

IN THE PUBLIC PROCUREMENT APPEALS AUTHORITY

APPEAL CASE NO. 08 OF 2024-2025

BETWEEN

M/S HOLTAN BUILDERS LIMITED.....APPELLANT

AND

SOKOINE UNIVERSITY OF AGRICULTURE.....RESPONDENT

DECISION

CORAM

- | | |
|-------------------------------------|---------------|
| 1. Hon. Justice (rtd) Sauda Mjasiri | - Chairperson |
| 2. Adv. Rosan Mbwanbo | - Member |
| 3. Eng. Stephen Makigo | - 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

- | | |
|-------------------------|---------------------------------|
| 1. Mr. Mpale Mpoki | - Advocate - Mpoki & Associates |
| 2. Eng. Jeremiah Uisso | - Technical Director |
| 3. Qs. Anasion J. Mangi | - Quantity Surveyor |



FOR THE RESPONDENT

- | | |
|--------------------------|-----------------------------------|
| 1. Ms. Lunyamadzo Gillah | - Corporate Counsel |
| 2. Mr. George Zambetakis | - Legal Officer |
| 3. Mr. Winfred Mbungu | - Project Coordinator |
| 4. Ms. Nyambilila Amuri | - Chairperson of the Tender Board |
| 5. Ms. Kuruthum A. Ndope | - Secretary to the Tender Board |
| 6. Mr. Damas Mushi | - Procurement Officer |

This Appeal was lodged by M/S **Holtan Builders Limited** (hereinafter referred to as "**the Appellant**") against the Sokoine University of Agriculture commonly known by its acronym as "**SUA**" (hereinafter referred to as "**the Respondent**"). The Appeal is in respect of Tender No. TR79/2023/2024/W/08 for the Proposed Construction of Infrastructure for Sokoine University of Agriculture (SUA) at Mizengo Pinda College Campus - Katavi (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 National Competitive Tendering method as specified in the Public Procurement Act, No.7 of 2011 (hereinafter referred to as "**the Act**") and the Public Procurement Regulations, GN. No. 446 of 2013 (hereinafter referred to as "**the Regulations**") as repealed and replaced by Act No. 10 of 2023 and Regulations, GN. No. 518 of 2024, respectively.



On 16th May 2024, the Respondent through the National e-Procurement System of Tanzania (NeST) invited tenderers to participate in the Tender. The deadline for submission of tenders was set on 6th June 2024. On the deadline, the Respondent received seven 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 TIL Construction Limited. The recommended contract price was Tanzania Shillings Fourteen Billion Four Hundred Forty Million Eight Hundred Seventy Two Thousand Three Hundred and Twenty One Cents only (14,440,213,872,303.21) VAT Exclusive. The Tender Board approved recommendations as tabled at its meeting held on 5th August 2024 subject to successful negotiations. The negotiations successfully took place on 20th August 2024.

On 21st August 2024, the Respondent issued the Notice of Intention to award. The Notice informed the Appellant that the Respondent intended to award the Tender to M/S TIL Construction Limited. In addition, the Notice informed the Appellant that its tender was not considered for award as the submitted confirmation letter on lines of credit did not specify the intended project and was issued on 6th May 2024, before the advertisement of the Tender on 16th May 2024.

Dissatisfied with the reason given for its disqualification, on 24th August 2024, the Appellant applied for administrative review to the Respondent. On 27th August 2024, the Respondent dismissed the Appellant's application



for administrative review. Aggrieved further, on 28th August 2024, the Appellant filed this Appeal to 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 was justified;**
- 2.0 Whether the proposed award of the tender to the proposed successful tenderer was justified; and**
- 3.0 What reliefs, if any, are the parties entitled to?**

SUBMISSIONS BY THE APPELLANT

The Appellant's submissions were made by Mr. Mpale Mpoki, Senior Counsel. He commenced on the first issue by stating that the Notice of Intention to award the Tender informed the Appellant that its tender was not successful. He further explained that the attached confirmation letter for lines of credit did not indicate the name of the project and was issued on 6th May 2024 before the Tender advertisement on 16th May 2024.

The learned counsel submitted that the reason which disqualified the Appellant from the Tender process was not amongst the requirements provided under Item 3 of Section III - Evaluation and Qualification Criteria on access to financial resources criterion. Item 3 reads as follows:

"The Bidder shall demonstrate that it has access to, or has available, liquid assets, unencumbered real assets, lines of credit, and other financial means (independent of any contractual advance payment)



sufficient to meet the construction cash flow requirements estimated stated for the subject contract(s) net of the Bidder's other commitments."

The learned counsel stated that tenderers were required to demonstrate their access to financial resources. However, Item 3 of Section III - Evaluation and Qualification Criteria did not specify clearly how such demonstration was to be done. The Appellant demonstrated its access to financial resources by submitting a confirmation letter from the Bank of Africa. This indicated that on receipt of the application the bank was ready to issue a credit facility to the tune of TZS 2,000,000,000.00. In addition, the Appellant contended that the amount of TZS 2,000,000,000.00 was available and independent of any other contractual advance payment or commitment. The Appellant claimed to have no other project which requires such kind of commitment.

The learned counsel conceded that the confirmation letter on the availability of the line of credit was issued on 6th May 2024 before the Tender was advertised. The Appellant contended to have processed the said letter in anticipation of new projects. Luckily, the Respondent advertised this Tender on 16th May 2024. Thus, the Appellant submitted the confirmation letter from the Bank of Africa to comply with the requirements of Item 3 of Section III - Evaluation and Qualification Criteria (access to financial resources).

The learned counsel submitted further that had the Respondent doubted the authenticity of the submitted letter, it should have sought for



clarification from the Appellant in compliance with Clause 27 of the Instructions To Tenderers (ITT). The learned counsel contended that Clause 27 of the ITT allows the Respondent to seek clarification on matters which do not increase or decrease the price, change the scope of work or quality of the project. Thus, before concluding the Appellant's tender to be non-responsive, the Respondent should have sought clarification.

The learned counsel stated that the Respondent was required to consider the Appellant's tender to be responsive as per Clause 29 of the ITT. The disqualification in respect of the observed anomaly in the confirmation letter could have been waived or treated as a minor non-conformity. Hence, its tender could have been considered responsive as per Clause 30 of the ITT. The learned counsel contended that the Respondent's act of disqualifying the Appellant's tender amounted to an unfair treatment. Therefore, the Respondent failed to adhere to the requirements of Clause 27 of the ITT which aims at ensuring fairness of treatment of tenderers during the evaluation process.

The learned counsel insisted that the confirmation letter on the availability of a line of credit submitted by the Appellant was proper and complied with the requirements of Item 3 of Section III - Evaluation and Qualification Criteria.

The learned counsel submitted that the Notice of Intention to award which was issued through NeST on 21st August 2024 by the Respondent indicated only one reason for the Appellant's disqualification. However, when responding to the Appellant's application for administrative review, the



Respondent stated that the Appellant's tender was also found non-responsive for submitting a Power of Attorney that was not signed by the donor. The learned counsel submitted that the Respondent's act of introducing a new reason for the Appellant's disqualification at this stage was just an afterthought and lacked any basis.

The learned counsel submitted that the Tender Document provided a sample format of the Power of Attorney to be submitted by tenderers. The provided format required the Power of Attorney to be signed by the donor and donee. The learned counsel stated that since the Appellant is a company, signing of the Power of Attorney is always done through affixation of the company seal as guided by Section 124 and Table A to the Companies Act, Cap 212 R.E 2020. The learned counsel added that the Appellant's Memorandum and Articles of Association also provide guidance on the signing of various company documents. That is, signing would be through affixation of the company seal witnessed by two directors or one director and a company secretary.

The learned counsel stated that the Appellant's Power of Attorney which was submitted for the Tender was duly signed on the part of the donor using the company seal in the presence of the company secretary. The stamped company seal signified that the company had granted all the powers to the donee to transact on its behalf on all matters relating to the Tender. The learned counsel explained that since the Power of Attorney's format provided in the Tender Document required the donor's part to be affixed with a company seal, the Appellant could not have altered the

Three handwritten signatures in blue ink, likely representing the donor and witnesses, are located at the bottom of the page.

provided format by adding a space for the company directors to sign. The learned counsel contended that the Appellant could not have altered the format of the Power of Attorney as such act would have contravened Clause 12 of the ITT in the Tender Document which prohibits alterations of all forms provided. Thus, the Appellant could not have attested the Power of Attorney contrary to the provided format.

The learned counsel submitted that the Respondent's basis of disqualifying the Appellant's tender for having a defective Power of Attorney was based on the guidance issued by the Public Procurement Regulatory Authority on 9th June 2017 (PPRA's Guidance on the Power of Attorney). The learned counsel stated that the Respondent was not required to consider the PPRA's Guidance on the Power of Attorney when evaluating the tenders. The PPRA's Guidance on the Power of Attorney was not part of the Tender document and a foreign document to the Tender. In addition, the learned counsel stated that the PPRA's Guidance on the Power of Attorney deals with the registration of the Power of Attorney during tendering. It also relates to Section 47 of the Stamp Duty Act, Cap 189 which requires a registered Power of Attorney to have stamp duty so as to be admissible as evidence before the court as per Section 94 of the Evidence Act, Cap 6. Thus, the PPRA's Guidance on the Power of Attorney was inapplicable under the circumstances of the Tender, the learned Counsel contended.

The learned counsel submitted that since non-conformity with Power of Attorney format was raised as one of the grounds for the Appellant's disqualification when the Respondent was considering the application for



administrative review, the Appellant urges the Appeals Authority to disregard this ground at this appellate stage.

On the second issue, the learned counsel submitted that the Respondent's act of proposing award of the Tender to M/S TIL Construction Limited was not proper in the eyes of the law. The learned counsel stated that the proposed successful tenderer does not have the required general experience as specified under Item 1 of Section III - Evaluation and Qualification Criteria. The referred provision required tenderers to possess construction experience in the role of prime contractor, JV member, subcontractor or management contractor for at least ten (10) years, starting from 1st January 2012. The learned counsel submitted that according to the records from the Contractors Registration Board (CRB), the proposed successful tenderer was registered in 2015 as a class one contractor. That means by the time the Tender was advertised the firm lacked the requisite experience of ten years as a local contractor. Thus, the firm lacked the required experience.

The learned counsel also stated that the proposed successful tenderer lacked the required average annual turnover of TZS 18,000,000,000.00 as required under Item 3 of Section III - Evaluation and Qualification Criteria. The learned counsel contended that the proposed successful tenderer had performed only two projects. Thus, it could not have managed to meet the required annual turnover of TZS 18,000,000,000.00. Had the Respondent evaluated all the tenders fairly, it could have disqualified the proposed



successful tenderer for failure to comply with average annual turnover requirement.

The learned counsel submitted that in conducting the Tender the Respondent used the national competitive tendering method. That means only local contractors registered in Tanzania as class one contractor with ten years experience were eligible for this Tender. In view of such a requirement, the proposed successful tenderer was ineligible to participate in this Tender. The learned counsel explained that the purpose of using national competitive tendering method instead of international competitive tendering method was to empower local contractors who meet the criteria provided in the Tender Document.

The learned counsel further stated that the Respondent awarded the Tender to the proposed successful tenderer who quoted a higher price compared to the Appellant. The learned counsel submitted that the proposed successful tenderer's quoted price was TZS 15,063,213,953.20 while the Appellant's price was TZS 14,179,824,000.50. However, when the Appellant received the Notice of Intention to award, it was surprised to learn that the Respondent intended to award the Tender to the proposed successful tenderer at the contract price of TZS 14,440,872,303.20 while such a price was not readout during the Tender opening. The learned counsel stated that had the Respondent considered the Appellant's tender to be successful it would have obtained a fair price and therefore attain value for money in this project.

Finally the Appellant prayed for the following orders: -



- i. The Respondent to accept the confirmation letter for lines of credit as genuine as it complied with the evaluation and qualification criteria provided in the Tender Document;
- ii. The Respondent to award the Tender to the Appellant as it complied with evaluation and qualification criteria and had the lowest evaluated price.

SUBMISSIONS BY THE RESPONDENT

The Respondent's submissions were made by Ms. Lunyamadzo Gillah, Corporate Counsel. She commenced by adopting the Respondent's Statement of Reply. On the first issue, the learned counsel submitted that the Appellant was among the tenderers which participated in the Tender. During evaluation, the Appellant's tender was found non-responsive for failure to comply with Item 3 of Section III - Evaluation and Qualification Criteria - access to financial resources criterion. In complying with this criterion, the Appellant attached a letter of confirmation on the availability of the lines of credit issued on 6th May 2024 before the Tender was advertised. The Tender was advertised on 16th May 2024. In addition, the same letter did not address the Respondent as the procuring entity and did not mention the specific project name.

The learned counsel submitted that in complying with access to financial resources criterion, the Appellant was required to submit a responsive letter which mentions the name of the procuring entity and the intended project. In addition, the letter should have contained relevant information for the



Tender, and be issued after the Tender has been advertised. Thus, the Appellant's letter was defective, and led to its disqualification.

Regarding the Appellant's contention that before disqualifying its tender the Respondent was required to have sought for clarification in compliance with Clause 27.1 of the ITT, the learned counsel stated that the Respondent was not mandatorily required to seek clarification. Seeking clarification during evaluation process falls within the discretion of the procuring entity. The learned counsel added that in the circumstances of the Appellant's tender, seeking clarification would amount to rectification of the Appellant's anomalies. Therefore, it would have unfairly affected the competitive position of other tenderers. The learned counsel contended further that had the Respondent sought for clarification, such an act would have amounted to contravention of Clause 29.2(ii) of the ITT. This clause requires a tender that is inconsistent with the Tender Document to be considered as non-responsive and disqualified from the Tender process.

In support of her proposition, the learned counsel cited PPAA Appeal Case No. 5 of 2021-2022 between ***M/S Amtec Consulting Company Ltd versus Tanzania National Roads Agency – TANROADS***. In the referred Appeal, the Appeals Authority dismissed the Appeal. This was due to the reason that the credit facility agreement attached to the Appellant's tender was issued in December 2020 while the Tender was floated in June 2021. Thus, the learned counsel urged the Appeals Authority to apply the same principle in this Appeal.



On the Power of Attorney, the learned counsel submitted that during evaluation, the Appellant was found to have submitted a Power of Attorney which was not signed by the donor. The learned counsel stated that the Appellant's Power of Attorney contravened the PPRA's Guidance on the Power of Attorney and Clause 20.3 of the ITT which requires the Power of Attorney to be signed by both donor and donee. The learned counsel contended further that the PPRA's Guidance on the Power of Attorney is applicable in the Tender as it is among the guidelines that have been issued by PPRA for regulating public procurement.

The learned counsel stated further that the fact that the Appellant is a company and signs its document by affixing a company seal witnessed by directors, the same does not exonerate it from complying with requirement as provided in the format of the Power of Attorney and Clause 20.3 of the ITT. The Appellant was mandatorily required to submit the Power of Attorney that was signed by both the donor and donee. Thus, the Appellant's act of submitting the Power of Attorney that was not signed by the donor led to its fair disqualification from the Tender process.

On the Appellant's contention that the Respondent's act of raising a point of defective Power of Attorney when considering its application for administrative review is an afterthought, the learned counsel contended that the referred anomaly on the Appellant's Power of Attorney was observed during evaluation of tenders. However, when communicating the Notice of Intention to award, NeST failed to pick it as one of the reasons for



the Appellant's disqualification. Thus, it is a justifiable reason for the Appellant's disqualification.

On the second issue, the learned counsel submitted that the proposed successful tenderer was evaluated in compliance with the criteria provided in the Tender Document. During evaluation the tenderer was found to possess the required specific experience. The successful tenderer attached to its tender two contracts which were successfully completed. Thus, the completed contracts indicated that a tenderer had complied with the specific experience requirement for the Tender.

The learned counsel submitted further that the Appellant failed to demonstrate on how the proposed successful tenderer failed to comply with the general experience requirement. The Appellant failed to establish that the proposed successful tenderer lacked ten (10) years experience on construction activities. The learned counsel stated that during evaluation of tenders, the successful tenderer was found to have complied with general experience requirement as it attached several contracts which proved that it had the required experience.

Regarding the average annual turnover requirement, the learned counsel contended that the proposed successful tenderer also complied with this requirement. During evaluation of tenders, the Respondent's evaluation team was satisfied that the proposed successful tenderer had complied with average annual turnover requirement of TZS 18,000,000,000.00 for the period starting from 2019 to 2023.



On the use of national competitive tendering method, the learned counsel submitted that such a method allows all tenderers to participate in the Tender regardless of their nationality. Except where there is limited participation in the tender proceeding on the basis of nationality, the procuring entity is required to apply the national preference scheme. The learned counsel submitted that the requirement to use national preference must be clearly specified in the Tender Document. The learned counsel contended that in this Tender the Respondent confirmed that the proposed successful tenderer has been registered as a local company in Tanzania according to the records obtained from Business Registration and Licensing Agency (BRELA). Therefore, there was no need of applying national preference as contended by the Appellant.

On the Appellant's argument that on the date of the tender opening it was clear that it had the lowest price than the price quoted by the proposed successful tenderer, the learned counsel submitted that the read-out price is not necessarily the awarded price. According to Clause 39 of the ITT, award of the Tender must be made to the lowest evaluated tender and not to the lowest quoted price. The learned counsel submitted that after completion of the evaluation process, the tender by the proposed successful tenderer was found to be the lowest evaluated tender, thus it was proposed for award. In addition, during the negotiation process, the proposed successful tenderer gave a discount that led the proposed successful tenderer's price to change from the quoted price of TZS 15,063,213,953.20 to TZS 14,440,872,303.20. Thus, the award proposed to the successful tenderer is justified.



In response to the Appellant's prayers, the leaned counsel urged the Appeals Authority to dismiss the Appellant's claim that, the confirmation letter for lines of credit complied with the Evaluation and Qualification Criteria. The Appeals Authority should dismiss the prayer that the contract should be awarded to the Appellant.

Finally, the Respondent prayed for the following orders: -

- i. A declaration that the Respondent issued the Notice of Intention to award the Tender in accordance with the law;
- ii. A declaration that the Appellant is not entitled to any reliefs as claimed;
- iii. The Respondent to be allowed to proceed with the Tender process; and
- iv. Any other reliefs, the Appeals Authority may deem fit to grant.

ANALYSIS BY THE APPEALS AUTHORITY

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

In resolving this issue, the Appeals Authority reviewed the evaluation report. It observed that the Appellant was disqualified for submitting the confirmation letter on the availability of the line of credit that was dated 6th May 2024 which was before the advertisement of the Tender on 16th May 2024. The letter also did not specify the name of the project and the procuring entity. In addition, the evaluation report indicates that the



Appellant was disqualified for submitting a defective Power of Attorney that was not signed by the donor.

The record of Appeal indicates that when communicating the Notice of Intention to award, the Respondent informed the Appellant that its tender was disqualified for failure to comply with access to financial resources requirement. The confirmation letter on the availability of the line of credit attached to meet the said requirement did not specify the name of the project and was issued on 6th May 2024 before the Tender was advertised. After receipt of the Notice of Intention to award and being dissatisfied with the reason given for its disqualification, the Appellant applied for administrative review to the Respondent. In response to the Appellant's application for administrative review, the Respondent rejected the application and also informed the Appellant that it submitted a defective Power of Attorney. Thus, its disqualification was justified.

In ascertaining if the disqualification of the Appellant's tender was justified, the Appeals Authority revisited Item 3 of Section III - Evaluation and Qualification Criteria which provided guidance on the access to financial resources criterion. Item 3 reads as follows: -

"The Bidder shall demonstrate that it has access to, or has available, liquid assets, unencumbered real assets, lines of credit, and other financial means (independent of any contractual advance payment) sufficient to meet the construction cash flow requirements estimated stated for the subject contract(s) net of the Bidder's other commitments."



(Emphasis supplied)

In order to substantiate if the Appellant complied with the above quoted requirements, the Appeals Authority reviewed the Appellant's tender submitted in NeST. It observed that at the slot named "*access to financial resources*", the Appellant attached a letter from the Bank of Africa dated 6th May 2024. The letter was addressed to "WHOM IT MAY CONCERN" and indicated that the bank was willing to grant a credit facility up to the tune of TZS 2,000,000,000.00 upon receipt of an application.

Having reviewed the Bank of Africa's letter, the Appeals Authority observed that the letter was dated 6th May 2024, while the record of Appeal indicates that the Tender was advertised on 16th May 2024. During the hearing Members of the Appeals Authority required the Appellant to clarify the date on the attached confirmation letter for the line of credit. In response thereof, the Appellant conceded that the letter dated 6th May 2024, was issued prior to the Tender advertisement date. The Appellant claimed that it requested the Bank of Africa to issue such a letter in anticipation of new projects. Thus, after the Tender was advertised, the Appellant submitted the same letter as a demonstration of having access to financial resources.

The Appeals Authority is of the considered view that the Appellant's act of obtaining a confirmation letter which was issued before the advertisement of the Tender, not addressed to the procuring entity and not mentioning the project name, indicates clearly that the same was not intended for the Tender. Therefore, the Appellant did not comply with the criteria on proof of access to financial resources for the subject contract.



The Appeals Authority further considered the Appellant's assertion that the Respondent should have sought for clarification from it in compliance with Clause 27.1 of the ITT. The Appeals Authority observed that the Respondent could not have verified the authenticity of the letter from the Bank of Africa as the same was not addressed to the Respondent. In addition, Clause 27.1 of the ITT gives the Respondent discretion of seeking clarification as long as the sought clarification will not change the substance of the tender. Thus, it is the considered view of the Appeals Authority that the Respondent cannot be faulted for not seeking for clarification in the circumstances of this Tender.

From the above observations, the Appeals Authority finds the Appellant to have failed to comply with the requirements of Item 3 of Section III - Evaluation and Qualification Criteria. In view of this position, the Appeals Authority finds the Respondent's act of disqualifying the Appellant's tender to be proper and in accordance with Regulation 206(2) of the Regulations. This Regulation requires a procuring entity to reject any tender that has been found to be non-responsive to the requirements of the Tender. Regulation 206(2) of the Regulations 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 Supplied)



Having established that the Appellant was fairly disqualified for failure to comply with access to financial resources, the Appeals Authority finds no need to delve into the complaint relating to the Power of Attorney.

In view of the above findings, the Appeals Authority concludes the first issue in the affirmative that the disqualification of the Appellant's tender was justified.

2.0 Whether the proposed award of the tender to the proposed successful tenderer was justified

In resolving this issue, the Appeals Authority reviewed the parties' contentions. On the one hand, the Appellant contended that the proposed successful tenderer lacked the required experience of ten years in construction activities as per the CRB's records which show that the firm was registered in 2015. The Appellant asserted that the Tender Document required tenderers to have ten years experience starting from 1st January 2012. Thus, if the proposed successful tenderer was registered in 2015, it lacked the required experience. On the other hand, the Respondent contended that the proposed successful tenderer possesses the required experience as the same was verified through the documents that were attached to its tender.

The Appeals Authority revisited Item 1 of Section III - Evaluation and Qualification Criteria. It observed that tenderers were required to indicate their general experience on key construction activities as a prime contractor, sub-contractor, joint venture member or management



contractor for the past ten years starting from 1st January 2012. Item 1 of the Evaluation and Qualification Criteria reads as follows: -

"General Experience in Construction Activities

Experience under construction contracts in the role of prime contractor, JV prime contractor, JV member, subcontractor, or management for period stated.

<i>Key Construction Activities</i>
<i>Experience under construction contracts in the role of prime contractor, JV member, subcontractor, or management contractor for at least last ten (10) years, starting 1st January 2012."</i>

In ascertaining if the proposed successful tenderer complied with the above quoted requirement, the Appeals Authority revisited its tender in NeST. It observed that under a slot where general experience in construction key activities was to be shown, the proposed successful tenderer attached thirteen completion certificates. The attached certificates indicate that the projects were executed under the name of Tendar International Co Ltd between 31st August 2015 to 10th June 2019. There was one completion certificate with the name TIL Construction Ltd executed from 17th March 2022.

The Appeals Authority reviewed the record of Appeal and observed that the proposed successful tenderer was registered by BRELA on 11th March 2014. Moreover, on 25th November 2020, the proposed successful tenderer



changed its name from Tendar International Co Limited to TIL Construction Limited. The Appeals Authority reviewed Section 31(4) of the Companies Act, Cap 212. It observed that the law states categorically that a change of name does not affect the rights and obligations of the company. In view of this position of the law, the Appeals Authority observed that the contracts executed by the successful tenderer under the name Tendar International Co Ltd are to be considered as executed by TIL Construction Ltd.

The Appeals Authority considered all the contracts executed by the successful tenderer under the name Tendar International Co Ltd and TIL Construction Ltd. It observed that none of them indicates experience in construction activities from 1st January 2012, as required by the Tender Document. It is not disputed that the proposed successful tenderer was registered by CRB with Registration Number B1/145/01/2015. Based on this fact, the Appeals Authority is of the settled view that the proposed successful tenderer did not comply with the general experience criterion. Hence, its tender should have been disqualified as non-responsive pursuant to Regulation 204(2)(f) of the Regulations which reads as follows: -

"204(2) Material deviation to commercial terms and conditions, which justify rejection of a tender shall include the following: -

(f) failure to comply with minimum experience criteria as specified in the tendering document."

Having established that the proposed successful tenderer should have been disqualified for failure to comply with the general experience on key



construction activities, the Appeals Authority finds no need to delve into the remaining complaints raised by the Appellant in relation to average annual turnover, national competitive tendering method and the lowest evaluated bidder. Therefore, the Appeals Authority finds that the proposed successful tenderer should have been equally disqualified from the Tender process for lack of requisite experience.

Consequently, the Appeals Authority concludes the second issue in the negative that the proposed award of the Tender to the proposed successful tenderer was not justified.

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

Taking cognizance of the findings hereinabove, the appeal partly succeeds. The Appeals Authority hereby allows the Appeal to the extent that the proposed award of the Tender to the proposed successful tenderer was not justified and partly dismiss the Appeal as clearly indicated in the first issue hereinabove. The Respondent is hereby ordered to restart the Tender process afresh in compliance with the law. We make no order as to costs.

It is ordered 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 3rd day of October 2024.

HON.JUSTICE (RTD) SAUDA MJASIRI



CHAIRPERSON

MEMBERS: -

1. ADV. ROSAN MBWAMBO.



2. ENG. STEPHEN MAKIGO.

