

**IN THE PUBLIC PROCUREMENT APPEALS AUTHORITY**

**APPEAL CASE NO. 15 OF 2022-23**

**BETWEEN**

**M/S CHINA GEZHOUBA GROUP  
COMPANY LTD.....APPELLANT**

**AND**

**DAR ES SALAAM WATER SUPPLY AND SANITATION AUTHORITY  
(DAWASA).....RESPONDENT**

**DECISION**

**CORAM**

- |                                     |                 |
|-------------------------------------|-----------------|
| 1. Hon. Justice (Rtd) Sauda Mjasiri | - Chairperson   |
| 2. Ms. Ndeonika Mwaikambo           | - Member        |
| 3. Dr. William Kazungu              | - Member        |
| 4. Ms. Florida Mapunda              | - Ag. Secretary |

**SECRETARIAT**

- |                        |                        |
|------------------------|------------------------|
| 1. Ms. Violet Limilabo | - Senior Legal Officer |
|------------------------|------------------------|

**FOR THE APPELLANT**

- |                       |                                   |
|-----------------------|-----------------------------------|
| 1. Ms. Nina Mabiba    | - Lawyer - CGGC                   |
| 2. Mr. Philbert Msuya | - Advocate - Jus cogens Attorneys |
| 3. Mr. Li Boowei      | - Marketing Manager               |
| 4. Mr. Guo Shengbin   | - Marketing Manager               |
| 5. Mr. Kaswaka E.     | - Advocate - Jus cogens Attorney  |

## FOR THE RESPONDENT

1. Ms. Neema Mugassa - Senior State Attorney - DAWASA
2. Mr. Ayoub Sanga - State Attorney - OSG
3. Ms. Hellen Lubogo - Director of Procurement - DAWASA
4. Eng. Christian Christopher - Engineer - DAWASA

The Appeal was lodged by M/S China Gezhouba Company Ltd (hereinafter referred to as "**the Appellant**") against Dar es Salaam Water Supply and Sanitation Authority commonly known by its acronym as "DAWASA" (hereinafter referred to as "**the Respondent**"). The Appeal is in respect of Tender No. AE/033/2022/W/39 for Construction of Kidunda Dam Project (Design and Build Contract) (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 as amended (hereinafter referred to as "**the Regulations**").

On 14<sup>th</sup> February 2022, the Respondent through Tanzania National electronic Procurement System (TANePS) invited eligible tenderers to participate in the Tender. The deadline for submission of tenders was Initially set for 29<sup>th</sup> April 2022. However, it was extended up to 20<sup>th</sup> May



2022. On the deadline the Respondent received four tenders including that of the Appellant.

Tenders were then subjected to evaluation. After completion of the evaluation process, the Evaluation Committee recommended award of the Tender to M/S Sinohydro Corporation Ltd at the contract price of TZS 329,466,814,886.00 (Tanzanian Shillings Three Hundred Twenty Nine Billion Four Hundred Sixty Six Million Eight Hundred Fourteen Thousand Eight Hundred Eighty Six only) VAT Exclusive.

The Tender Board at its meeting held on 16<sup>th</sup> July 2022, approved the award of the Tender to M/S Sinohydro Corporation Ltd as recommended by the Evaluation Committee subject to successful negotiations. Negotiations took place on 29<sup>th</sup> July and 1<sup>st</sup> August 2022 and were successful.

On 22<sup>nd</sup> August 2022, the Respondent issued the Notice of Intention to award the Tender to all tenderers who participated in the Tender. The Notice informed tenderers that the Respondent intends to award the Tender to M/S Sinohydro Corporation Ltd at the contract price of TZS 329,466,814,886.00 (Tanzanian Shillings Three Hundred Twenty Nine Billion Four Hundred Sixty Six Million Eight Hundred Fourteen Thousand Eight Hundred Eighty Six only) VAT Exclusive. The Notice also informed the Appellant that its tender was disqualified for two reasons namely:-

- i. Failure to comply with design experience requirement as provided under Section V - Evaluation and Qualification Criteria. The Appellant submitted design experience of another contractor M/s China Water Resources Beifang Investigation Design and Research Co. Ltd who was not in any contractual relationship with it.



- ii. Failure to comply with construction experience requirement as provided under Section V - Evaluation and Qualification Criteria. The Appellant submitted only one project which complied with construction experience requirement instead of two projects as required.

Dissatisfied with the reasons given for its disqualification, on 25<sup>th</sup> August 2022, the Appellant applied for administrative review to the Respondent. On 5<sup>th</sup> September 2022, the Respondent issued its decision which dismissed the Appellant's application for administrative review. Aggrieved further, on 14<sup>th</sup> September 2022, 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 Appellant's ground of Appeal relating to clarifications sought prior to the deadline for submissions of tenders is properly before 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?**

### **SUBMISSIONS BY THE APPELLANT**

The Appellant was represented by Ms. Nina Mabiba, the firm's inhouse lawyer and Mr. Philbert Msuya learned advocate. In relation to the first issue the Appellant submitted that, the Tender process did not comply with Regulation 4 of the Regulations as the Respondent failed to



respond to all the clarifications sought by it as required by Clause 9.2 of the Instructions To Tenderers (ITT). The Appellant claimed that it submitted six letters to the Respondent seeking clarifications on various issues on the Tender Document. The Respondent alleged to have issued clarifications; however, the same were not received directly by the Appellant as they were sent through a link which was not accessible to all tenderers. The Appellant was informed by other tenderers that the Respondent has issued clarifications; however, there was no direct reply by the Respondent on the Appellant's raised queries. The Appellant expounded that the clarifications issued by the Respondent were in relation to other tenderer's queries. The said clarifications did not cover all of the Appellant's queries.

The Appellant submitted further that, being one of the tenderers which participated in this Tender ought to have access of viewing the record of tender opening through TANEPS. To the contrary, such access was denied by the Respondent without justifiable reasons thereof. The Appellant stated that according to Clause 25.7 of the ITT and Regulation 4(1) of the Regulations the Respondent is required to publish the Tender opening results on TANEPS. However, the Respondent had failed to do so. The Appellant contended that, it obtained the tender opening results (read out prices) from other tenderers who participated in the Tender. The said record indicates that its tender price of TZS 332,420,562,092.00 (Three Hundred Thirty Two Billion Four Hundred Twenty Million Five Hundred Sixty two Thousand and Ninety Two Only) was relatively lower compared to the price of M/S Sinohydro Corporation Ltd (the proposed successful tenderer) who quoted TZS 449,881,157,010.00 (Tanzanian Shillings Four Hundred Forty Nine Billion



Eight Hundred Eighty One Million One Hundred Fifty Seven Thousand and Ten only).

The Appellant contended that the Notice of Intention to award indicates that the Respondent intends to award the Tender to the proposed successful tenderer at the contract price of TZS 329,466,814,886.00 (Tanzanian Shillings Three Hundred Twenty Nine Billion Four Hundred Sixty Six Million Eight Hundred Fourteen Thousand Eight Hundred Eight Six only). The Respondent alleged through its statement of reply that the change in price was caused by correction of errors and deduction of VAT. The Appellant disputes the Respondent's contention in this regard as no matter how many corrections of errors were made, the same would not have led to the change of price from TZS 449,881,157,010 (Four Hundred Forty Nine Billion Eighty Hundred Eighty One Million One Hundred Fifty Seven Thousand and Ten only) to TZS 329,466,814,886.00 (Tanzanian Shillings Three Hundred Twenty Nine Billion Four Hundred Sixty Six Million Eight Hundred Fourteen Thousand Eight Hundred Eight Six only). The Appellant doubted the validity of the correction of errors made which led the price of the proposed successful tenderer to change for over Tanzanian Shillings One Hundred Billion.

The Appellant submitted further that the proposed successful tenderer had been working with the Respondent in other projects; hence, familiar with the Respondent's working environment. The Appellant asserted that the proposed successful tenderer ought not to have included VAT on its price as it is aware that the projects of this nature are VAT exempted.

Regarding the second issue the Appellant submitted that, it complied with design experience requirement as per Section V - Evaluation and

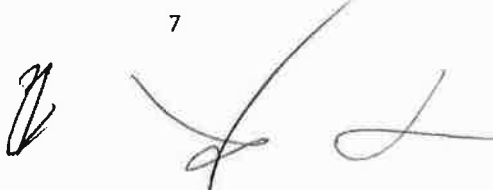


Qualification Criteria in the Tender Document. The Appellant stated that, in compliance with design experience criterion, it attached to its tender Information Form No. 3 which contained the name of the subcontractor, M/S China Water Resources Beifang Investigation Design and Research Co. Ltd who is an expert in dam designing. The Appellant stated that M/S China Water Resources Beifang Investigation Design and Research Co. Ltd has executed projects number 5 to 8 as attached to its tender. The Appellant asserted that the executed projects indicate that the firm met the design experience requirements as provided in the Tender Document.

The Appellant conceded that it lacks design experience, however in order to comply with such a requirement it submitted projects executed by M/S China Water Resources Beifang Investigation Design and Research Co. Ltd, a subcontractor to its company. The Appellant submitted that it has indicated in Information Form No. 3 that the firm has been engaged as a subcontractor. The Appellant added that the Tender Document provides a clear guidance for joint ventures or associations that its legal relationship must be declared, however it is silent on the part of subcontractors. According to the Appellant Information Form No.3 Item 5 was sufficient to declare that the firm is a sub-contractor. The Appellant added that in demonstrating experience of the firm it listed four projects executed by it, namely:-

- i. Survey, Design and Technician Service Contract (Civil Part) for Suki Kinani Hydropower Project In Pakistan.

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- ii. Construction engineering survey and design contract for Qingshanchong Reservoir Project in Yuping County in Guizhou Province, China.
- iii. Construction and design contract for Pazi Water Conservancy and Irrigation Project on Dogxung Zangbu River Basin in Tibet Autonomous Region. The total reservoir capacity is 375 million m<sup>3</sup>, the normal value water level is 4,325m, the maximum dam height of asphaltic concrete core sand-gravel dam is 108m, the installed capacity of power stations is 58 MW and the average power generation is 208.4 million KW.h.
- iv. Guanjingkou Water Control Project in Chongqing City, China. The total storage capacity of reservoir is 152 million m<sup>3</sup>. The total length of water conveyance line is 24.97km, and designed discharge is 4.76m<sup>3</sup>/s.

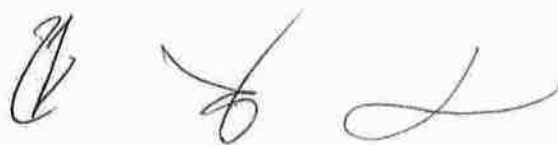
The Appellant submitted that in a dam project a design subcontractor can never be a lead firm because the design component is much lower than the works component.

The Appellant stated further that, if the Respondent failed to understand the legal status of M/S China Water Resources Beifang Investigation Design and Research Co. Ltd it ought to have sought for clarification from it pursuant to Clause 27.1 of the ITT.

Regarding construction experience the Appellant submitted that, it has attached to its tender four projects which indicates compliance with Item 4.1 and 4.3 of Section V- Evaluation and Qualification Criteria. The submitted projects were:-



- i. Yele Hydropower Station Head Pivot Project. The dam is designed as an asphalt concrete core rockfill dam with a maximum dam height of 125.5m, a normal water storage level elevation of 2,650m, and a total storage capacity of 298 million m<sup>3</sup>. The reservoir has many years of regulation performance, the installed capacity of power station is 240,000kW and the annual power generation is 5.88 kW\*h.
- ii. Excavation and filling works of Zhanghewan Pumped Storage Power Station Upper Reservoir. The total installed capacity of the power station is 1000MW; the dam crest elevation of the upper reservoir rockfill dam is 812m, the axis of the reservoir crest is 2,842.907m long. The normal storage level of the reservoir is 810m, the dead water level is 779m, the working water depth is 31m, the total storage capacity is 7.890 million cubic meters and the adjustment storage capacity is 7.175 million cubic meters.
- iii. Shandong Yimeng Pumped Storage Power Station Upper Reservoir Civil Construction and Metal Structure Installation Project. The normal storage level of the upper reservoir is 606m; the dead water level is 571m. The project value was USD 95,693,265 (TZS 221.52 billion).
- iv. Construction of Shuibuya Hydropower in Hubei Province in China which consists of open spillway on the left bank concrete slab rock fill dam, underground generator house on the right bank. The dam has a total reservoir capacity of



4580 Mil m<sup>3</sup>. The project value was USD 126,131,133 (TZS 292 billion).

The Appellant submitted that the listed projects particularly that of Shandong and Shaibuya complied with requirements of Item 4.1 and 4.3 of Section V- Evaluation and Qualification Criteria. Thus, the Appellant complied with the requirements of the Tender Document; hence, it ought not to have been disqualified from the Tender process.

Finally, the Appellant prayed for the following orders:-

- i. Cancellation of the Notice of Intention to award letter with Ref No. DAWASA/PU/W/KID/04 dated 22<sup>nd</sup> August 2022;
- ii. Declaration that the reasons used by DAWASA to disqualify the Appellant are not valid and the disqualification was illegal;
- iii. Reinstatement of the Appellant as the lowest evaluated bidder and be awarded the contract.

### **REPLY BY THE RESPONDENT**

The Respondent was represented by Ms. Neema Mugassa Senior State Attorney and Mr. Ayoub Sanga State Attorney. Mr. Ayoub Sanga commenced the submissions by indicating that parties are always required to be bound by their pleadings. That is to say, parties are required to be bound by what was presented before the court or tribunal. According to him, the filed pleadings will give another party notice of the nature of the claim in order to get prepared for the same. In support of his proposition the learned State Attorney cited the case of ***James Funke Gwagilo versus Attorney General***, Civil Appeal No.



67 of 2001, (2004) T.L.R at pg 162. In this case the Court of Appeal held that:-

*"the function of pleadings is to give notice of the case which has to be met. A party must therefore so state his case that his opponent will not be taken by surprise".*

The learned State Attorney stated that the Appeals Authority is bound by the pleadings filed by the parties when filing this Appeal and the responses thereof. Pleadings for this Appeal relates to the documents submitted by the tenderers on the deadline for submission of tenders. The Respondent urges the Appeals Authority not to accept other documents apart from those submitted on TANePS by the deadline for submission of tenders.

On the first issue the learned State Attorney submitted that; the Respondent complied with Regulation 13(1) and (2) of the Regulations read together with Clause 9(2) and (3) of the ITT which require the procuring entity to respond to all queries raised by tenderers within three days and to communicate the same to all tenderers participating in the Tender without disclosing the source in TANePS.

The Respondent stated that it received the Appellant's requests for clarification through letters dated 10<sup>th</sup> March 2022, 23<sup>rd</sup> March 2022, 29<sup>th</sup> March 2022, 30<sup>th</sup> March 2022 and 1<sup>st</sup> April 2022 respectively. The Respondent denied having received the Appellant's request for clarifications through a letter dated 11<sup>th</sup> April 2022. The Respondent indicated that after receipt of the Appellant's request for clarifications, it issued clarifications No. 1 and 2 through letters with Ref. No. DAWASA/PU/W/KID/01 and DAWASA/PU/W/KID/02 dated 8<sup>th</sup> March



2022 and 19<sup>th</sup> April 2022, respectively. According to the Respondent, the issued clarifications addressed all the queries raised by the Appellant. The Respondent added that the issued clarifications were sent to all tenderers via TANePS.

The learned State Attorney submitted further that, if the Appellant did not receive clarifications for all the raised queries, it ought to have invoked Sections 95(1) and 96(1) and (4) of the Act and submit a complaint to the Respondent within seven working days. To the contrary, the Appellant proceeded to participate in the Tender and raised the issue of clarifications after receipt of the Notice of Intention to award. According to Section 5 of the Law of Limitation Act Cap 89, the cause of action on any proceedings accrues on the date on which the cause of action arises. The Respondent submitted that the Appellant's cause of action with respect to the contents of the Tender Document accrues from 19<sup>th</sup> April 2022 when the former issued clarification No. 2 with regard to tenderers' requests for clarifications.

In support of his proposition the learned State Attorney cited the case of ***M/S SGS Tanzania Superintendence Company Ltd versus Tanzania Communications Regulatory Authority and another***, Appeal Case No. 38 of 2021-2022 whereby this Appeals Authority held that, a tenderer was required to file an application for administrative review upon becoming aware of the circumstances giving rise to a complaint.

The learned State Attorney submitted that Regulation 13 of the Regulations and Clause 9 of the ITT require any request for clarifications from tenderers to be responded within three days. If the Appellant was



of the view that the Respondent failed to issue clarifications within three days as required or dissatisfied with the given clarifications, it ought to have filed a complaint to the Respondent within seven working days. However, the Appellant failed to exercise its right in this regard. The Respondent submitted that, since the Appellant slept on its own right, it cannot raise issues relating to clarifications at this juncture.

With regard to the tender opening record the Respondent submitted that, the bid opening results are available on TANEPS and any registered tenderer can access such information. The Respondent submitted that, it is strange that the Appellant did not see the tender opening results and kept quiet without making any inquiry. The Respondent elaborated that the tenders were opened on TANEPS and the results were generated from the system. Thus, the Appellant's assertion that the Respondent did not comply with the basic principles enshrined under the Act and its Regulations is baseless. The Respondent stated that if the opening summary were not public how did the Appellant manage to attach the same on its Statement of Appeal as appendix 1.

In relation to the Appellant's submissions on the tender price of the proposed successful tenderer, the Respondent submitted that, it is true that the tender opening record indicates that the read out price for the proposed successful tenderer was TZS 449,881,157,010.00 (Tanzanian Shillings Four Hundred Forty Nine Billion Eight Hundred Eighty One Million One Hundred Fifty Seven Thousand and Ten only). However, according to the Form of Tender of the proposed successful tenderer the quoted price was TZS 392,449,519,945.00 (Tanzanian Shillings Three Ninety Two Billion Four Hundred Forty Nine Million Five Hundred Nineteen Thousand Nine Hundred Forty Five only). According to the



Respondent the discrepancy in price was due to the fact that during the Tender opening the quoted prices were entered manually and it was indicated by mistake that the proposed successful tenderer quoted TZS 449,881,157,010.00 instead of TZS 392,449,519,945.00.

The Respondent submitted further that during the evaluation process, the Evaluation Committee observed arithmetic errors of TZS 3,678,678,379.00 (Tanzanian Shillings Three Billion Six Hundred Seventy Eight Million Six Hundred Seventy Eight Thousand Three Hundred Seventy Nine only) on the price quoted by the proposed successful tenderer. The errors were corrected and the proposed successful tenderer was notified accordingly. The proposed successful tenderer accepted the corrections made.

The Respondent submitted further that TZS 59,304,026,680.00 (Tanzanian Shillings Fifty Nine Billion Three Hundred and Four Million Twenty Six Thousand Six Hundred and Eighty only) was deducted from the price of the proposed successful tenderer since water projects are VAT exempted. In so doing the Respondent was guided by Regulation 207 of the Regulations. After correction of errors and deduction of VAT the price of the proposed successful tenderer was adjusted to TZS 329,466,814,886.00 (Tanzanian Shillings Three Hundred Twenty Nine Billion Four Hundred Sixty Six Million Eight Hundred Fourteen Thousand Eight Hundred Eighty Six only), thus lower than the price quoted by the Appellant. The Respondent added that, the Appellant was not the lowest evaluated tenderer as its tender did not reach the price comparison stage, hence it cannot consider itself to be the lowest evaluated tenderer.

In relation to the second issue the learned State Attorney submitted that the Appellant was disqualified for failure to comply with design and construction experience criteria. In relation to design experience the learned State Attorney submitted that dam designing is one of the major components of the Tender. According to the Respondent the designing component is important as it will affect the operation, safety and life span of the dam. Hence, it cannot be regarded as a minor component of the Tender as submitted by the Appellant.

The Respondent submitted that design experience was guided by the Tender Document under Item 4.2 of Section V - Evaluation and Qualification Criteria. According to this provision tenderers were required to demonstrate their experience by submitting two contracts which demonstrate that they were involved in design dam construction as lead engineers. The Respondent submitted further that the Tender Document allowed such an experience to be that of tenderer or a joint venture partner or specialized subcontractor provided that the legal relationship is disclosed.

The Respondent submitted that, Clause 3.1 of the ITT and Clauses 7 and 8 of the Tender Data Sheet (TDS) allowed joint ventures (JV) or associations. The Clauses required a joint venture agreement or an intention to enter into such an agreement be submitted with the tender. Further the clauses indicate that the partners would be severally and jointly liable. The Respondent stated further that Item 2.5 of Section V - Evaluation and Qualification Criteria allowed specialized subcontractors provided that a declaration of its involvement in the tender is provided.



The learned State Attorney submitted that in demonstrating design experience the Appellant attached contracts executed by another company (M/S China Water Resources Beifang Investigation Design and Research Co. Ltd) indicating that the same is a sub-contractor. The Appellant did not disclose any document establishing the existing legal relationship between the Appellant and M/S China Water Resources Beifang Investigation Design and Research Co. Ltd. The Respondent contended that it could not have established the sub-contracting arrangements between the Appellant and the mentioned firm in the absence of any document showing the legal relationship to that effect. The Appellant's Form of Tender or other related documents ought to have mentioned the arrangements between the two firms.

The Respondent submitted further that, the Appellant had an obligation to disclose the relationship in writing as required under Regulation 12(1) and (2) of the Regulations. Since the relationship between the two parties was not disclosed, the Respondent did not consider the attached projects as part of the Appellant's experience, as the Appellant and the mentioned firm are two distinct entities in the eyes of the law.

The learned State Attorney submitted further that, even though the Appellant attached to its tender contracts executed by another firm, the attached contracts did not comply with Item 4.2 of Section V - Evaluation and Qualification Criteria. The Respondent submitted that to comply with design experience requirement the attached contracts ought to have indicated that the subcontractor is a lead design engineer. According to the Respondent contracts No. 5, 6, 7 and 8 attached to the Appellant's tender did not indicate that M/S China Water Resources Beifang Investigation Design and Research Co. Ltd was a lead design

engineer. The Respondent added that the details of the design contracts attached indicates that the firm lacks experience of designing a dam with storage capacity of 190mil m<sup>3</sup> as specified in the Tender Document. Under the circumstances the Appellant failed to comply with design experience requirement.

The Respondent disputed the Appellant's argument under Clause 27 of the ITT that it ought to have sought for clarification in relation to the Appellant's relationship with M/S China Water Resources Beifang Investigation Design and Research Co. Ltd. The Respondent submitted that the wording of Clause 27 gives procuring entities discretion of seeking clarification or not. Therefore, it was not mandatory for the Respondent to seek such clarification.

In relation to construction experience the Respondent submitted that the same was guided by Items 4.1 and 4.3 of Section V – Evaluation and Qualification Criteria. The Respondent stated that the mentioned items required tenderers to demonstrate their experience by attaching two dam construction contracts which proves that they have constructed dam projects with a storage capacity of 190Mil.m<sup>3</sup> and value of at least TZS 200 Billion. The Respondent submitted that in compliance with construction experience requirement the Appellant attached four contracts and amongst them only one project, the one for construction of Shuibuya hydropower project in Hubei province China qualified in terms of value and capacity of the dam. Therefore, the Appellant was disqualified for attaching one contract instead of two contracts which demonstrate its construction experience.

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The learned counsel concluded his submissions by stating that the Appellant's tender was fairly disqualified for failure to comply with the requirements of the Tender Document.

Finally, the Respondent prayed for the following orders:-

- i. The Appeal be dismissed in its entirety;
- ii. The Respondent be ordered to proceed with the award process;
- iii. Any other relief as the Appeals Authority may deem appropriate to grant in the circumstances; and
- iv. Costs of the Appeal be borne by the Appellant.

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

#### **1.0 Whether the Appellant's ground of Appeal relating to clarifications sought prior to the deadline for submissions of tenders is properly before the Appeals Authority**

In resolving this issue, the Appeals Authority reviewed the record of Appeal and observed that, the Tender was floated on 14<sup>th</sup> February 2022. On 10<sup>th</sup> March 2022, 23<sup>rd</sup> March 2022, 29<sup>th</sup> March 2022, 1<sup>st</sup> April 2022 and the 11<sup>th</sup> April 2022 respectively, the Appellant sought for clarifications from the Respondent on various issues relating to the Tender Document. The Respondent through letters dated 8<sup>th</sup> March 2022 and 19<sup>th</sup> April 2022 issued clarifications No. 1 and 2 which addressed amongst others queries raised by the Appellant. The record of Appeal indicates that the deadline for submission of tenders was 20<sup>th</sup>



May 2022 and the Appellant was among the tenderers who submitted their tenders.

Sections 95(1) and 96(1) and (4) of the Act read together with Regulation 104 of the Regulations read as follows:-

*"Sec. 95(1) Any tenderer who claims to have suffered or that may suffer any loss or injury as a result of a breach of a duty imposed on a procuring entity by this Act may seek a review in accordance with sections 96 and 97.*

*Sec. 96(1) Any complaints or dispute between procuring entities and tenderers which arise in respect of procurement proceedings, disposal of public assets by tender and awards of contracts shall be reviewed and decided upon a written decision of the accounting officer of a procuring entity and give reasons for his decision.*

*(4) The accounting officer shall not entertain a complaint or dispute unless it is submitted within seven working days from the date the tenderer submitting the complaint or dispute or when that tenderer should have become aware of those circumstances, whichever is earlier".*

*"Reg. 104 A tenderer who claims to have suffered or who may suffer any loss or injury as result of breach of a duty imposed on a procuring entity or an approving authority by the Act or these Regulations may apply for a review in accordance with section 95 of the Act."*



The above quoted provisions indicate clearly that if a tenderer is not satisfied with the procuring entities' acts or omissions, it is required to file an application for administrative review to the respective procuring entity within seven working days of becoming aware of the circumstances giving rise to a complaint.

Having related the above quoted provisions to the facts of this Appeal, the Appeals Authority observes that the Appellant having received the Respondent's 2<sup>nd</sup> clarifications issued on 19<sup>th</sup> April 2022 and having noted that some of its queries were not addressed it ought to have submitted an application for administrative review pursuant to the above quoted provisions. The Appeals Authority observes further that if the Appellant did not receive the clarifications issued as it contended, it ought to have submitted its application for administrative review within seven working days after the lapse of three days within which the Respondent as per Regulation 13 of the Regulations and Clause 9 of the ITT ought to have issued its clarifications.

The record of Appeal indicates that the Appellant raised issues relating to the Respondent's failure to issue clarifications on 25<sup>th</sup> August 2022 when it submitted its application for administrative review challenging reasons given for its disqualification. The reasons for the Appellant's disqualification were contained in the Notice of Intention to award dated 22<sup>nd</sup> August 2022. Since the Appellant's last letter seeking for clarification was written on 11<sup>th</sup> April 2022, the Appeals Authority observes that if the Appellant received the Respondent's clarification issued on 19<sup>th</sup> April 2022, it ought to have filed its application for administrative review by 28<sup>th</sup> April 2022. The Appeals Authority observes



further that if the Appellant did not receive the Respondent's clarifications issued on 19<sup>th</sup> April 2022 as it contended, it ought to have filed the application for administrative review after lapse of three days from 11<sup>th</sup> April 2022 when it submitted the last request for clarifications.

In view of the above observations the Appeals Authority is of the settled view that the Appellant ought to have filed its application for administrative review regarding clarifications on the Tender Document latest by 28<sup>th</sup> April 2022. To the contrary, the Appellant failed to exhaust the available remedy as per Sections 95(1) and Section 96(1) and (4) of the Act. In this regard the Appeals Authority concurs with the Respondent's argument that since the Appellant failed to exhaust the available remedy at the appropriate time, it cannot raise issues relating to clarifications when challenging the reasons for its disqualification issued through the Notice of Intention to award.

The Appeals Authority considered the Appellant's argument that it was denied access to view the record of tender opening through TANePS and observes that the demanded records are available on TANePS. The Appeals Authority observes further that, if the Appellant faced the said challenge as it contended, it ought to have contacted the relevant authorities for further guidance.

Based on the above findings, the Appeals Authority concludes the first issue in the negative that, the Appellant's ground of Appeal relating to clarifications sought prior to the deadline for submissions of tenders is not properly before the Appeals Authority.

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## **2.0 Whether the disqualification of the Appellant's tender was justified**

According to the record of Appeal, the Appellant was disqualified for failure to comply with design experience and construction experience requirements. In order to establish if the Appellant's disqualification is justified, the Appeals Authority analysed the reasons provided as hereunder:-

### **i. Failure to comply with design experience requirement.**

According to Item 4.2 of Section V-Evaluation and Qualification Criteria, tenderers were required to demonstrate dam design experience by attaching to their tenders a minimum of two contracts undertaken as a lead design engineer. Item 4.2 reads as follows:-

*"Item 4.2 A minimum number of Two (2) contracts for the design of Dam construction contracts undertaken as a lead design engineer between 1<sup>st</sup> January 2000 and the Application submission deadline;*

*The selected design contracts shall relate to Dam construction contracts that:-*

- Have been satisfactorily and substantially completed,*  
*NB: the above specific experience requirements may be met by specialized subcontractors."*

In ascertaining if the Appellant complied with the above quoted requirement, the Appeals Authority revisited its tender on TANePS and observed that under a slot where experience was to be demonstrated the Appellant attached copies of several contracts. The relevant

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contracts for design experience were contracts No. 5, 6, 7 and 8. The summary of the contracts were provided through Information Form 3A as required by the Tender Document. The forms indicate that the mentioned contracts were executed by M/S China Water Resources Beifang Investigation Design and Research Co. Ltd as a subcontractor. The Appellant did not disclose to the Respondent the legal relationship which exists between it and M/S China Water Resources Beifang Investigation Design and Research Co. Ltd.

The Appeals Authority reviewed the Appellant's tender on TANePS and observed that the Appellant's Form of Tender clearly indicated that it participated in this Tender as a single firm. No joint venture or association relationship was disclosed. The Appellant also did not disclose the existence of any relationship with specialized subcontractors.

During the hearing the Appellant was required to clarify its legal relationship with M/S China Water Resources Beifang Investigation Design and Research Co. Ltd. In response thereof, the Appellant submitted that the firm is its subcontractor and it is well experienced in dam designing. The Appellant stated further that its relationship has never been disclosed to the Respondent as it was not a requirement of the Tender Document. The Appellant asserted that the said subcontractor would neither enter into contract nor be directly liable to the Respondent.

Based on the requirement of Item 4.2 of Section V-Evaluation and Qualification Criteria the Appeals Authority observes that in order for the Appellant to comply with design experience requirement, it was required

Three handwritten signatures in black ink, located at the bottom of the page. The first signature on the left is a stylized 'Z' or 'J' shape. The middle signature is a more complex, flowing script. The signature on the right is a simple, horizontal, wavy line.

to submit two contracts which indicates that it executed the projects as a lead design engineer or prime contractor. The contracts attached by the Appellant as a proof of design experience were in the name of M/S China Water Resources Beifang Investigation Design and Research Co. Ltd who executed the contracts as subcontractor as per the Information Form 3A.

The Appeals Authority revisited Information Form (3) and observed that the last paragraph required tenderers if they intend to use subcontractors for highly specialized works, the information for such a subcontractor should be supplied to the procuring entity. Item 2.5 of Section V-Evaluation and Qualification Criteria requires a tenderer to make a declaration where there is a use of specialized subcontractors.

Having considered the Appellant's Form of Tender which indicates that it participated in this Tender as a single firm and that it conceded to have not disclosed any existing relationship with subcontractors, the Appeals Authority is of the firm view that in the absence of any disclosed legal relationship, the Appellant was duty bound to submit contracts which proves that it executed dam design projects as a lead design engineer so as to comply with the design experience requirement. The Appellant's act of submitting contracts executed by another firm whose status is not known to the Respondent to prove its design experience contravenes the requirement of the Tender Document. Under the circumstances the Appeals authority finds the Respondent's act of disqualifying the Appellant for submitting the design experience of another firm whose legal status was not disclosed to be proper.



The Appeals Authority is of the considered view that even if the contracts executed by M/S China Water Resources Beifang Investigation Design and Research Co. Ltd could have been accepted, the same would have not complied with design experience requirement, since the said firm executed the contracts as a subcontractor and not as a lead design engineer (prime contractor) as was required by the Tender Document.

Given the above findings, the Appeals authority is of the firm view that the Appellant failed to comply with design experience requirement.

**ii. Failure to comply with construction experience requirement.**

According to the Tender Document requirements for construction experience were provided for under Item 4.1 and 4.3 of Section V- Evaluation and Qualification Criteria. The Items read as follows:-

*"Item 4.1 Experience of similar dam construction contracts is a mandatory qualification.*

*(a) The experience requirement is a minimum **number of two (2) similar dam construction contracts as prime contractor, lead member of a joint venture, or management contractor** which are either in operational at the date of application, or in which the operations period ended after 1<sup>st</sup> January 2000.*

*The selected Dam construction contracts shall:-*

- **Have a minimum reservoir's storage capacity of 190Mil.m<sup>3</sup>**



- *Have been operating for at least two years since commissioning".*

*"Item 4.3 A minimum number of two Dam Construction contracts that have been satisfactorily and substantially completed as a prime contractor, joint venture member, management contractor or subcontractor between 1<sup>st</sup> January 2000 and Bid submission deadline.*

***The value of the member's participation in each selected construction contract shall be at least TZS 200 billion".***

In ascertaining if the Appellant complied with the above requirements, the Appeals Authority reviewed its Tender on TANePS and observed that at the slot where experience was to be shown it attached contracts No. 1, 2, 3 and 4 which indicate construction experience. The attached contracts were summarized in Information Form 3A. The form indicates that in all four contracts the Appellant executed them in the capacity of a prime contractor or a lead engineer. The Appeals Authority observes further that amongst the four contracts, two of them which are Shandong Yimeng Pumped Storage Power Stations upper Reservoir Civil Construction and Metal Structure Installation project and Shuibuya Hydropower project in Hubei Province had the value exceeding TZS 200 Billion which was required in the Tender Document. The Shandong project has a value of USD 95,693,265.00 (United State Dollars Ninety Five Million Six Hundred Ninety Three Thousand Two Hundred and Sixty Five only) equivalent to TZS 221.52 Billion and the Shaibuya project has



a value of USD 126,131,133.00 (United States Dollars One Hundred Twenty Six Million One Hundred Thirty One Thousand One Hundred Thirty Three only) which is equivalent to TZS 292 Billion.

The Appeals Authority also observed that between the two contracts the value of which meets the requirements of the Tender Document, the Shandong project lacks the minimum reservoir storage capacity of 190Mil.m<sup>3</sup> as per Item 4.1 of Section V-Evaluation and Qualification Criteria. The dam in the Shandong project has the adjusted storage capacity of 8 Million m<sup>3</sup> which is below the required capacity for this Tender. The Shaibuya project has a reservoir storage capacity of 4,580 Million m<sup>3</sup> above the required capacity for this Tender.

From these facts, the Appeals Authority observes that the Shaibuya project complies with the requirement of the Tender Document regarding construction experience. However, since Item 4.3 of Section V-Evaluation and Qualification Criteria required tenderers as proof of their construction experience to submit a minimum number of two dam construction projects, the Appeals Authority finds that the Appellant failed to comply with such a requirement as it submitted one contract instead of two contracts which were required for this Tender.

Based on the above findings the Appeals Authority is of the settled view that the Appellant failed to comply with the construction experience requirement as provided in the Tender Document. In view of the above the Appeals Authority finds the Respondent's act of disqualifying the Appellant for failure to comply with design experience and construction experience to be proper and in accordance with Regulation 206(2) of the Regulations which reads as hereunder:-



"Reg.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)

The Appeals Authority considered the Appellant's argument in relation to the awarded price of the proposed successful tenderer. The Appellant challenged the proposed contract's price for the reason that according to the tender opening record the price of the successful tenderer was TZS 449,881,157,010.00 (Tanzanian Shillings Four Hundred Forty Nine Billion Eight Hundred Eighty One Million One Hundred Fifty Seven Thousand and Ten only) and it has been reduced for over one hundred billion to TZS 329,466,814,886.00 (Tanzanian Shillings Three Hundred Twenty Nine Billion Four Hundred Sixty Six Million Eight Hundred Fourteen Thousand Eight Hundred Eighty Six only).

In ascertaining the validity of the Appellant's argument, the Appeals Authority revisited the tender opening record and observed that the quoted price of the proposed successful tenderer was TZS 449,881,157,010.00. The Appeals Authority revisited the Form of Tender of the proposed successful tenderer and observed that the quoted price for the Tender was TZS 392,449,519,945.00 (Tanzanian Shillings Three Ninety Two Billion Four Hundred Forty Nine Million Five Hundred Nineteen Thousand Nine Hundred Forty Five only).

The Appeals Authority revisited the Evaluation Report and observed that during evaluation the price quoted by the proposed successful tenderer



was found with some errors and the same were corrected. After correction the price of the proposed successful tenderer was adjusted to TZS 388,770,841,566.00 (Tanzanian Shillings Three Eighty Eight Billion Seven Hundred and Seventy Million Eight Hundred Forty One Thousand Five Hundred Sixty Six only). The Appeals Authority observed further that VAT of TZS 59,304,026,680.00 was deducted from the proposed successful tenderer's price as the project is VAT exempted. After deduction of VAT the price of the proposed successful tenderer came to TZS 329,466,814,886.00

On the basis of the documents availed before the Appeals Authority, we are satisfied that the price awarded to the proposed successful tenderer was the lowest evaluated price.

Regulation 212 of the Regulations clearly provides that, a successful tender shall be the tender with the lowest evaluated tender price for goods, works or services or the highest evaluated tender in case of revenue collection. The Regulation reads as follows: -

***"Reg. 212 The successful tenderer shall be -***

***(a) the tender with the lowest evaluated tender price in case of goods, works, or services, or the highest evaluated tender price in case of revenue collection but not necessarily the lowest or highest submitted price, subject to any margin of preference applied."***

(Emphasis supplied)



Based on the findings hereinabove the Appeals Authority is of the settled view that the proposed successful tenderer was the lowest evaluated tenderer and therefore entitled to be awarded the Tender. The Appeals Authority is of the firm view that since the Appellant's tender did not reach the financial evaluation stage; its price could not have been compared with that of the proposed successful tenderer. In order for a price of a tenderer to be compared with prices quoted by other tenderers, a tender should reach the price comparison stage. In this Tender the Appellant's tender was disqualified during technical evaluation for failure to comply with experience requirement. Therefore, its price could not have been considered for award.

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

### **3.0 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 17<sup>th</sup> day of October 2022.

**HON.JUSTICE (RTD) SAUDA MJASIRI**

  
.....  
**CHAIRPERSON**

**MEMBERS: -**

**1. MS. NDEONIKA MWAIKAMBO**.....

**2. DR. WILLIAM KAZUNGU**.....

