

**IN THE PUBLIC PROCUREMENT APPEALS AUTHORITY**

**APPEAL CASE NO. 3 OF 2022-23**

**BETWEEN**

**M/S SONGORO MARINE TRANSPORT LTD.....APPELLANT**

**AND**

**TANZANIA ELECTRICAL, MECHANICAL**

**AND ELECTRONICS SERVICES AGENCY.....RESPONDENT**

**DECISION**

- |                           |                   |
|---------------------------|-------------------|
| 1. Adv. Rosan S. Mbwambo  | - Ag. Chairperson |
| 2. Mr. Rhoben P. Nkori    | - Member          |
| 3. Mr. Pius M. Mponzi     | - Member          |
| 4. Ms. Florida R. Mapunda | - Ag. Secretary   |

**SECRETARIAT**

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

**FOR THE APPELLANT**

- |                        |  |
|------------------------|--|
| 1. Mr. Gracian B. Mali | - Advocate - Ardean Law Chambers                     |
| 2. Mr. Aman J. Richard | - Advocate - Ardean Law Chambers                     |
| 3. Mr. Khalid Songoro  | - Managing Director- Songoro Marine<br>Transport Ltd |

4. Mr. Hamadi Aweso

- Procurement Officer

### **FOR THE RESPONDENT**

1. Ms. Nancy Mpiri

- Legal Officer - TEMESA

M/S Songoro Marine Transport Ltd (hereinafter referred to as "**the Appellant**") has preferred this appeal against Tanzania Electrical, Mechanical and Electronics Services Agency commonly known by its acronym "**TEMESA**" (hereinafter referred to as "**the Respondent**"). The Appeal is in respect of Tender No. AE/006/2021-2022/HQ/W/09/ Category-01 for Major Rehabilitation of MV Magogoni Ferry Plying between Magogoni-Kigamboni in Dar es Salaam Region (hereinafter referred to as "**the Tender**"). According to the documents submitted to the Public Procurement Appeals Authority (hereinafter referred to as "**the Appeals Authority**") its background may be summarized as follows: -

The Tender was conducted through international competitive tendering procedures as specified under the Public Procurement Act, No. 7 of 2011 as amended in 2016 (hereinafter referred to as "**the Act**") and the Public Procurement Regulations, GN. No. 446 of 2013 as amended by GN. No. 333 of 2016 (hereinafter referred to as "**the Regulations**").

On 13<sup>th</sup> April 2022, the Respondent through the Tanzania National e-Procurement System (TANePS) invited eligible tenderers to participate in the Tender. Deadline for submission of tenders was initially set on 5<sup>th</sup> May

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2022 and was later extended to 19<sup>th</sup> May 2022. On the deadline, two tenders including that of the Appellant were received. The received tenders were accordingly evaluated. After completion of the evaluation process, the Evaluation Committee recommended award of the Tender to M/S African Marine and General Engineering Company Ltd. Negotiations were successfully done on 23<sup>rd</sup> June 2022. The Tender Board at its meeting held on 30<sup>th</sup> June 2022 approved the negotiations report. It also approved award of the Tender to M/S African Marine and General Engineering Company Ltd at the contract price of United States Dollars Three Million Two Hundred Forty Seven Thousand One Hundred and Twenty Eight (USD 3,247,128.00) only VAT inclusive.

On 4<sup>th</sup> July 2022, through a Notice of Intention to award the Respondent informed all tenderers that it intends to award the Tender to M/S African Marine and General Engineering Company Ltd. The notice also informed the Appellant that its tender was disqualified for two reasons. One is that the Appellant failed to submit Ship Builder Certificate contrary to Clause 27.6 (i) and (vi) of the Instructions To Tenderers (ITT) and two that the Power of Attorney was not notarized as per the requirements of Clause 11 (g) of the ITT.

Aggrieved with its disqualification, on 7<sup>th</sup> July 2022 the Appellant applied for administrative review to the Respondent. In its decision dated 15<sup>th</sup> July 2022, the Respondent dismissed the application for administrative review.

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Dissatisfied with the decision the Appellant lodged this Appeal on 22<sup>nd</sup> July 2022. The Respondent accordingly filed a Statement of Reply.

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

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

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

### **SUBMISSIONS BY THE APPELLANT**

Mr. Gracian Mali the learned counsel for the Appellant submitted that, the Respondent erred in law and fact for disqualifying the Appellant on the ground that it failed to submit Ship Builder Certificate. According to Clause 27.6(vi) of the ITT tenderers were not required to submit Ship Builder Certificates, the learned counsel contended. The said requirement according to the learned counsel did not specify particularly where the certificates were to be obtained or what was the issuing authority.

The learned counsel submitted that in Tanzania the certificate of ship building is issued by the Contractors' Registration Board (CRB). In compliance to Clause 26.7(vi) of the ITT the Appellant submitted Certificate No. SPM1/0106/11/06 issued by CRB which certifies that it has been registered as specialist contractor, class one, local category in the field of marine structures

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The learned counsel referred the Appeals Authority to an article by Prof. Yucheng Li and Linpu Li titled "***Marine Structures and Materials***", Oceanography Journal, Vol. III, Dalian University of Technology, China. In this article the term marine structures are defined as "*...engineering facilities constructed and installed in coastal zones or open ocean for exploitation of marine resources and the maintenance of its continuous operations*". According to this article marine engineering structures can be divided into three types: fixed, movable (floating structures) and complimentary structures. It is the learned counsel's proposition that MV Magogoni Ferry falls under the category of movable structures. The learned counsel also made reference to section 2 of the Merchant Shipping Act No. 21 of 2003. In this Act the term ship is defined as a floating vessel capable of carrying passengers or cargo.

Based on the definitions of the terms "*marine structures*" and "*ship*" the Appellant contended that CRB certificate suffices the requirement of Clause 27.6(vi) of the ITT.

The learned counsel made reference to section 4A(3) of the Act which requires procuring entities to execute their duties in observance of the principles of fairness and equal treatment of tenderers. In order to ensure that tenderers are treated equally and fairly, the Respondent should not have confined itself to the wording of the Tender Document. It should have rather considered the meaning of the word marine structures in the certificate submitted by the Appellant.

The learned counsel submitted that the requirement to have a Ship Builder Certificate was for purposes of demonstrating that tenderers have got experience in ship building works. According to the learned counsel the Appellant is a registered local company operating under the laws of Tanzania. It has executed several projects of a similar nature and currently has got five ongoing projects. Some with the Respondent and others with other Government entities. The Appellant expounded further that, the requirement to submit Ship Builder Certificates existed in previous tenders and the same CRB certificate was accepted by the Respondent and the Appellant qualified for award.

Finally, the Appellant prayed for the following orders:-

- i. A declaration that evaluation proceedings in respect of the Tender is null and void for being conducted contrary to Section 72 of the Act;
- ii. A declaration that the Appellant was wrongly disqualified from the Tender;
- iii. Quashing the evaluation proceedings of the Tender and all its subsequent decisions of the Respondent;
- iv. Re-evaluation proceedings to be done in accordance to the content and criteria of the Tender Document;
- v. The Respondent to pay costs incurred by the Appellant;

- vi. Any other relief(s) that the Authority may deem fit to grant.

### **REPLY BY THE RESPONDENT**

Ms. Nancy Mpiri, a legal officer in the Respondent organization appeared and adopted the Statement of Reply. In the Statement of Reply the Respondent admitted the complaint in respect to notarized Power of Attorney. However, she submitted that the Appellant was fairly disqualified for failure to submit Ship Builder Certificate as required by Clause 27.6 (i) and (vi) of the ITT. The Respondent stated that the fact that the Appellant is registered by CRB as a specialist contractor class one in the field of Marine Structures is not disputed. However, the certificate issued by CRB to the Appellant is not a Ship Builder Certificate which was required under Clause 27.6 (i) and (vi) of the ITT. The Respondent submitted further that the term "*marine structure*" is too general, while the term "*ship*" is more specific. Thus, the Appellant ought to have complied with the requirement of the Tender Document.

It was also submitted by the Respondent that in Tanzania there is no known institution which issues Ship Builder Certificate. However, since the tender was international, tenderers were expected to comply with this requirement. The Respondent therefore insisted that, its decision to disqualify the Appellant was fair and justified.

With regard to the Appellant's prayers the Respondent submitted that they should not be granted and prayed for dismissal of the Appeal in its entirety



with costs; and that the Appeals Authority may be pleased to grant any other relief(s) as it deems fit and justified.

### **ANALYSIS BY THE APPEALS AUTHORITY**

Clause 27.6 (i) of the ITT modified by Clause 19(vi) of the Tender Data Sheet (TDS) read as follows:-

*"Clause 27.6 The PE shall confirm that the following documents and information have been provided in the Tender. If any of these documents or information is missing, or is not in accordance with the Instructions to Tenderers, the Tender shall be rejected:-*

*(i) Any other information/data required by this Tendering document as specified in the TDS."*

*"Clause 19 List any information/data required:-*

*(vi) Registration, Ship Builder Certificate."*

In order to ascertain whether the Appellant complied with the above quoted requirements, the Appeals Authority reviewed tenders submitted on TANePS. It observed that at a slot where it was required to attach a Ship Builder Certificate, the Appellant attached a letter dated 19<sup>th</sup> May 2022 titled "SHIP BUILDING PROOF". The said letter indicates that the Appellant is a Tanzanian Ship building company and has its shipyard in Mwanza at Ilemela Industrial Area and in Dar es Salaam at Kigamboni-Magogoni. The



said letter was attached with a Certificate of Registration issued by CRB which certifies that the firm *"is registered as SPECIALIST CONTRACTOR Class One"*, local category *"in the field of MARINE STRUCTURES"*.

The Appeals Authority further reviewed the tender submitted by M/S African Marine and General Engineering Company Ltd, the proposed successful tenderer. In its tender at a slot where it was required to attach a Ship Builder Certificate a letter dated 23<sup>rd</sup> April 2022 with a title *"SHIP BUILDING CERTIFICATION LETTER"* is attached. In the said letter the proposed successful tenderer indicated that it has been certified to ISO 9001:2015 under IACS class Bureau Veritas in the activity of *"Ship Repair and Dry Docking, Marine & General Engineering Construction and Services"*. The attached Bureau Veritas Certificate indicates that the scope of certification was *"FABRICATION AND INSTALLATION OF STEEL STRUCTURE, PIPING SYSTEMS, DRY DOCKING SERVICES AND MECHANICAL ACTIVITIES FOR NEW BUILD, CONVERSION OF VESSELS AND SHIP REPAIR"*.

The Appeals Authority revisited Section 2 of the Merchant Shipping Act No. 21 of 2003 where the word "Ship" has been defined to mean:-

*"a floating vessel which is self propelled and capable of carrying passengers or cargo"*

The Appeals Authority further revisited the Article titled "*Marine Structures and Materials*" relied upon by the Appellant which defines the term marine structures as follows:-

*"Marine structures are various kinds of engineering facilities, which are constructed and installed in the ocean for marine resource exploitation and continuous operations. Generally, marine engineering structures can be divided into three types: fixed, movable (or floating structures) and complementary structures".*

*"These types of structures can be categorized according to their usage, material and supporting system".*

Based on the record of this Appeal and the above quoted definitions of the words "Ship" and "Marine Structures", the Appeals Authority is of the view that marine structures include Ship and other floating vessels. The Appeals Authority also agrees with the proposition by the learned counsel for Appellant that Magogoni Ferry falls under the category of movable (floating) structures. The Appellant having submitted CRB certificate which certifies that it is a specialist contractor, class one, local category in the field of marine structures should not have been disqualified.

As observed herein above the proposed successful tenderer did not submit a ship builder certificate either. Having accepted a Bureau Veritas Certification as submitted by the proposed successful tenderer as a Ship

Builder Certificate the Respondent ought to have equally accepted the certificate issued by CRB submitted by the Appellant.

Therefore, the Appeals Authority finds the Respondent's act of disqualifying the Appellant and qualifying the proposed successful tenderer while none of them submitted a certificate titled ship builder certificate to have contravened Section 4A(3) of the Act. This section provides as follows:-

(3) *"Procuring entities shall in the execution of their duties, undertake to achieve the highest standard of equity, taking into account-*

*a) equality of opportunities to all tenderers;*

***b) fairness of treatment to all parties; and***

*c) the need to obtain the value for money in terms of price, quality and delivery having regards to prescribed specifications and criteria".*

(Emphasis added)

The above quoted provision requires procuring entities to treat tenderers fairly. The Appeals Authority finds that the Respondent did not treat the Appellant fairly in this Tender.

Under the circumstances, the Appeals Authority concludes the first issue in the negative that the disqualification of the Appellant's Tender is not justified.

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

Following the findings hereinabove, the Appeal is hereby allowed. The decision of the Respondent to disqualify the Appellant is nullified. The Respondent is ordered to re-evaluate the tenders including that of the Appellant in compliance 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 Appellant and in the absence of the Respondent this 2<sup>nd</sup> day of September 2022.

**ADVOCATE ROSAN S. MBWAMBO**



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**Ag. CHAIRPERSON**

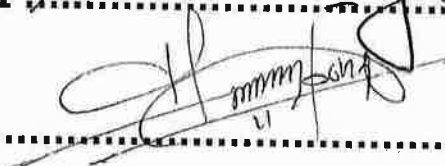
**MEMBERS: -**

**1. MR. RHOBEN P. NKORI**



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**2. MR. PIUS M. MPONZI**



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