

IN THE PUBLIC PROCUREMENT APPEALS AUTHORITY

APPEAL CASE NO. 40 OF 2023-24

BETWEEN

M/S CHORA ARCHITECTURE AND URBANISM.....APPELLANT

AND

MINISTRY OF FINANCERESPONDENT

DECISION

CORAM

- | | |
|-------------------------------------|---------------|
| 1. Hon. Justice (rtd) Sauda Mjasiri | - Chairperson |
| 2. Ms. Ndeonika Mwaikambo | - Member |
| 3. Dr. William Kazungu | - Member |
| 4. Mr. James Sando | - Secretary |

SECRETARIAT

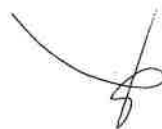
- | | |
|-------------------------|------------------------------|
| 1. Ms. Florida Mapunda | - Deputy Executive Secretary |
| 2. Ms. Agnes Sayi | - Senior Legal Officer |
| 3. Ms. Violet Limilabo | - Senior Legal Officer |
| 4. Mr. Venance Mkonongo | - Legal Officer |

FOR THE APPELLANT

- | | |
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| 1. Mr. Alex Temu | - Managing Director |
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FOR THE RESPONDENT

- | | |
|--------------------------|--|
| 1. Ms. Jenipher Kaaya | - Senior State Attorney –
Office of the Solicitor General |
| 2. Ms. Catherine Chilewa | - State Attorney – Ministry of |



Finance

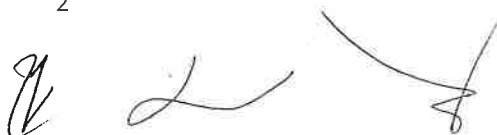
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| 3. Ms. Agnes Nasetsi | - Supplies Officer |
| 4. Mr. Hamis Ally | - Principal Supplies Officer |
| 5. Abdallah Ndungwi | - Supplies Officer |
| 6. Ms. Florentina Masuruli | - Supplies Officer |
| 7. Mr. David Shunu | - Engineer |
| 8. Ms. Jesca Lema | - Accounts Officer |

This Appeal was lodged by **M/S Chora Architecture and Urbanism** (hereinafter referred to as "**the Appellant**") against the **Ministry of Finance** (hereinafter referred to as "**the Respondent**"). The Appeal is in respect of Tender No. 50/2023/2024/G/43 for Supply of Chairs and Sofas for Main Treasury Building at Mtumba Government City (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 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 5th January 2024, the Respondent through National electronic Procurement System of Tanzania (NeST) invited tenderers to participate in the Tender. The deadline for submission of tenders was set on 2nd



February 2024. On the deadline, the Respondent received six (6) 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 New Jarifashion Limited subject to successful negotiations. The recommended contract price was Tanzania Shilling One Billion Seven Hundred Sixty Five Million Six Hundred Twenty Thousand only (TZS 1,765,620,000.00) VAT Exclusive.

The Evaluation Committee's recommendations were approved by the Tender Board through Circular Resolution No. 275 of 2023/2024 dated 27th March 2024. Negotiations between the Respondent and M/S New Jarifashion Limited successfully took place on 04th April 2024. The negotiation outcome was approved by the Tender Board through Circular Resolution No. 298 of 2023/2024 dated 16th April 2024.

On 22nd April 2024, the Respondent issued the Notice of Intention to award the Tender. The Notice informed tenderers that the Respondent intends to award the Tender to M/S New Jarifashion Limited at a contract price of Tanzania Shilling One Billion Seven Hundred Sixty Five Million Six Hundred Twenty Thousand only (TZS 1,765,620,000.00) VAT Exclusive. The delivery period was 120 days. The Notice also informed the Appellant that its tender was unsuccessful for failure to comply with the requirement of an average annual turnover of TZS 1,000,000,000.00 as specified under Item 3 of Section IV - Qualification and Evaluation Criteria of the Tender Document.



Dissatisfied with the reason given for its disqualification, on 24th April 2024, the Appellant applied for administrative review to the Respondent. On 29th April 2024, the Respondent issued its decision which dismissed the Appellant's application for administrative review. Aggrieved further, on 6th May 2024, the Appellant lodged this Appeal before 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 is 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. Alex Temu, the Managing Director. He commenced his submissions on the first issue by stating that the Appellant was among the six tenderers which participated in this Tender. In complying with an average annual turnover requirement as specified in the Tender Document, it submitted the documents from M/S CHORA ARCHITECTURE AND URBANISM and M/S FORMTECH LIMITED as the two companies are managed and owned by Alex Temu. Mr. Temu stated that M/S FORMTECH LIMITED is in the process of being wound up and M/S CHORA ARCHITECTURE AND URBANISM is taking up the lead. Thus, the two companies are related.

Mr. Temu submitted further that the reason provided by the Respondent that the Appellant failed to comply with the

requirement of average annual turnover of TZS 1,000,000,000.00 and therefore its tender was found to be non-responsive is not true. The Appellant contended that M/S FORMTECH LIMITED recently completed an installation contract with CRDB Plc which had a value of TZS 12,000,000,000.00. Thus, the Appellant cannot be considered to have failed to comply with an average annual turnover requirement.

Mr. Temu contended that all information regarding the relationship between the Appellant and FORMTECH LIMITED is available and visible on the Appellant's websites, namely; www.chora-interiors.co.tz and www.formtech.co.tz. Mr. Temu elaborated that the Tender Document allows the Respondent to seek for clarification from tenderers where any of the submitted information is not clear. Hence, the Respondent should have used the same opportunity to seek clarification on the existing relationship between the Appellant and FORMTECH LIMITED. However, the Respondent did not do so; instead, it disqualified the Appellant's tender at the preliminary evaluation stage.

Mr. Temu asserted further that the Respondent erred for disqualifying the Appellant's Tender at the preliminary evaluation stage for just missing an item while the evaluation was not score based. He contended that the Appellant's tender was to be assessed on the criteria provided in the Tender Document. Hence, it was not to be disqualified for missing an item that could be recovered at other stages of evaluation.

However, having been required by the Members of the Appeals Authority to elaborate on the existing relationship between the Appellant and FORMTECH LIMITED, Mr Temu stated that the Appellant participated in this Tender as a single entity. In substantiating its qualifications for the Tender, the Appellant also attached the document of FORMTECH LIMITED, a company which is also owned by the Appellant's managing director. Mr. Temu stated that the Appellant did not participate in this Tender in a joint venture or partnership with FORMTECH LIMITED. The Appellant used the documents of the latter to substantiate its qualifications for the Tender as the two companies are related.

In view of the above fact that the Appellant participated in this Tender as a single entity, Mr. Temu conceded that if an average annual turnover is calculated based on the Appellant's audited financial statements without including FORMTECH LIMITED's financial information, it would not meet the requirement of Item 3 of Section IV - Qualification and Evaluation Criteria of the Tender Document.

Finally, the Appellant prayed that the Tender process be repeated.

SUBMISSIONS BY THE RESPONDENT

The Respondent's submissions were made by Ms. Jenipher Kaaya, Senior State Attorney from the Office of the Solicitor General. She commenced her submissions on the first issue by adopting the Written Statement of Reply. She went on to state that through Circular Resolution No. 181 of

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2023/2024 dated 2nd January 2024, the Respondent's Tender Board approved the procurement method and the Tender Document for the Tender. To abide with procurement principles of integrity, competition, accountability, economy, efficiency, transparency, achieving value for money and to ensure fair participation by tenderers on equal terms, the Respondent through International Competitive Tendering method, invited eligible suppliers to participate in the Tender floated through NeST.

On the deadline for submission of tenders, the Respondent received six tenders including that of the Appellant. The learned State Attorney stated that when the received tenders were evaluated, the Appellant's tender was found not to have complied with the minimum requirement of average annual turnover of TZS 1,000,000,000.00 for the period of three years. Thus, its tender was disqualified.

The learned State Attorney contended that the average annual turnover for the Tender was assessed for the period of three years from 1st January 2020 to 31st December 2022. This requirement was under Item 3 of Section IV - Qualification and Evaluation Criteria of the Tender Document. In complying with this requirement, the Appellant presented documents which indicated that it has an average annual turnover of TZS 126,019,963.00 for the period of four years from 2018 to 2021. Thus, the Appellant did not comply with the average annual turnover requirement as provided in the Tender Document.

The learned State Attorney stated further that the Appellant participated in this Tender as a single entity, namely M/S CHORA ARCHITECTURE AND URBANISM. However, in proving its financial stability, the Appellant

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attached the documents of M/S FORMTECH LIMITED. There was no clear relationship which was disclosed between the Appellant and M/S FORMTECH LIMITED. The learned State Attorney asserted that the fact the two companies are related and owned by the same managing director is not a justifiable reason for either of the company to use the documents of the other in supporting its qualification for the Tender.

The learned State Attorney submitted that after registration a company becomes a separate legal entity. Thus, its rights and responsibilities are separate from its owners and directors. A registered company can sue or be sued on its own name. Therefore, since the law recognizes the Appellant's company and FORMTECH LIMITED as separate legal entities, the Appellant's act of submitting documents of FORMTECH LIMITED in substantiating its qualifications for this Tender was not proper, the learned State Attorney contended.

The learned State Attorney contended further that the Appellant has indicated on its Statement of Appeal that FORMTECH LIMITED is in the process of being wound up. According to the law, a company which is in the process of winding up, its documents are not supposed to be considered for any transaction. Thus, it was not proper for the Appellant to include documents of FORMTECH LIMITED.

The learned State Attorney stated that Item 3 of Section IV - Qualification and Evaluation Criteria of the Tender Document required average annual turnover to be calculated for the period of three years from 1st January 2020 to 31st December 2022. In complying with this requirement, the Appellant submitted audited financial statements

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for the year 2018, 2020, 2021 and 2022, contrary to the requirement provided in the Tender Document. The learned State Attorney added that despite the Appellant's submission of audited financial statements of four years contrary to the Tender Document, when its average annual turnover was calculated, it did not meet TZS 1,000,000,000.00 as required.

Regarding the Appellant's contention that the Respondent failed to seek clarification from the Appellant as required by the Tender Document, the learned State Attorney submitted that Regulation 207(1) of the Regulations prohibits procuring entities from seeking clarification from tenderers that would make a non-responsive tender responsive. The learned State Attorney contended that seeking clarification on the relationship between the Appellant and FORMTECH LIMITED while the same was not disclosed in the submitted documents for the Tender, would have made a non-responsive tender responsive. Thus, the Respondent did not seek for clarification as such an act would not only have contravened the law but also encroached the rights of other tenderers which participated in the Tender.

In support of her argument the learned State Attorney cited PPPA Appeal Case No. 08 of 2022-23 between ***M/S Handan Iron and Steel Group Company Limited (HBIS Group Company Ltd) and Kastipharm Ltd (JV) versus Tanzania Railways Corporation***. In the referred case, this Appeals Authority ruled that seeking clarification on a clear requirement of the tender would amount to making a non-responsive tender responsive

and such an act would infringe the rights of other tenderers who complied with such a requirement.

The learned State Attorney expounded that the CRDB's contract which the Appellant relies upon to show its experience and financial stability was awarded and executed by FORMTECH LIMITED and not the Appellant. Hence, as long as the Appellant participated in this Tender as a single entity, it cannot rely on the contract executed by FORMTECH LIMITED to justify its experience and financial stability, the learned State Attorney contended.

The learned State Attorney emphasised that the Appellant's disqualification was justified and in accordance with Regulation 204(2)(b) of the Regulations as the Appellant failed to satisfy eligibility requirement provided in the Tender Document.

In concluding her submissions, the learned State Attorney cited PPAA Appeal Case No. 35 of 2021-22 between ***M/S Aroche Systecs and Investico Ltd versus Tanzania Airport Authority***. In the referred case, the Appeals Authority nullified the procuring entity's decision of intending to award the tender to a tenderer who was recommended for award of the tender while it presented the documents of another company to establish its financial capacity.

In view of the above submissions, the learned State Attorney prayed for the following reliefs: -

- i) The Appeal be dismissed with costs;



- ii) The Respondent be allowed to proceed with the procurement process and;
- iii) Any other relief(s) that the Appeals Authority may deem fit and just to grant.

ANALYSIS BY THE APPEALS AUTHORITY

1.0 Whether the disqualification of the Appellant's tender is justified.

In resolving this issue, the Appeals Authority took cognizance of the fact that the Appellant conceded to have not complied with average annual turnover requirement as was specified in the Tender Document. However, it prayed that the Respondent consider its technical and financial offer which is more advantageous than what has been offered by other tenderers. In view of the Appellant's prayer, the Appeals Authority deemed it proper to analyse the above named issue for enlightening the Appellant on the matter at hand.

In so doing, the Appeals Authority reviewed the record of Appeal. It observed that the Appellant was disqualified for failure to comply with the average annual turnover requirement of TZS 1,000,000,000.00 for three years as from 1st January 2020 to 31st December 2022. The average annual turnover requirement was provided under Item 3, Section IV - Qualification and Evaluation Criteria of the Tender Document. Item 3 reads as follows: -

3. Financial Situation and Performance

Average Annual Turnover



Average Annual Turnover of the mentioned amount, calculated as total certified payments received for contracts in progress and/or completed within the mentioned duration. (In case of Joint Venture, compliance requirements are: All parties combined – Must Meet requirements, Each Member – Must Meet percentage requirements and if One Member – Must Meet percentage requirements stated).

<i>Average Annual Turnover amount in TZS or any other freely convertible currency</i>	<i>1,000,000,000.00</i>
<i>Turnover Start Date</i>	<i>2020-01-01</i>
<i>Turnover End Date</i>	<i>2022-12-31</i>

(Emphasis Added)

The above provision states clearly that tenderers were required to substantiate an average annual turnover of TZS 1,000,000,000.00 for the period of three years from 1st January 2020 to 31st December 2022.

In complying with the above named requirement, the Appellant's tender on NeST indicates that it attached audited financial statements for the year 2018, 2021 and 2022. The Appellant also attached the audited financial statements for the year ending 31st December 2019 from FORMTECH LIMITED. There were no audited financial statements attached for the year ending 31st December 2020. At the slot where it indicated to have

attached the audited financial statement for the year 2020, it attached audited financial statements for the year 2021.

The Appeals Authority related the presented audited financial statements to the requirement of Item 3 of Section IV - Qualification and Evaluation Criteria. It observed that the attached audited financial statements were from the year 2018 to 2022 while the requirement was from 1st January 2020 to 31st December 2022. The Appeals Authority noted further that the Appellant's average annual turnover was calculated from the year 2018 to 2022 and was TZS 126,019,963.00 which was below TZS 1,000,000,000.00 specified under Item 3 of Section IV - Qualification and Evaluation Criteria. In addition, the Appellant's calculated average annual turnover included the year 2018 that was out of the range specified in the Tender Document. Further, the Appellant included the audited financial statements of FORMTECH LIMITED for the year 2019 while the company did not participate in the Tender.

As per the requirement of Item 3 of Section IV - Qualification and Evaluation Criteria, the Appellant's average annual turnover was to be calculated from the year 2020 to 2022; however, the Appellant did not submit audited financial statements for the year 2020. Since TZS 126,019,963.00 was the Appellant's average annual turnover calculated from the year 2018, 2019, 2021 and 2022, it goes without saying that even if the average annual turnover could have been calculated within the specified range, the Appellant would have failed to comply with the requirement of the Tender Document.

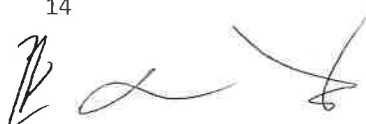
Based on the above findings and as was rightly conceded by the Appellant, the Appeals Authority concurs with the Respondent's act of disqualifying the Appellant's tender at the preliminary evaluation stage that was in accordance with Regulation 206(2) of the Regulations which reads as follows: -

"206(2) *Where a tender is not responsive to the tender document, it shall be rejected by the procuring entity, and may not subsequently be made responsive by correction or withdrawal of the deviation or reservation*".

[Emphasis provided]

The record of this Appeal indicates that the Appellant emphasized on the consideration of the documents from FORMTECH LIMITED, another company owned by the Appellant's managing director. However, after being enlightened during the hearing of this Appeal on the legal status of each company which are separate legal entities, the Appellant conceded that it ought not to have submitted the documents of FORMTECH LIMITED in substantiating its experience and financial stability.

The Appeals Authority considered the Appellant's proposition that despite its failure to comply with the average annual turnover requirement, the Respondent should consider its technical and financial offer which is more advantageous than what has been offered by other tenderers. The Appeals Authority wishes to enlighten the Appellant that Regulation 206(2) of the Regulations quoted hereinabove requires that once a tender is found



to be non-responsive, the same should be rejected and may not be made responsive by correction, withdrawal of deviation or reservation.

Having established that the Appellant's disqualification at the preliminary evaluation stage was proper, the Appeals Authority is of the firm view that if the Respondent would proceed to consider the Appellant's tender at this juncture, the same would amount to withdrawal of deviation or reservation. Thus, the Respondent would be contravening Regulation 206(2) of the Regulations.

Under the circumstances, the Appeals Authority concludes the first issue in the affirmative that the disqualification of the Appellant's tender is justified.

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

In view of the above findings, the Appeals Authority rejects the Appellant's prayer that the Respondent should re-consider its tender despite failing to comply with the average annual turnover requirement. Therefore, the Appeals Authority hereby dismiss the Appeal and allows the Respondent to proceed with the Tender process 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 Respondent and in the absence of the Appellant though duly notified this 13th day of June 2024.

HON. JUSTICE (rtd) SAUDA MJASIRI



.....
CHAIRPERSON

MEMBERS: -

1. MS NDEONIKA MWAIKAMBO.....



2. DR. WILLIAM KAZUNGU.....

