

IN THE PUBLIC PROCUREMENT APPEALS AUTHORITY

APPEAL CASE NO. 09 OF 2022-23

BETWEEN

**M/S HANDAN IRON AND STEEL GROUP COMPANY LTD
(HBIS GROUP COMPANY LTD) AND
KASTIPHARM LTD (JV).....APPELLANT**

AND

TANZANIA RAILWAYS CORPORATION.....RESPONDENT

DECISION

CORAM

- | | |
|-------------------------------------|-----------------|
| 1. Hon. Justice (rtd) Sauda Mjasiri | - Chairperson |
| 2. Ms. Ndeonika Mwaikambo | - Member |
| 3. Mr. Rhoben Nkori | - Member |
| 4. Mr. Pius Mponzi | - Member |
| 5. Ms. Florida Mapunda | - Ag. Secretary |

SECRETARIAT

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

FOR THE APPELLANT

- | | |
|--------------------------------|----------------------------------|
| 1. Mr. Revocatus Thadeo Mathew | - Advocate - Ardean Law Chambers |
| 2. Mr. Jeremia Mtobesya | - Advocate - Juris Peritis |
| 3. Mr. Joseph Mgaya | - Chairman - Kastipharm Ltd |
| 4. Mr. Anwar Kachra | - Director - Kastipharm Ltd |



FOR THE RESPONDENT

- | | |
|------------------------|---------------------------------------|
| 1. Mr. Jonas P. Maheto | - Legal Officer |
| 2. Mr. Reginald Malele | - Head of Procurement Management Unit |
| 3. Mr. Edger Lugongo | - Supplies Officer |

The Appeal was lodged by M/S Handan Iron and Steel Group Company Ltd (HBIS Group Company Ltd) & Kastipharm Ltd Joint Venture (JV) (hereinafter referred to as **"the Appellant"**) against Tanzania Railways Corporation commonly known by its acronym as **"TRC"** (hereinafter referred to as **"the Respondent"**). The Appeal is in respect of Tender No. PA/154/HQ/2021-22/G/18 for Supply of Materials to Rehabilitate Track to 80lb Rail and Bridge Improvements from Ruvu to Mruazi Junction Railway Line (Link Line) 188km (hereinafter referred to as **"the Tender"**).

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

The Tender was conducted through International Competitive Tendering method as specified in the Public Procurement Act, No. 7 of 2011 as amended (hereinafter referred to as **"the Act"**) and the Public Procurement Regulations, GN. No. 446 of 2013 and GN. No. 333 of 2016 (hereinafter referred to as **"the Regulations"**).

The Respondent advertised the Tender on 4th April 2022 through Tanzania National e-Procurement System (TANePS). The deadline for submission of Tenders was set for 26th April 2022. On the deadline two tenders were received including that of the Appellant.



Tenders were then evaluated accordingly. After completion of the evaluation process, the Evaluation Committee recommended award of the contract to M/S China Civil Engineering Construction Corporation and M/S China Railway Material Group Hong Kong and Macau Co. Ltd JV at the contract price of United States Dollars Fifty Six Million Three Hundred Seventy Two Thousand Eight Hundred Fifty Five (USD 56,372,855.00) only subject to negotiations.

The Evaluation Committee's recommendations were tabled at the Tender Board meeting held on 8th June 2022. After deliberations the Tender Board approved the award subject to negotiations as was recommended by the Evaluation Committee. Negotiations took place on 15th-23rd and 26th June 2022. The negotiations were successful as the proposed tenderer reduced its price to United State Dollars Fifty Six Million Two Hundred Seventy Two Thousand Eight Hundred Fifty Five (USD 56,272,855.00) only CIF Dar es Salaam Port. The Tender Board at its meeting held on 5th to 6th July 2022 approved the award as recommended by the negotiation team.

On 10th August 2022, the Respondent issued the Notice of Intention to award the Tender to all tenderers who participated in the Tender process. The Notice informed the tenderers that the Respondent intends to award the Tender to M/S China Civil Engineering Construction Corporation and M/S China Railway Material Group Hong Kong and Macau Co. Ltd JV, at a contract price of USD Fifty Six Million Two Hundred Seventy Two Thousand Eight Hundred Fifty Five (USD 56,272,855.00) only CIF Dar es Salaam Port for a delivery period of 12 calendar months from the commencement date. The Notice also



informed the Appellant that its tender was disqualified for the reasons that:-

- i. The Form of Tender was not addressed to Tanzania Railways Corporation contrary to Clause 14.1 of the Instruction To Tenderers (ITT);
- ii. Details of financial statements, turnover information, certified Bank Statements and experience of one of the JV member (Handan Iron & Steel Group Co. Ltd (HBIS Group Co. Ltd) were submitted in Chinese language contrary to Clause 10.1 of the ITT which required all documents to be in English language;
- iii. The average turnover submitted was less than USD 20 billion, whereby the annual turnover for 5 years was USD 10.76 billion
- iv. A copy of the compliance program was not attached as indicated in the anti bribery policy; and
- v. Less experience as the highest contract value attended is 17 billion while the Tender price submitted is 78 billion.

Dissatisfied with the Respondent's decision, on 16th August 2022, the Appellant applied for administrative review to the Respondent challenging the reasons given for its disqualification. On 17th August 2022, the Respondent issued a decision dismissing the Appellant's application for administrative review in respect of grounds number one, two, four and five, while it upheld ground number three. Aggrieved further, on 22nd August 2022, the Appellant lodged this Appeal to the Appeals Authority. In its Statement of Appeal the Appellant raised all the five grounds for its disqualification while the Respondent had conceded that ground three was erroneously stated. In this Appeal therefore, the Appeals Authority will not delve into the third ground of the Appellant's



disqualification as it has been conceded by the Respondent in its decision for administrative review and in its Statement of Reply.

When the matter was called on for hearing the following issues were framed by the parties and approved by the Appeals Authority: -

1.0 Whether the disqualification of the Appellant's Tender was justified; and

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

SUBMISSIONS BY THE APPELLANT

The Appellant was represented by Mr. Revocatus Thadeo and Mr. Jeremia Mtobesya learned counsel. On the first issue, the learned counsel commenced his submissions by addressing the first ground of disqualification relating to the Form of Tender. According to the learned counsel tenderers were required to fill in the Form of Tender in compliance with requirements of Clause 14.1 of the ITT. The said Clause requires the Form of Tender to be completed without any alterations to its format and no substitute would be accepted.

The learned counsel submitted that, the Appellant completed the Form of Tender as per the instructions provided. The Appellant stated that the Form of Tender indicated clearly in brackets the parts which were to be inserted. On the space where the Respondent alleges that the address of the procuring entity was to be inserted was written "To: Gentlemen and/ or Ladies". There was no indication that the part was required to be filled in with the address of the procuring entity. The Appellant stated further that, if the Respondent wanted the name of the procuring entity to be inserted in the Form of Tender, it ought to have specified in the



same way as it was in the forms of securities. In the form of securities at a place where the name of a procuring entity was to be inserted it was written in bracket "*insert complete name of PE*". However the Respondent's Form of Tender did not have such a provision. The Appellant added that, it inserted the date as there was a provision for inserting the same unlike for the name of the procuring entity.

The Appellant submitted further that, if the proposed successful tenderer has inserted the name of a procuring entity its bid ought to have been rejected as the same would amount to alteration of the Form of Tender. In support of his argument the learned counsel cited the case of ***M/S M.A.K Engineering Co. Ltd & M/S Softnet Ltd JV versus National Institute of Transport***, Appeal No. 113 of 2011 whereby this Appeals Authority strictly prohibited the alteration of the Form of the Tender.

The Appellant urged the Appeals Authority to invoke its powers as it did in the case of ***M/S Aroche Systecs & Investico Ltd versus Tanzania Airports Authority***, Appeal Case No. 35 of 2021/22 whereby it reviewed the tender submitted by the proposed successful tenderer and realized that the same failed to comply with the requirement of the Tender Document and therefore ordered that the Tender process be started afresh in compliance with the law.

The Appellant disputed the Respondent's argument that the act of the proposed successful tenderer to insert the name of the procuring entity can be regarded as a substitution and not alteration. The Appellant stated that Clause 14.1 of the ITT strictly prohibits alteration or substitution of the Form of Tender. Thus, if the proposed successful

tenderer substituted the Form of Tender its bid ought to have been rejected.

The learned counsel disputed the Respondent's argument in relation to the second ground of disqualification that some of the documents like financial statements, turnover information, certified Bank Statements and experience of one of the Appellant's JV partner were in Chinese Language. The learned counsel submitted that, the Tender was advertised internationally, and it attracted firms from different countries. M/s Handan Iron & Steel Group Co. Ltd, the Appellant's JV partner in this Tender was from China and its documents were in Chinese which is their official language.

The Appellant expounded that Clauses 10.1 and 12.6 of the ITT specified clearly that the official language for the Tender is English; however, documents in another language were acceptable provided that the same are supported by accurate translation of the relevant passages in the English language. The Appellant added that in complying with the requirements of Clauses 10.1 and 12.6 of the ITT the Appellant attached translated documents in English. The translated documents bear the signature of the translator.

The learned counsel submitted further that if the translated documents were not sufficient or short of relevant information, the Respondent ought to have sought for clarification from the Appellant pursuant to Regulation 207(1) of the Regulations and Clause 27 of the ITT. The provisions allow the procuring entity to seek clarification if the information provided by a tenderer is not clear. However, the Respondent did not exercise such right and unfairly disqualified the Appellant's tender.



The Appellant submitted that Section 4A of the Act requires procuring entities when executing their duties to undertake to achieve the highest standards of equity taking into account equality of opportunity and fair treatment of all tenderers. The Respondent failed to adhere to this requirement of the Act as it ought to have sought for clarification if the translated information provided was not clear.

The learned counsel urged the Appeals Authority to revisit the tender of the proposed successful tenderer and ascertain if the same was attached with the required translation as per Clauses 10.1 and 12.6 of the ITT as the firm is also a Chinese Company.

With regard to the fourth ground of disqualification that the Appellant failed to attach a copy of compliance programme, the learned counsel submitted that the Appellant attached to its tender a form of undertaking in format No. 2 as provided in the Tender Document. The form of undertaking indicates that the Appellant agrees to abide by the rules relating to corruption in public procurement as required by Regulation 78 of the Regulations. The Appellant conceded to have not attached a copy of compliance programme to the form of undertaking as was required. However, it contended that the form of undertaking on its own suffices to confirm that the Appellant is compliant with the corruption programme.

The learned counsel stated further that the Appellant's failure to attach a compliance programme could have been cured by treating the anomaly as a minor deviation pursuant to Regulation 207(2)(b) of the Regulations. The Appellant added that, Regulation 204(2) of the Regulations listed several conditions which would render a tender to be rejected for material deviations to commercial terms. According to the

Appellant failure to attach a compliance programme is not among the listed conditions that amount to material deviations. Therefore, the Appellant's failure to attach a compliance programme ought to have been considered as a minor deviation which would not have resulted in the Appellant's disqualification.

In relation to the fifth ground of disqualification that the Appellant has less experience, the learned counsel submitted that the Respondent's assessment of this requirement was linked to monetary value of previously performed contracts contrary to the requirement of Clause 13(ii) (a) of the Tender Data Sheet (TDS). The referred Clause requires tenderers to demonstrate their experience on similar contracts awarded in the last three years. The requirement did not indicate that the previously performed contract ought to have the same value as the Tender which is the subject of this Appeal.

The Appellant submitted further that, the Respondent's act of assessing experience requirement by taking into account the value of the previously performed contracts or annual turnover and relating it to the price quoted by the Appellant in this Tender would be introducing a new evaluation criterion. According to the Appellant the Respondent's act in this regard contravened Section 72 of the Act which requires the criteria for evaluation to be clearly provided for in the Tender Document. The Respondent was required to evaluate experience by assessing if the previously performed contracts are of a similar nature to this Tender. The similarity ought to be on the nature of the contract performed and not the monetary value.



The learned counsel for the Appellant submitted that, following the Respondent's shortfalls as elucidated in the grounds for disqualification, relied upon by the Respondent, it is evident that the Tender process was marred with inconsistencies and irregularities as it was conducted in contravention of the law.

Finally, the Appellant prayed for the following orders: -

- i. A declaration that the evaluation proceedings in respect of the Tender is null and void for having been made in violation of the Act;
- ii. A declaration that the Appellant was wrongly disqualified from the Tender;
- iii. An order to reinstate the Appellant in the Tender process and declare its tender as a responsive tender as all reasons are dismissible for lack of merit and most are not even based on the Act and its Regulations;
- iv. An order that the Tender be re-evaluated;
- v. The Respondent to pay costs incurred by the Appellant; and
- vi. Any other relief that the Appeals Authority may deem fit to grant.

REPLY BY THE RESPONDENT

The Respondent was represented by Mr. Jonas P. Maheto, a legal officer who commenced his submissions by stating that in this Tender, tenderers were required to comply with requirements of the Form of Tender as provided under Clause 14.1 of the ITT and the format provided in the Tender Document. According to the Respondent the provided format required tenderers to indicate amongst others the name of the procuring entity. The Appellant inserted all the required

information except the name of the procuring entity. That is to say, the Appellant's Form of Tender was not addressed to the Respondent.

The Respondent stated further that, the Appellant claimed that the parts of the Form which were to be completed were in brackets and italicized; however, it inserted the date at a place where there were no brackets or italicized words. The Appellant could have inserted the name of the procuring entity in the place written "To: Gentlemen and/ or Ladies", the Respondent insisted. To the contrary, the Appellant failed to comply with the format required on the Form of Tender.

The Respondent disputed the Appellant's argument that inserting the name of the procuring entity would amount to alteration of the Form of Tender. The Respondent submitted that according to **Black's Law Dictionary**, 11th Edition, the term "alteration" has been defined to mean making a thing different from what it was without destroying its identity. The Respondent stated that, according to the definition of **Black's Law Dictionary** inserting the name of the procuring entity in the Form of Tender would not amount to alteration of the form of Tender but rather substitution of words.

The Respondent submitted further that, according to Clause 7.1 of the ITT, Form of Tender is among the key documents for the Tender and therefore non-compliance with the provided format renders a tender to be non-responsive. The Respondent asserted that, since the Appellant failed to insert the name of the procuring entity in the Form of Tender, its tender was found to be non-responsive.

The Respondent submitted further that Clause 8.1 of the ITT allows tenderers to seek clarifications if the requirements of the Tender

Document are not clear. The Appellant did not seek for clarification, thus this implies that the terms and conditions of the Tender were clear.

The Respondent distinguished the case of ***M/S M.A.K Engineering Co. Ltd & M/S Softnet Ltd JV versus National Institute of Transport*** (supra) by stating that the circumstances are different from this Appeal. In the referred case the issue in dispute was alteration of the Form of Tender while in this Appeal the issue is about the Appellant's failure to insert the name of the procuring entity in the Form of Tender. Therefore, the circumstances in this case are not relevant.

In relation to the second ground of disqualification that some of the documents submitted by the Appellant's partner in the JV were in Chinese language, the Respondent submitted that, according to Clauses 10.1 and 12.6 of the ITT the language of the Tender is English. Tenderers were required to submit their documents in English and for the documents which were in another language, accurate translation of the relevant passages in English were required. The Respondent expounded further that, the Appellant submitted Audited Financial Statements and turnover information in Chinese. The Appellant attached to its tender an abstract of the audited report in English. However, the abstract attached did not include all the required information for assessing the tenderer's financial capability. The Respondent contended further that, the abstract lacked a stamp of a translator to prove that the same was translated by an authorized translator.

The Respondent considered the Appellant's argument that it ought to have sought for clarification before concluding that the Appellant's information was in Chinese and therefore relevant information could not



be obtained. The Respondent stated that seeking clarification on a clear requirement of the Tender Document would have unfairly affected the rights of other tenderers in this Tender process. Thus, the Respondent stated that the Appellant's disqualification on this ground was justified.

With regard to the Appellant's failure to submit compliance programme, the Respondent submitted that Clause 7.1 of the ITT and Section X of the Tender Document indicate clearly that an undertaking by a tenderer on Anti-Bribery Policy/Code of conduct and compliance programme is among the mandatory documents required for the Tender. The Respondent submitted further that, the Tender Document provided two formats of anti-bribery undertaking and tenderers had an option of using either of the format, provided that a compliance programme is attached. The Appellant submitted Format No. 2 without a compliance programme.

The Respondent submitted further that Regulation 78(2) of the Regulations and Item 4 of the Third Schedule to the Regulations are very clear that anti-bribery policy and compliance programme are among the mandatory documents for the Tender and if a tenderer fails to submit the same, its tender is to be rejected.

The Respondent expounded further that compliance programme encompasses in detail how the firm participating in a Tender would combat corruption from the procurement process to the stage of execution of the contract. The compliance programme would indicate the firm's commitment from the top management to supporting staff. Thus, the Appellant's failure to attach a compliance programme created uncertainty as to how corruption would be combated by the Appellant.

The Respondent stated further that, failure to attach a compliance programme could not have been treated as a minor deviation as asserted by the Appellant. According to Clause 28(2)(b) of the ITT, a responsive tender is the one which conforms to all the terms and conditions of the Tender. If a tenderer fails to comply with the requirements of the Tender its bid would be disqualified. The Respondent submitted that it rightly disqualified the Appellant's tender for failure to comply with the requirements of the Tender Document.

In support of his proposition the Respondent's counsel cited the case of ***M/S Aroche Systecs & Investico Ltd versus Tanzania Airports Authority***, Appeal Case No. 35 of 2021/22 whereby this Appeals Authority upheld the disqualification of a tenderer for failure to submit anti-bribery policy and compliance programme. The Respondent urged the Appeals Authority to uphold the same position in this Appeal.

Regarding the disqualification on less experience, the Respondent submitted that, Clause 13(ii)(a) of the TDS provides clear guidance on experience requirement for this Tender. The referred clause states clearly that tenderers were required to provide evidence of their technical capabilities and experience in executing the works of a similar nature. As a proof of its experience the Appellant provided a list of the previously executed contracts. The said list was attached with other documents which were in Chinese. There was no translation attached to the said documents. The Respondent contended that, during evaluation it was unable to verify the Appellant's experience as the list of executed works attached was neither supported with copies of completion certificates nor signed contracts. The Respondent added that had the Appellant complied with the requirements of Clauses 10.1 and 12.6 of

the ITT, the submitted documents would have been attached with the translation.

The Respondent submitted further that the list of executed works which indicates the Appellant's experience shows that the latter has executed contracts with a maximum amount of USD 17 Billion while the quoted price for this Tender was USD 78 Billion. The Respondent elaborated that in order to determine if a tenderer possesses the required experience it ought to prove that the previously executed contracts are of similar nature and value with the intended project. The Appellant's list of previously performed works indicates that none amongst them had a similar value with the price quoted by the Appellant in this Tender. Thus, the Appellant lacks the requisite experience.

The Respondent disputed the Appellant's assertion that the Respondent introduced a new evaluation criterion on experience and stated that the assessment of the tenderers' experience was based on Clause 13(ii)(a) of the TDS. The Respondent submitted that there was no new criterion on experience introduced during evaluation as alleged by the Appellant.

The Respondent concluded its submissions by stating that Regulation 206 of the Regulations requires a non-responsive tender to be rejected and it should not subsequently be made responsive on correction or rectification. The Respondent asserted that from the above submissions the Appellant's tender was non-responsive, thus its disqualification was correct and in accordance with the law.

Finally, the Respondent prayed for the following orders:-

- i. The Appeal be dismissed with costs; and

- ii. The Respondent be allowed to proceed with the procurement process.

ANALYSIS BY THE APPEALS AUTHORITY

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

In resolving this issue, the Appeals Authority deemed it prudent to analyse each of the reason that led to the disqualification of the Appellant's tender in order to substantiate if it was justified. The given reasons are analysed as hereunder:-

i. Submissions of the Form of Tender that was not addressed to Tanzania Railways Corporation

In ascertaining the validity of this reason the Appeals Authority revisited Section VIII of the Tender Document where the format of the Form of Tender was provided. Having reviewed the format provided the Appeals Authority observed that, places where tenderers were required to insert their information were in brackets, italicized and some had blank lines to be completed. The format indicated clearly the required information which was to be inserted or provided by the tenderers. The Appeals Authority could not find a place where the name of the procuring entity was to be inserted.

During the hearing the Respondent elaborated that, tenderers were required to insert the name of the procuring entity in a place where it was written "To: Gentlemen and/or Ladies". The Appellant challenged the Respondent's assertion on this regard by stating that inserting the name of the procuring entity at the place written "To: Gentlemen and/or Ladies" would amount to alterations of the Form of Tender.

The Appeals Authority revisited Clause 14.1 of the ITT which provides guidance of how the Form of tender should be completed. Clause 14.1 of the ITT reads as follows:-

*"The tenderer shall fill the Form of Tender furnished in the Tendering Documents. **The Tender Form must be completed without any alterations to its format and no substitute shall be accepted.**"*

(Emphasis supplied)

The wording of the above quoted clause is clear that the Form of Tender is to be completed without any alterations to its format and no substitute would be accepted. The Appeals Authority revisited the Appellant's Form of Tender submitted on TANePS and observed that, it was completed as per the format provided. The Appellant's Form of Tender indicates specifically the name, date and amount of the Tender. The form did not contain the name of the procuring entity.

The Appeals Authority also revisited the Form of Tender of the proposed successful tenderer on TANePS and observed that it provided the same information as was required by the format provided. The Appeals Authority observed further that the name of the procuring entity was not inserted in the Form of Tender of the proposed successful tenderer.

The Appeals Authority revisited Section IX of the Tender Document and observed that the format provided for tender security form, tender securing declaration, performance security form, manufacturer's authorization form, just to mention a few, have all indicated a place where a tenderer is required to insert the name of the procuring entity.



From the above observations the Appeals Authority is of the settled view that the Appellant was right not to insert the name of the procuring entity as the Form of Tender did not identify a place where such information could be inserted. If the Respondent wanted the name of the procuring entity to be inserted in the Form of Tender, it could have specifically stated as was in other forms such as tender security form, tender securing declaration, performance security form and manufacturer's authorization form.

The Appeals Authority is of the firm view that inserting a name of a procuring entity in a place where it was not designated for such kind of information would amount to alteration of the Form of Tender. The Appeals Authority states further that since none of the tenderers who participated in the Tender had inserted the name of the procuring entity in the Form of Tender, this implies that they were all aware of the strict requirement of Clause 14.1 of the ITT. That is to say, alteration of the Form of Tender was strictly prohibited.

From the above findings the Appeals Authority is of the considered view that the Respondent's act of disqualifying the Appellant's tender on this ground was not proper in the eyes of the law.

ii. Submission of financial statements, turnover information, certified Bank Statement and experience in Chinese instead of English language.

In ascertaining the validity of the Appellant's disqualification on this ground, the Appeals Authority revisited Clauses 10.1 and 12.6 of the ITT read together with Clause 9 of the TDS which provide guidance as to the language of the Tender. The clauses read as follows:-

*"Clause 10.1 The Tender prepared by tenderers, as well as all correspondences and documents relating to the Tender exchanged by the Tenderer and the PE **shall be written in the English language** unless specified in the TDS. **Supporting documents and printed literature furnished by the tenderer may be in another language provided they are accompanied by an accurate translation of the relevant passages in the English language** unless specified in the TDS, in which case, for purposes of interpretation of the Tender, the translation shall govern.*

*Clause 12.6 **The required documents and other accompanying documents must be in English. In case any other language than English is used, the pertinent translation into English shall be attached to the original version***"

*"TDS 9 The language of all correspondences and documents related to the Tender is: **English**"*

The above quoted clauses indicate clearly that the language for this Tender is English. Tenderers were required to submit all documents in English and for the documents which were in different languages, accurate translation in English was to be attached to the original version.

In order to establish if the Appellant complied with this requirement, the Appeals Authority revisited the Appellant's tender on TANePS and observed that, documents submitted by one of the Appellant's JV partner M/S Handan Iron and Steel Group Company Ltd (HBIS Group

Company Ltd) were in Chinese. Some of these documents included:- turnover information, audited financial statements and bank statements. According to the record from TANEPS, in proving financial capabilities the Appellant's JV partner submitted documents which were in Chinese and the same were attached with abstracts written in English. Having reviewed the attached documents, the Appeals Authority observed that, the Appellant did not attach the translated version of audited financial statement and other relevant documents; the abstract attached did not contain sufficient information which would warrant a proper assessment of financial capability. The Appellant ought to have attached the translated version in English of all the required documents.

From the above observations the Appeals Authority is of the settled view that the Appellant submitted documents which failed to comply with the requirements of Clauses 10.1 and 12.6 of the ITT read together with Clause 9 of the TDS.

The Appeals Authority considered the Appellant's assertion that the Respondent ought to have sought for clarification before concluding that the tender was non-responsive and observed that clarifications based on clear requirements of the Tender are prohibited. According to Regulation 207(1) of the Regulations, clarifications are not allowed if aimed at making a non-responsive tender responsive. The Appellant's failure to comply with requirements of Clauses 10.1 and 12.6 of the ITT rendered its tender non-responsive. Therefore, if the Respondent would have sought for clarification on a clear requirement, the same would have unfairly affected the rights of other tenderers who complied with such a requirement.



From the above findings, the Appeals Authority is of the firm view that the Appellant's disqualification for submitting documents which were in Chinese is justified.

iv. Failure to attach compliance program

The record of Appeal indicates that the Appellant was disqualified for amongst other reasons failure to attach a compliance programme. In order to establish if the Appellant's disqualification on this ground is justified, the Appeals Authority revisited the Tender Document and observed that Clause 7.1 of the ITT mandatorily requires tenderers to submit an undertaking on Anti-bribery policy/code of conduct and compliance programme.

The Appeals Authority revisited Section X of the Tender Document and observed that it provided for two formats which could be used by tenderers in submitting its undertaking on Anti-bribery Policy/Code of Conduct and Compliance Programme. Tenderers were required to choose either of the provided formats and to comply with its requirements.

In order to ascertain if the Appellant complied with this requirement, the Appeals Authority reviewed its tender submitted on TANePS and observed that the Appellant attached to its tender a form titled "an undertaking on Anti-bribery Policy/Code of Conduct and Compliance Programme using format No. 2." The attached form indicates that the undertaking would be attached with a compliance programme which would assure the Respondent that, the no bribery commitment given in the undertaking would be complied with all the Appellant's employees as well as all third parties working with them. The Appeals Authority reviewed all the Appellant's documents submitted on TANePS and



observed that the compliance programme was not attached on the Appellant's undertaking as required.

During the hearing members of the Appeals Authority asked the Appellant to clarify if it submitted a compliance programme. In response thereof, the Appellant conceded to have mistakenly not attached the compliance programme as required. The Appellant contended that the form of undertaking submitted suffices to confirm the Appellant's commitment on combating corruption.

The Appeals Authority revisited Regulation 78(2) of the Regulations read together with the Third Schedule to the Regulations and observed that it requires tenderers on each tender process to submit an anti-bribery policy/code of conduct and compliance programme. Paragraph 4 of the Third Schedule requires any tender which had not complied with an anti-bribery requirement to be rejected. Paragraph 4 reads as follows:-

"Tenders which do not conform to these requirements shall not be considered".

(Emphasis added)

From the record of Appeal, it is crystal clear that the Appellant had submitted an undertaking committing itself to submit a compliance programme. However, the same was not submitted. The Appeals Authority rejects the Appellant's argument that non-submission of a compliance programme ought to have been treated as a minor deviation. The submission of a compliance programme is a requirement under Section X of the Tender Document read together with Regulation 78 and the Third Schedule to the Regulations.

Given the above findings, the Appeals Authority is of the firm view that the Respondent's act of disqualifying the Appellant for failure to submit a compliance programme is proper and in accordance with the law.

v. Less experience as per the attached contracts

The record of Appeal indicates that the Appellant was also disqualified for having less experience. In ascertaining if disqualification of the Appellant on this ground is justified, the Appeals Authority revisited the Tender Document so as to verify the experience requirement for this Tender. In the course of so doing the Appeals Authority observed that Clause 13.3(b) of the ITT as modified by Clause 13(ii)(a) of TDS clearly indicates the required experience for this Tender. Clause 13(ii)(a) of TDS reads as follows:

"Clause 13 (ii) The bidder shall furnish documentary evidence to demonstrate that it meets the following experience requirement(s):-

(a) Experience

Experience on similar contracts awarded in the last three (3) years indicating name of client, address, contract amount, delivery period etc."

From the above quoted clause it is crystal clear that tenderers were required to furnish documentary evidence proving experience in performing similar contracts awarded in the last three years. In order to establish if the Appellant complied with this requirement, the Appeals Authority revisited the Appellant's tender on TANEPS and observed that at the slot where it was required to attach proof of experience, it attached a list indicating that it has performed similar contract with



other entities. The said list was attached with documents which were in Chinese.

During the hearing the Appellant conceded to have submitted a list of previously performed contracts attached with documents in Chinese. The Appellant contended that the Respondent could have sought for clarification before disqualifying the Appellant on this point.

Having reviewed Clause 13(ii)(a) of the TDS and the documents submitted by the Appellant, the Appeals Authority observes that, the Appellant did not comply with the experience requirement. The Appellant did not submit documentary evidence in English which proves its experience in performing similar contracts. The Appellant ought to have attached in support of its working experience contracts translated in English as required under Clauses 10.1 and 12.6 of the ITT. The Appellant's failure to submit translated version of copies of contracts and/or certificates of completion means that the Appellant failed to establish its experience in contracts of a similar nature.

Given the above findings, the Appeals Authority is of the firm view that the disqualification of the Appellant on this ground is justified as it failed to provide documentary proof of similar contracts.

Under the circumstances the Appeals Authority is compelled to conclude the first issue in the affirmative, that is, the Appellant's disqualification is justified in relation to the ii, iv and v of grounds of disqualification as analysed hereinabove.



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

Taking cognizance of the findings hereinabove, the Appeals Authority hereby dismiss the Appeal with no order as to costs. The Respondent is allowed to proceed with the Tender process.

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 parties this 26th day of September 2022.

HON.JUSTICE (RTD) SAUDA MJASIRI



CHAIRPERSON

MEMBERS: ..

1. MS. NDEONIKA MWAIKAMBO.....

2. MR. RHOBEN NKORI.....

3. MR. PIUS MPONZI

