

IN THE PUBLIC PROCUREMENT APPEALS AUTHORITY

APPEAL CASE NO. 20 OF 2024 - 2025

BETWEEN

M/S CHINA JIANGXI INTERNATIONAL

ECONOMIC AND TECHNICAL COOPERATION

CO. LIMITED.....APPELLANT

AND

GEITA TOWN COUNCIL.....RESPONDENT

RULING

CORAM

- | | |
|-------------------------------------|---------------|
| 1. Hon. Justice (Rtd) Sauda Mjasiri | - Chairperson |
| 2. Eng. Stephen Makigo | - Member |
| 3. Dr. William Kazungu | - Member |
| 4. Mr. James Sando | - Secretary |

SECRETARIAT

- | | |
|-------------------------|---------------------------|
| 1. Ms. Florida Mapunda | - PALS Manager |
| 2. Ms. Agnes Sayi | - Principal Legal Officer |
| 3. Ms. Violet Limilabo | - Senior Legal Officer |
| 4. Mr. Venance Mkonongo | - Legal Officer |

FOR THE APPELLANT

- | | |
|-------------------------|-------------------------------------|
| 1. Mr. Jeremia Mtobesya | - Advocate, Sweet and
Conrad LLP |
| 2. Mr. Prosper Mtui | - Quantity Surveyor |
| 3. Mr. Peng Chao | - Country representative |



FOR THE RESPONDENT

- | | |
|--------------------------|----------------------------|
| 1. Mr. Netho Mwambalaswa | - Municipal Solicitor |
| 2. Mr. Steven Mhina | - Town Procurement Officer |
| 3. Mr. Jerry Lukinga | - Procurement Officer |

This Appeal was lodged by **M/S China Jiangxi International Economic and Technical Cooperation Co. Ltd** (hereinafter referred to as "**the Appellant**") against **Geita Town Council** (hereinafter referred to as "**the Respondent**"). The Appeal is in respect of Tender No. 63CC1/2023/2024/W/72 for Package 2 - Construction of Magogo Bus Terminal in Geita (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 the International Competitive Tendering method as specified in the World Bank's "Procurement Regulations for IPF Borrowers" Fourth Edition, November 2020 (hereinafter referred to as "**the World Bank's Procurement Regulations**"). In addition, the Tender was regulated under the Public Procurement Act, No. 7 of 2011 as amended (hereinafter referred to as "**the Act**") which was repealed and replaced by the Public Procurement Act, No.10 of 2023 with effect from 16th June 2024. Furthermore, it was conducted under the Public Procurement Regulations, GN. No. 446 of 2013 as amended (hereinafter referred to as "**the Regulations**") which was repealed and



replaced with the Public Procurement Regulations, GN. No. 518 of 2024 effective from 01st July 2024.

On 19th January 2024, the Respondent through National e-Procurement System of Tanzania (**NeST**) invited eligible tenderers to participate in the Tender. The deadline for submission of tenders was set on 05th March 2024. By the deadline, the Respondent received eight 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 the Appellant. The recommended contract price was Tanzania Shillings Fourteen Billion Two Hundred Six Million Eighty Hundred Thirty-Four Thousand Five Hundred Eighty-Three and Ninety-Seven Cents only (TZS 14,206,834,583.97) VAT Exclusive for a completion period of 365 days. On 06th April 2024, the Respondent's Tender Board approved the award of the Tender as recommended by the Evaluation Committee. On 17th May 2024, the Respondent issued a Notice of Intention to award the contract to the Appellant. On 25th May 2024, the Respondent issued notification of award of the contract to the Appellant and required it to submit a performance security.

The record of Appeal indicates that through a letter dated 1st July 2024, the Appellant submitted the performance security to the Respondent. The Respondent through a letter dated 18th October 2024, required the Appellant to confirm the validity of the company's name used during tendering between M/S China Jiangxi Corporation for International Economic and Technical Cooperation and M/S China Jiangxi International



Economic and Technical Cooperation Co. Ltd. The Appellant through a letter dated 21st October 2024, informed the Respondent that when it started its business operation in Tanzania, it was registered as a foreign firm by Business Registration and Licensing Agency (BRELA) on 9th January 2015. The registered name was M/S China Jiangxi Corporation for International Economic and Technical Cooperation. On 29th December 2017, the Appellant passed a board resolution which changed its name. The new name is M/S China Jiangxi International Economic and Technical Cooperation Co. Ltd. The changes were reported to BRELA and were effective from 10th February 2021.

The record of Appeal further indicates that after seeking clarification from the Appellant on the noted discrepancy on its name, the Respondent through a letter dated 22nd October 2024, requested BRELA to verify the authenticity of the Appellant's name. BRELA through a letter dated 1st November 2024, informed the Respondent that on 9th January 2015, the Appellant's company was registered as a foreign firm and issued with Certificate of Compliance No. 114304. The registered name was M/S China Jiangxi Corporation for International Economic and Technical Cooperation. Later on, through a board resolution dated 29th December 2017, the Appellant changed its name to M/S China Jiangxi International Economic and Technical Cooperation Co. Ltd. The record of Appeal shows that the Appellant's change of name was registered by BRELA on 10th February 2021.

After deliberating on the Appellant's issue on the company name, the Respondent's Tender Board approved cancellation of an award made to the



Appellant at its meeting held on 7th November 2024. The Tender Board also approved the rejection of the whole Tender.

The Respondent through a letter dated 7th November 2024, notified the Appellant about cancellation of award of the contract that was already issued. The letter stated that since the Appellant's change of name was registered by BRELA from 10th February 2021 before NeST came into operation, it was required to use the new name instead of the old name when participating in this Tender. To the contrary, the Appellant submitted the tender under the old name and attached legal documents under the new name. Thus, the Respondent cancelled the award made to the Appellant.

Aggrieved with the reason given for cancellation of the award, on 8th November 2024, the Appellant applied for administrative review to the Respondent. The Respondent through a letter dated 13th November 2024, acknowledged receipt of the Appellant's application for administrative review. The letter stated further that the Respondent was still reviewing the Appellant's application for administrative review. Hence, when the review is completed, the Respondent's decision would be communicated to the Appellant. However, there was no decision from the Respondent. Thus, on 21st November 2024, the Appellant filed this Appeal before the Appeals Authority.

In this Appeal, the Appellant disputes the Respondent's decision of nullifying the award made to it due to discrepancy noted on its company name. The Appellant stated that it was first registered under the name M/S China Jiangxi Corporation for International Economic and Technical



Cooperation. Later on the name was changed to M/S China Jiangxi International Economic and Technical Cooperation Co. Ltd. The changes were registered with BRELA with effect from 10th February 2021. Thus, from the date the Appellant changed its name, all its documents appeared in the new name. The Appellant stated further that when registering on NeST, it only enters the company's registration number. NeST does not allow tenderers to manually fill in their information.

The Appellant added that according to Sections 31(1) and 436(1)(e) of the Companies Act, Cap 212, a change of name does not affect the mandate or legal status of the company. Thus, the Respondent's decision to nullify the award made to the Appellant is improper and in contravention of the law.

After receipt of this Appeal, the Appeals Authority notified the Respondent about the existence of the same and required it to submit a Statement of Reply. In response to the grounds of Appeal, the Respondent stated that the company which participated in this Tender did not exist as the Appellant changed its name from 29th December 2017. The change was registered by BRELA on 10th February 2021 before NeST came into operation. Thus, when registering itself in NeST and participating in this Tender, the Appellant was expected to use its changed name. To the contrary, the Appellant participated in the Tender using the old name which did not exist. Thus, the Respondent nullified the award made to the Appellant as it could not enter into a contract with a non existing company. Therefore, the nullification of the award is proper and fair under the law.

When the matter was called on for hearing and at the time of framing up the issues, the Appeals Authority informed the parties that there is a point



of law to be determined as per the record of Appeal. This was about the bid validity period of the Tender. In view of this observation, the following issues were framed which cover both the point of law raised *suo motu* by the Appeals Authority and the substantive merits of the Appeal. The issues were as follows: -

1.0 Whether there is a valid Tender for determination by the Appeals Authority;

2.0 Whether the disqualification of the Appellant's tender was justified; and

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

Having framed the issues, the Appeals Authority required the parties to address the first issue which relates to a point of law before embarking on the substantive Appeal.

SUBMISSIONS BY THE APPELLANT

The Appellant's submissions were made by Mr. Jeremia Mtobesya, learned Advocate. He commenced by stating that the tender validity period for the Tender was 120 days from the Tender opening date which was on 5th March 2024. Counting from the Tender opening date, the tender validity period was to expire on 3rd July 2024. Before expiry of the tender validity period, on 17th May 2024, the Respondent communicated the Notice of Intention to award. The Notice indicated that the Respondent intended to award the Tender to the Appellant. On 25th May 2024, the Appellant received a Notice of award of contract from the Respondent. The Notice



indicated clearly that the Appellant had been awarded the contract and it was required to submit performance security.

The learned counsel submitted that before the tender validity period expired, on 2nd July 2024 the Appellant submitted the performance security. He argued that the Appellant's act of submitting performance security before the expiry of the tender validity period, implied that the Tender was still valid. He explained that the tender validity period covers the period from the Tender opening up to the issuance of notification of award and submission of the performance security. He added that, once the performance security is submitted, the tender validity period ceases to exist. Thus, since the performance security was submitted to the Respondent on 2nd July 2024, before expiry of the tender validity period, the Tender is still valid, the learned counsel contended.

The learned counsel elaborated that Section 71 of the Act requires the tender validity period to be sufficient to enable the procuring entity to complete evaluation of tenders, obtain tender board's approval of award and award of the contract. The learned counsel stated that in the disputed Tender, evaluation of tenders, approval of award by the Tender Board and award of the contract to the Appellant were all made when the Tender was still valid. He added that Regulation 29(1) of the Regulations requires a successful tenderer after award of the contract to submit performance security to guarantee successful performance of the contract. The learned counsel submitted that the plain interpretation of Section 71 of the Act and Regulation 29(1) of the Regulations is that once an award has been issued within the tender validity period and the performance security being filed,



the tender validity period ceases to exist and the performance security takes over.

After relating the requirements of Section 71 of the Act and Regulation 29(1) of the Regulations to the facts of this Appeal, the learned counsel stated that it is crystal clear that before the expiry of the tender validity period, the performance security was submitted to the Respondent. Thus, the performance security took over the role of the tender validity period.

The learned counsel submitted further that there was no extension of the tender validity period. Thus, after expiry of the tender validity period, the performance guarantee which was already submitted to the Respondent a day before the expiry of the validity period covered the role of the tender validity period. Thus, the Tender under Appeal is still valid for determination by the Appeals Authority.

REPLY BY THE RESPONDENT

The Respondent's reply submissions were made by Mr. Netho Mwambalaswa, Municipal Solicitor. He commenced by stating that the tender validity period for this Tender expired on 3rd July 2024. The Municipal Solicitor submitted that before expiry of the tender validity period, on 17th May 2024, the Respondent issued the Notice of Intention to award the Tender to the Appellant. On 25th May 2024, the Respondent issued the Notification of award of the contract to the Appellant. The Appellant accepted the award and filed the performance security. The Municipal Solicitor contended that all the mentioned series of events were done prior to the expiry of the Tender validity period.



The Municipal Solicitor submitted further that after receipt of the Appellant's performance security, it failed to proceed with the signing of the contract as it realized that the submitted security was in a different name from a tenderer which was awarded the Tender. However, this fact did not negate the truth that award and submission of the performance security were all done within the tender validity period. Thus, the Tender is still valid, the Municipal Solicitor contended.

However, after being asked by the Appeals Authority on the requirements of the law regarding the tender validity period and the need for extension under special circumstances; the Municipal Solicitor submitted that the tender validity period expired on 3rd July 2024 prior to the signing of the contract and no extension was sought. The Municipal Solicitor stated that after expiry of the tender validity period on 3rd July 2024, all the Respondent's subsequent acts thereafter were a nullity in the eyes of the law. Thus, there is no valid tender for determination by the Appeals Authority.

REJOINDER BY THE APPELLANT

On his brief rejoinder, the learned counsel for the Appellant reiterated his earlier position that, Section 71 of the Act read together with Regulation 29(1) of the Regulations clearly set out the processes to be conducted within the tender validity period and that after submission of the performance security, the tender validity period ceases to exist. The learned counsel submitted that in view of the requirement of Section 71 of the Act and Regulation 29(1) of the Regulations, it is not proper to require application for administrative review and appeal to be submitted within the



tender validity period. The tender validity period has to cover the period from the opening of the Tender up to award of the contract. Thus, since award of the contract and submission of the performance security were made prior to the expiry of the tender validity period, this Tender is still valid. Therefore, it is eligible for determination by the Appeals Authority.

The learned counsel added that Clause 44.4 of the Instruction To Bidders (ITB) recognizes a notice of acceptance to constitute a binding contract until after a formal contract is prepared and executed. Since the notice of acceptance was issued by the Respondent and the Appellant accepted the same and filed the performance security, the performance security succeeds the tender validity period. Thus, the Tender is valid.

ANALYSIS BY THE APPEALS AUTHORITY ON THE POINT OF LAW

1.0 Whether there is a valid Tender for determination by the Appeals Authority

In resolving this issue, the Appeals Authority reviewed Clause 18.1 of the ITB read together with Clause 16 of the Bid Data Sheet (BDS). These Clauses indicate that the tender validity period for this Tender was 120 days. The Appeals Authority further reviewed Section 71 of the Act read together with Regulation 191(3) of the Regulations which read as follows: -

"71. The procuring entity shall require tenderers to make their tenders and tender securities including tender securing declaration valid for periods specified in the tendering documents, sufficient to enable the procuring entity to complete the comparison and evaluation of the tenders



and for the appropriate tender board to review the recommendations and approve the contract or contracts to be awarded whilst the tenders are still valid.

191(3) The period fixed by a procuring entity shall be sufficient to permit evaluation and comparison of tenders, for obtaining all necessary clearances and approvals, and for the notification of the award of contracts and finalise a contract but the period shall not exceed one hundred and twenty days from the final date fixed for submission of tenders”.

(Emphasis supplied)

The above quoted provisions clearly indicate that tenderers were required to make their tenders valid for a period specified in the Tender Document. In addition, a procuring entity is required to specify the tender validity period that would be sufficient to enable it to complete the evaluation of tenders. Furthermore, the time specified should be sufficient for the appropriate Tender Board to review the recommendations and approve award of the contract. In addition, the specified period should allow the procuring entity to issue notification of award and finalize the contract.

In ascertaining if the Tender under Appeal is still valid, the Appeals Authority reviewed the record of Appeal. It observed that the tender validity period specified in this Tender under Clause 16 of the BDS was 120 days from the tender opening date. The Tender opening took place on 05th March 2024. Counting from the Tender opening date, the tender



validity period expired on 03rd July 2024. The Appeals Authority observed from the record of Appeal that by 3rd July 2024, the Respondent had completed the evaluation process, obtained internal approvals and issued the Notice of Intention to award which was subsequently followed by Notification of award of the contract. The Respondent had also received the performance security from the Appellant.

Having reviewed the Tender process *vis-à-vis* the requirements of Section 71 of the Act read together with Regulation 191(3) of the Regulations, the Appeals Authority observed that the tender validity period specified for this tender was required to cover all the tender processes from the Tender opening date up to finalization of the contract. According to Section 60(11) of the Act read together with Regulation 233(3) of the Regulations, a contract is deemed to have been finalized when signed by the parties. Section 60(11) of the Act and Regulation 233(3) of the Regulations read as follows: -

"60(11) A procurement contract shall enter into force when the formal contract is signed by the parties to the contract.

233(3) A procurement contract shall enter into force when a written acceptance of a tender is communicated to the successful tenderer and a formal contract is signed by the parties."

From the record of Appeal and the requirements of Section 71 of the Act read together with Regulation 191(3) of the Regulations, the Appeals Authority observes that it is crystal clear that by 3rd July 2024, when the

Handwritten signature and initials in blue ink, consisting of a stylized 'Z' or 'J' followed by a long horizontal stroke and a small flourish.

tender validity period expired, the contract for this Tender was not finalized.

The Appeals Authority considered the Appellant's contention that the Tender is still valid as prior to the expiry of the specified tender validity period, the Respondent awarded the contract to the Appellant and submitted the performance security as required. The Appellant contended that the tender validity period was to be valid until the notification of award is issued. Once the notification of award is issued and the performance security is submitted, the tender validity period ceases to exist.

In ascertaining the validity of the Appellant's contention in this regard, the Appeals Authority reviewed the definitions of words "*tender validity period*" and "*performance security*" as provided under Regulation 3 of the Regulations. The referred definitions read as follows: -

"Performance security" means a guarantee or a bond from a successful tenderer's bank or an Insurance Company, which should be provided by the successful tenderer to the procuring entity with the aim of compensation for any loss resulting from the tenderer's failure to complete its obligations under the contract;

"Tender validity period" means the period of time subsequent to the closing date for submission of tenders for which the tender price and the conditions of the tender shall not be subject to any change by the tenderer;"



The above quoted definitions provide clearly that performance security aims at ensuring that a procuring entity is compensated for any loss resulting out of the tenderer's failure to complete its obligation under the contract. The tender validity period aims at ensuring that the tender price and conditions of the tender are not changed during the tendering process. According to Regulation 191(3) of the Regulations the tender validity has to cover the period from the tender opening date up to finalization of the contract.

The Appeals Authority further reviewed Regulation 29(1) of the Regulations relied upon by the Appellant that performance security takes over the role of the tender validity period once an award of the contract is made and performance security having been submitted. After reviewing Regulation 29(1) of the Regulations, the Appeals Authority observed that the purpose of submitting performance security is to ensure faithful performance of the contract including timely payment to all labourers, suppliers, mechanics and subcontractors if any.

Having reviewed the definitions of the words "*tender validity period*" and "*performance security*" quoted hereinabove and Regulation 29(1) of the Regulations, the Appeals Authority rejects the Appellant's proposition that the performance security once submitted to the procuring entity takes over the role of the tender validity period. According to Section 71 of the Act read together with Regulation 191(3) of the Regulations, the tender validity period is applicable during tendering and it covers the period from the tender opening date up to the finalization of the contract. The performance



security is applicable during execution of the contract. That is, prior to that, performance security is not applicable.

The Appeals Authority further considered the Appellant's argument that as per Clause 44.4 of the ITB, acceptance letter constitutes a binding contract until a formal contract is prepared and executed. Thus, since the acceptance letter has already been issued to the Appellant and performance security had been submitted, there is a binding contract which is guided by the performance security. The tender validity period has no role to play under the circumstances of this Tender, hence the Tender is still valid. In view of Section 60(11) of the Act read together with Regulation 233(3) of the Regulations that the contract shall enter into force when the formal contract is signed by the parties, the Appeals Authority hereby rejects the Appellant's proposition in this regard as a letter of acceptance cannot constitute a binding contract. The fact that the performance security was submitted after issuance of the acceptance letter cannot validate the tender validity period which expired on 3rd July 2024.

The Appeals Authority reviewed Regulation 191(4) of the Regulations. The referred regulation allows in exceptional circumstances a procuring entity to request tenderers to extend the tender validity period, provided that such a request is made prior to the expiry of the initial specified period. Regulation 191(4) of the Regulations reads as follows: -

191(4) "***In exceptional circumstances, prior to the expiry of the original period of effectiveness of tenders, a procuring entity may request tenderers to extend the period for an additional specified period of time***"



(Emphasis supplied)

According to the record of Appeal, there is no evidence which shows that the tender validity period was extended prior to its expiry on 3rd July 2024. During the hearing of this Appeal, the Respondent confirmed that there was no request made to tenderers to extend the tender validity period.

Given the above observations, the Appeals Authority finds that the tender validity period for this Tender expired on 3rd July 2024 and there was no extension that was made. Thus, all the Respondent's subsequent acts after 3rd of July 2024 were null and void in the eyes of the law.

Consequently, the Appeals Authority concludes the first issue in the negative that there is no valid tender for determination by the Appeals Authority.

Taking cognizance of our findings hereinabove, the Appeals Authority would not delve into the remaining issues. The Appeals Authority hereby dismiss the Appeal due to the expiry of the tender validity period and orders the Respondent to re-start the Tender process in compliance with the law.

Each party to bear its own costs.

It is so ordered.

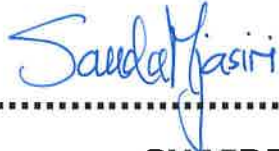
This Ruling is binding and can be enforced in accordance with Section 97(8) of the Act.

The Right of Judicial Review as per Section 101 of the Act is explained to the parties.



This Ruling is delivered in the presence of the parties this 20th day of December 2024.

HON. JUSTICE (rtd) SAUDA MJASIRI



.....
CHAIRPERSON

MEMBERS: -

1. ENG. STEPHEN MAKIGO.....



2. DR. WILLIAM KAZUNGU.....

