

IN THE PUBLIC PROCUREMENT APPEALS AUTHORITY

APPEAL CASE NO. 48 OF 2022-23

BETWEEN

M/S SOBETRA UGANDA LIMITED.....APPELLANT

AND

TANZANIA NATIONAL ROADS AGENCY.....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. Marco Mkumbo - Advocate - Steward & Shitong Attorneys
2. Mr. Wallace B. Mfuko - Advocate - Steward & Shitong Attorneys
3. Mr. Wilson Anyira - Local Representative
4. Mr. Reuben Vuhasho - Tendering Engineer
5. Mr. Siegfried Mtei - Consultant

FOR THE RESPONDENT

- | | |
|------------------------|--|
| 1. Mr. Kenan Komba | - Chief Legal Counsel |
| 2. Mr. Gurisha Muwanga | - Senior Legal Counsel |
| 3. Ms. Huruka Kissiwa | - Senior Procurement Officer |
| 4. Mr. Yona Malolo | - Manager, Procurement of GoT Projects |
| 5. Mr. Daniel Shilla | - Manager, Contract & Control |

M/S Sobetra Uganda Ltd (hereinafter referred to as "**the Appellant**") has lodged this Appeal against the **Tanzania National Roads Agency** commonly known by its acronym as "**TANROADS**" (hereinafter referred to as "**the Respondent**"). The Appeal is in respect of Tender No. AE/001/2022-23/HQ/W/14 for Upgrading of Omugakorongo – Kigarama – Murongo Road (111 Km) to Bitumen Standard, Lot 2: Businde – Murongo Section (53.4Km) (hereinafter referred to as "**the Tender**").

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

The Tender was conducted through International 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 28th October 2022 the Respondent floated the Tender through the Tanzania National electronic Procurement System (TANePS). The



deadline for submission of tenders was initially set on 29th November 2022; however, it was extended to 16th December 2022. On the deadline, the Respondent received tenders from the Appellant and M/S China Road and Bridge Corporation (T) Limited.

The received tenders were subjected to evaluation that was conducted into three stages namely preliminary, detailed and Post-qualification. After the evaluation process was completed, the Evaluation Committee recommended award of the Tender to M/S China Road and Bridge Corporation (T) Ltd. The proposed contract price was Tanzania Shillings One Hundred Twenty-Three Billion Three Hundred Eight Million One Hundred Forty One Thousand Two Hundred and Four and Sixty Six cents (TZS 123,308,141,204.66) VAT inclusive.

The recommendations of the evaluation committee were tabled before the Tender Board at its meeting held on 17th February 2023. After deliberations, the Tender Board approved the recommendations subject to negotiations. Negotiations successfully took place on 16th to 23rd March 2023. The negotiations findings were accordingly approved by the Tender Board through its meeting held on 16th March 2023.

On 19th May 2023 the Respondent issued the Notice of Intention to award the Tender. The Notice informed the Appellant that the Respondent intends to award the Tender to M/S China Road and Bridge Corporation (T) Ltd. The proposed contract sum was Tanzania Shillings One Hundred Five Billion Five Hundred Thirteen Million Eight Hundred Ninety-Nine Thousand Three Hundred Twenty Five and Ninety Eight cents (TZS 105,513,899,325.98)



inclusive of all taxes, duties, royalties, levies except 18% of VAT which is estimated at TZS 17,794,241,878.68. The Notice also informed the Appellant that its tender was not considered for award as it was ranked the second during price comparison.

Dissatisfied with the Tender results, on 31st May 2023, the Appellant applied for administrative review to the Respondent challenging the proposed award to M/S China Road and Bridge Corporation (T) Ltd. On 9th June 2023, the Respondent issued its decision which dismissed the Appellant's application for administrative review. Aggrieved further, on 19th June 2023 the Appellant lodged this Appeal to the Appeals Authority.

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

1.0 Whether the proposed award of the Tender to M/S China Road and Bridge Corporation (T) Limited was in accordance with the law; and

2.0 What reliefs, if any, are the parties entitled to.

SUBMISSIONS BY THE APPELLANT

In this Appeal the Appellant's submissions were made by Mr. Marco Mkumbo assisted by Mr. Wallace Mfuko, learned advocates. Mr. Marco Mkumbo commenced the submissions by pointing out that according to the online Tender opening record, the Appellant and M/S China Road and Bridge Corporation (T) Ltd were the only tenderers which participated in this Tender. The learned counsel contended that after the deadline for submission of tenders, the received tenders were subjected to evaluation.



After finalization of all the internal processes, the Respondent issued the Notice of Intention to award which indicated that the Tender was to be awarded to M/S China Road and Bridge Corporation (T) Ltd.

Having received the Notice of Intention to award, the Appellant conducted its own due diligence and found that M/S China Road and Bridge Corporation (T) Ltd was neither registered by the Contractors Registration Board (CRB) nor by the Business Registration and Licensing Agency (BRELA). The learned counsel submitted that Regulation 9(5) of the Regulations requires tenderers in each tender process to provide evidence of their eligibility and proof of compliance with legal, technical and financial requirements. The wording of Regulation 9(5) of the Regulations is in line with Section 51(1), (2) and (3) of the Act and Regulation 118(2) and (3) of the Regulations. The learned counsel elaborated that since the Appellant and M/S China Road and Bridge Corporation (T) Ltd were both local firms, they were required to comply with local registration requirements.

The learned counsel submitted that since M/S China Road and Bridge Corporation (T) Ltd was not registered by the relevant local authorities; it ought to have been found ineligible during preliminary evaluation. To the contrary, the Respondent on its decision to the Appellant's application for administrative review indicated that a tenderer who is intended to be awarded the Tender is M/S China Road and Bridge Corporation and not M/S China Road and Bridge Corporation (T) Ltd. According to the Respondent M/S China Road and Bridge Corporation is the firm that submitted the tender as per the Form of Tender and not M/S China Road and Bridge Corporation (T) Ltd.



The learned counsel disputed the Respondent's assertion on this point as the tender opening record indicates clearly the names of the tenderers which participated in the Tender and M/S China Road and Bridge Corporation was not amongst them. The Appellant claimed not to be privy to the Respondent's internal process. However, the Respondent was duty bound to conduct this Tender process in adherence to the requirement of Section 4A(2) of the Act which requires all tenders to be conducted in a manner that would maximize integrity, competition, accountability, economy, efficiency and transparency.

The learned counsel also submitted that, the Respondent having realized that M/S China Road and Bridge Corporation (T) Limited is ineligible, it attempted to award the Tender to M/S China Road and Bridge Corporation, a tenderer who never participated in this Tender process. The learned counsel expounded that since M/S China Road and Bridge Corporation (T) Limited lacked the requisite qualifications, it misrepresented itself as being a subsidiary of M/S China Road and Bridge Corporation. M/S China Road and Bridge Corporation (T) Limited responded to the Tender by using the documentations and details of M/S China Road and Bridge Corporation.

The learned counsel contended that had the Respondent been careful enough it would have disqualified the tender submitted by M/S China Road and Bridge Corporation (T) Limited for being non-responsive to the Tender requirements. The Respondent's act of qualifying M/S China Road and Bridge Corporation (T) Limited by using the documents of M/S China Road and Bridge Corporation contravenes Regulation 206(2) of the Regulations.

The said provision requires a non-responsive tender to be rejected and it should not subsequently be made responsive by correction or reservation.

The learned counsel submitted that according to TANePS User Manual, tenderers are required to participate in tenders using their names registered on TANePS. That is to say, a company registered on TANePS is expected to use its own account to submit a tender. Clause 3 of the TANePS User Manual strictly prohibits creation or use of fake accounts when submitting tenders. In this Tender M/S China Road and Bridge Corporation (T) Limited is having an account on TANePS; however, the Respondent claimed that same account was used to submit the tender by M/S China Road and Bridge Corporation.

The Appellant submitted that TANePS is a trusted system for processing public tenders, thus if tenderers would be allowed to use one account for submission of tenders by different companies, the same would result in injustice in the procurement process. Section 63 of the Act requires that if the tender is submitted electronically all the information are to be as per the electronic guidance on submission of tenders. In this disputed Tender the Respondent ought to have disqualified M/S China Road and Bridge Corporation (T) Limited for being registered in one name and for bidding in another name. The Respondent equally ought to have not accepted the Tender of M/S China Road and Bridge Corporation that was submitted through the TANePS account of M/S China Road and Bridge Corporation (T) Limited.

7



With regards to the Respondent's contentions that the name of M/S China Road and Bridge Corporation (T) Ltd appearing on the Notice of Intention to award was inadvertent error, the Appellant submitted that if there was an error on the name, the same ought to have been corrected. However, no correction had been effected up to the time this Appeal was lodged.

Finally, the Appellant prayed for the following reliefs: -

- i) Suspension of the Tender process that led award to M/S China Road and Bridge Corporation;
- ii) Find that only the Appellant and M/S China Road and Bridge Corporation (T) Ltd were eligible for evaluation and subsequent award;
- iii) Find that M/S China Road and Bridge Corporation (T) Ltd has misrepresented itself as a local registered subsidiary of M/S China Road and Bridge Corporation and therefore did not qualify to proceed for evaluation pursuant to Clause 3.6 of the ITT;
- iv) Find that M/S China Road and Bridge Corporation (T) Ltd is neither registered locally nor a subsidiary of M/S China Road and Bridge Corporation. Thus, it is not a legal entity qualified to be registered on TANEPS and to participate on this Tender;
- v) A declaration that M/S China Road and Bridge Corporation did not submit any bid for this Tender and therefore it was a ghost tenderer and should not have been considered for award;
- vi) Find that the Respondent has contravened the law by indicating that the tenderer who is to be awarded the Tender is M/S China



Road and Bridge Corporation and not M/S China Road and Bridge Corporation (T) Ltd. The record of the Tender opening and the letter of the Notice of Intention to award indicates that a tenderer for this Tender was M/S China Road and Bridge Corporation (T) Ltd;

- vii) Find the Respondent to have erred in law by indicating that the only bonafide tenderer for this Tender is one indicated in the Form of Tender and not the one registered on TANEPS as a supplier;
- viii) Cancel and recall the letter of Intention to award to M/S China Road and Bridge Corporation (T) Ltd in lieu of (ii) and (iii) above; and
- ix) Find that the Appellant having passed preliminary and detailed evaluation to be the bonafide lowest evaluated tenderer.

REPLY BY THE RESPONDENT

The Respondent's submissions were made by Mr. Gurisha Muwanga, Senior Legal Counsel from the Respondent's office. He commenced his submissions by stating that, the Appellant and M/S China Road and Bridge Corporation were the only tenderers which participated in the Tender. The received tenders were evaluated and after completion, M/S China Road and Bridge Corporation was found to be the lowest evaluated tenderer and was therefore recommended for award. The Respondent's intention to award was communicated to the Appellant on 29th May 2023. Dissatisfied with the Respondent's intention to award the Tender, the Appellant filed an application for administrative review to the Respondent and subsequently

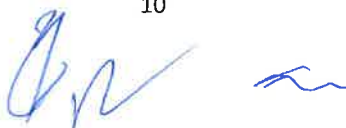


this Appeal, challenging the proposed award to M/S China Road and Bridge Corporation for the reason that the firm did not participate in the Tender.

The legal counsel submitted that according to the Form of Tender attached on TANePS, M/S China Road and Bridge Corporation was a tenderer for this Tender and not M/S China Road and Bridge Corporation (T) Limited. However, the record of the online tender opening indicates M/S China Road and Bridge Corporation (T) Limited to be a tenderer in this Tender. The legal counsel elaborated that, apart from the online tender opening record, all other documents attached on TANePS indicate that M/S China Road and Bridge Corporation was a tenderer for this Tender and has been incorporated in China and was granted a Certificate of Compliance No. 41586 on 21st June 2001 by BRELA.

The legal counsel submitted further that during evaluation it was observed that M/S China Road and Bridge Corporation was a foreign firm and was therefore exempted from registration requirement with appropriate statutory bodies as per Section 51(1), (2) and (3) of the Act read together with Regulation 118(1), (2) and (3) of the Regulations and Clause 3.6 of the ITT read together with Section IV-Qualification and Evaluation Criteria, Item 1.1. According to the said provisions, a foreign tenderer would be obliged to be registered with appropriate statutory bodies after being selected to be the lowest evaluated tenderer. The said registration is to be done prior to the signing of the contract.

The legal counsel submitted further that during evaluation and at the Tender Board meeting, it was observed that the tenderer who is proposed



to be awarded the Tender appears on TANePS with the name M/S China Road and Bridge Corporation (T) Limited while other documents establishing eligibility and qualifications for the Tender indicate that a tenderer is M/S China Road and Bridge Corporation. Having noted such a mismatch of names, the Tender Board directed the Negotiation Team to seek clarification from the respective tenderer. M/S China Road and Bridge Corporation was invited for negotiations and during deliberations, it indicated that it has been using the two names, that is, M/S China Road and Bridge Corporation and M/S China Road and Bridge Corporation (T) Limited interchangeably. The clarification given by a tenderer was supported by an affidavit sworn by one Jiang Quanxin on 4th May 2023.

The legal counsel also submitted that having noted the mismatch of the names of the tenderer who is proposed to be awarded the Tender, the Respondent sought clarification from BRELA on the registration M/S China Road and Bridge Corporation (T) Ltd. In response thereof, BRELA indicated that M/S China Road and Bridge Corporation (T) Ltd does not exist on its register. Thus, since M/S China Road and Bridge Corporation (T) Ltd does not exist, the tenderer for this Tender is M/S China Road and Bridge Corporation. The legal counsel contended that the name M/S China Road and Bridge Corporation (T) Ltd that appears on TANePS might have been entered erroneously by M/S China Road and Bridge Corporation when registering on the system.

The legal counsel contended that when issuing the Notice of Intention to award to M/S China Road and Bridge Corporation, the Respondent inadvertently issued the said notice in the name of M/S China Road and

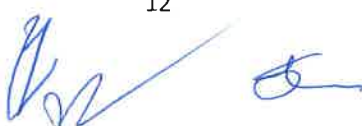


Bridge Corporation (T) Limited based on the name erroneously entered on the record of the online Tender opening. The noted error was clarified to the Appellant through the Respondent's response to the Appellant's application for administrative review. The Respondent submitted further that the error could not have been rectified as the act of doing so would have contravened Section 100 of the Act. The said provision requires that once a complaint or an appeal is lodged, the procurement process to be suspended until the matter is finally determined. Thus, the correction would be done once the Appeal is resolved.

The legal counsel submitted that as per the facts of this Appeal, it cannot be termed that there was a misrepresentation as to the identity of the successful tenderer as alleged by the Appellant. The error committed by the Respondent when communicating the Notice of intention to award was bonafide and had no intention to deceive the Appellant. The procurement process had also no effect of trumping the Appellant's rights as reflected in the evaluation report.

The legal counsel concluded his submissions by addressing the Appellant's prayers and stated that all be dismissed in their entirety as they are baseless and unfounded in law.

On his brief rejoinder the learned counsel for the Appellant submitted that despite the fact that M/S China Road and Bridge Corporation (T) Limited does not legally exist, it has previously been awarded contracts by the Respondent under the same name.



The learned counsel contended further that, according to the online tender opening record M/S China Road and Bridge Corporation (T) Limited was among the tenderers for this Tender, the firm ought to have been evaluated as per its own documents. The Respondent's act of evaluating the said tenderer using the documents of another entity contravenes Regulation 206(2) of the Regulations.

ANALYSIS BY THE APPEALS AUTHORITY

1.0 Whether the proposed award of the Tender to M/S China Road and Bridge Corporation (T) Limited was in accordance with the law

In resolving the contentious argument by the parties on this issue the Appeals Authority revisited the record of Appeal on TANEPS and observed that according to the online tender opening record two tenderers participated in this Tender namely, the Appellant and M/S China Road and Bridge Corporation (T) Limited. The Appeals Authority reviewed the documents attached on the tender of M/S China Road and Bridge Corporation (T) Limited and observed that the Form of Tender, Tender Security, Tenderer's Information Form, Power of Attorney, Anti-Bribery Policy, Audited Financial Statements, previous performed contracts, source of financing, average annual construction turnover, just to mention the few, bear the name of M/S China Road and Bridge Corporation.

The Appeals Authority reviewed the record of Appeal and observed that the Respondent noted the mismatch of the names of the tenderer registered on TANEPS and the documents submitted for the Tender. A tenderer whose name is registered on TANEPS is M/S China Road and Bridge Corporation



(T) Limited. The documents attached to the TANEPS' account of the above named tenderer belong to M/S China Road and Bridge Corporation.

The record of Appeal indicates that, the Respondent having noted the mismatch of names, sought verification from BRELA if M/S China Road and Bridge Corporation (T) Limited exist. In response thereof, BRELA informed the Respondent that M/S China Road and Bridge Corporation (T) Limited does not exist on its register.

During the hearing Members of the Appeals Authority asked the Respondent to clarify on the mismatch of names. In response, the Respondent submitted that having received BRELA's clarification that M/S China Road and Bridge Corporation (T) Limited does not exist, it concluded that the tenderer for this Tender is M/S China Road and Bridge Corporation whose name appears on the Form of Tender and other important documents establishing eligibility uploaded on TANEPS. According to the Respondent, the name M/S China Road and Bridge Corporation (T) Limited that has been registered on TANEPS cannot render a responsive tender submitted by M/S China Road and Bridge Corporation to be non-responsive. The Respondent contended that the registered accounts on TANEPS are not part of the evaluation criteria and therefore cannot be used to disqualify a tenderer from the Tender process.

The Appeals Authority revisited Regulations 340, 345(1),(3),(8),(10) and 351(1) and (2) of the Regulations which provide as follows:-

"340 "centralized registration system" means the single place for all e-PP users to register and provide credentials for



verification for their authenticity to conduct different activities by utilizing tools or features provided by the e-PPs;

"e-PPs portal" means a single web portal, from where and through which procuring entities perform all or some of their e-procurement related functions which include publishing of annual procurement plans, invitation of tenders, request for quotation, tender proposals submission, tender opening, evaluation, auction, contract award notices, contract management, e-payments, procurement management information functions, and any other functions required by the Act and these regulations;

"e-PPs" means electronic Public Procurement system – a system developed, hosted and operated by the Authority or its agent, to enable procuring entity carry out e-procurement;

"e-submission" means submitting tender documents through the e-PPs to participate in a tender and **legally binds the tenderer with the particular tender as authentic tender participant.**

345 (1) A prospective users shall register in the ePPs under an appropriate user category in order to have appropriate access points and to get access to working dashboards with authorized features of the e-PPs.



(3) The registration shall be done through the online centralised registration system of the e-PPs and may be followed by validation of credentials through due-diligence by the Authority.

(8) Users registration for e-PPs shall be completed after the validation of credentials is completed, appropriate registration fees paid, and users confirmed by the Authority.

(10) Upon successful registration in any category the user account shall be assigned a secured dashboard with features that enable the user to perform his roles in e-PPs.

351 (1) A tender submitted electronically shall be considered to be true and legal version, duly authorized and duly executed by the tenderer and intended to have binding legal effect.

(2) The tender shall bear e-signature or digital signatures for identity and authentication purposes and the identity of the tenderer may be verified with a follow-up due diligence process”.

(Emphasis supplied)

The above quoted provisions entail that in order for a tenderer to participate in a Tender through an electronic means, it has to be registered through the online centralized registration system of the ePPs. Upon successful registration, the user account shall be assigned with a secured



dashboard and provided with confidential credentials that would be used to operate the relevant account. Thus, a tenderer who submits a tender through electronic means is bound by the information provided as an authentic participant.

Having related the above quoted provisions to the facts of this Appeal, the Appeals Authority observed that in order for a tenderer to be able to submit its tender electronically, it is required to have an account containing credential information that would identify and bind the tenderer. In the Tender under Appeal the registered firm on TANEPS is M/S China Road and Bridge Corporation (T) Limited. When participating in this tender M/S China Road and Bridge Corporation (T) Limited submitted the documents which bear the name of M/S China Road and Bridge Corporation.

The Appeals Authority is of the considered view that, it is obvious that the tenderer for this tender was M/S China Road and Bridge Corporation (T) Limited. However, M/S China Road and Bridge Corporation (T) Limited when submitting the tender it uploaded the documents of another company. The Appeals Authority observes that the Respondent when evaluating the tenders, it evaluated the tender of M/S China Road and Bridge Corporation (T) Limited by using the documents of M/S China Road and Bridge Corporation. Given the above observations, the Appeals Authority finds the Respondent to have contravened the above quoted provisions of the law.

The Appeals Authority is of the firm view that the Respondent having confirmed from BRELA that M/S China Road and Bridge Corporation (T)



Limited does not exist, it ought to have taken further steps to verify the authenticity of a tenderer it intends to award the Tender. This was to be done bearing in mind that despite the said M/S China Road and Bridge Corporation (T) Limited not being registered, it possesses the TIN Certificate, VAT Certificate, Tax Clearance Certificate and Business Licence. The Appeals Authority noted with concern how these important statutory documents were obtained by a non existing entity.

Given the above findings and the requirements of the law, the Appeals Authority is of the considered view that the Respondent should have disqualified the tender submitted by M/S China Road and Bridge Corporation (T) Limited.

In the circumstance, the Appeals Authority concludes the first issue in the negative in that the award proposed to M/S China Road and Bridge Corporation (T) Limited was not in accordance with the law.

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

Taking cognizance of the above findings the Appeals Authority hereby nullifies the Respondent's intention to award the Tender to M/S China Road and Bridge Corporation (T) Limited. The Respondent is ordered to proceed with the Tender process in accordance with the law. The Appeal is hereby allowed.

None of the parties prayed for costs and therefore we make no order as to costs. Order accordingly.

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 21st day of July 2023.

HON. JUSTICE (rtd) SAUDA MJASIRI



.....
CHAIRPERSON

MEMBERS: -

1. ADV. ROSAN MBWAMBO.....



2. ENG. STEPHEN MAKIGO.....

