFICATES OF QUALITY FOR ROASTED CASHEWNUTS". In response to the Respondent's letter, TBS through a letter dated 13th July 2022 titled "AUNTHENTICITY OF THE SUBMITTED TBS LICENCES FOR CASHEWNUTS" confirmed that licence number 4628 issued to the proposed successful tenderer and licence number 705 issued to the Appellant were all authentic. TBS in its letter added that: *"Moreover, licence number 4628 (Royal Cashewnuts), is the one issued to use TBS mark on roasted cashewnuts as per specified standards."*

During the hearing the Respondent confirmed that TBS certificate submitted by the Appellant can be used for supply of cashewnuts in a variety of forms like roasted, spiced, steamed, etc. This means, in the Appeals Authority's view that cashew kernels is not exclusively for raw cashewnuts but inclusive of roasted cashewnuts.

Therefore, since both the Appellant and the proposed successful tenderer submitted TBS certificates of quality which can be used to supply roasted cashewnuts; and the fact that the Tender Document did not explicitly required tenderers to submit TBS certificate of quality for roasted cashewnuts, the Appeals Authority finds the act of the



Respondent to disqualify the Appellant on the ground that it did not submit certificate of quality for roasted cashewnuts was not justified.

Regarding prices, the Appeals Authority agrees with the Respondent that the Appellant's bid did not reach price comparison stage and therefore the issue of price cannot be raised at this juncture.

Based on the above findings the Appeals Authority concludes the first issue in the negative that the Appellant's disqualification is not justified.

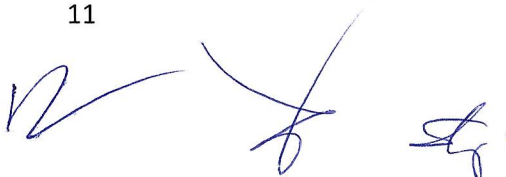
What reliefs, if any, are the parties entitled to?

Taking cognizance of the findings on the first issue hereinabove that the Appellant was unfairly disqualified, the Appeals Authority hereby allows the Appeal. Since the Appellant was unfairly disqualified at the preliminary evaluation stage, the Appeals Authority hereby orders the Respondent to reinstate the Appellant in the Tender process and re-evaluate the tenders in accordance with the law. We make no order as to costs.

It is so ordered.

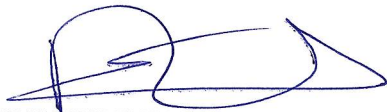
This decision is binding and can be enforced in accordance with Section 97(8) of the Act.

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 05th day of October 2022.

ADV. ROSAN MBWAMBO



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Ag: CHAIRPERSON

MEMBERS: -

1. ENG. STEPHEN MAKIGO



2. DR. WILLIAM KAZUNGU

