

IN THE PUBLIC PROCUREMENT APPEALS AUTHORITY

APPEAL CASE NO. 28 OF 2022-23

BETWEEN

**M/S ARAB CONTRACTORS
(OSMAN AHMED OSMAN & CO).....APPELLANT**

AND

**TANZANIA PORTS
AUTHORITY.....RESPONDENT**

RULING

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| 1. Adv. Rosan Mbwambo | - Ag. Chairperson |
| 2. Ms. Ndeonika Mwaikambo | - Member |
| 3. Dr. William Kazungu | - Member |
| 4. Mr. James Sando | - Executive Secretary |

SECRETARIAT

- | | |
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| 1. Ms. Florida Mapunda | - Deputy Executive Secretary |
| 2. Ms. Violet Limilabo | - Senior Legal Officer |

FOR THE APPELLANT

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| 1. Ms. Patricia Robert | - Assistant to Managing Director |
| 2. Ms. Nazmeen Mustafa | - Business Development Manager |

FOR THE RESPONDENT

- | | |
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| 1. Mr. Christian Chiduga | - Litigation Services Manager |
| 2. Mr. Shija Charles | - Senior Legal Officer |
| 3. Mr. Yona Malago | - Oil Terminal Manager |
| 4. Mr. Geoffrey Mwakasala | - Procurement Officer |
| 5. Mr. Patience Mutabirwa | - Ag. Manager Goods and
non-consultancy services |
| 6. Mr. Pasific Ibrahim | - Legal Officer |

M/S ARAB CONTRACTORS (OSMAN AHMED OSMAN & CO)

(hereinafter referred to as **"the Appellant"**) has preferred this appeal against **TANZANIA PORTS AUTHORITY** commonly known by its acronyms as **"TPA"** (hereinafter referred to as **"the Respondent"**). The Appeal is in respect of Pre-Qualification for Tender No. AE/016/2022-2023/HQ/W/07 for Design and Build for Construction of New Tanks Farm (Oil Terminal) for Receiving and Storage of Various Liquid Bulk Cargoes, Distribution Facilities at Dar es Salaam Port (hereinafter referred to as **"the Pre-qualification"**).

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

On 6th August 2022, the Respondent through Tanzania National e-Procurement System (TANePS) invited applicants to submit applications



for the pre-qualification. Deadline for the submission of applications was set for 16th September 2022 at 10:00 hours. By the deadline, thirty two (32) applications were received.

The received applications were subjected to evaluation which was conducted in two stages, namely preliminary and detailed evaluation. After completion of the evaluation process, three applications were found responsive to the Pre-qualification Document and therefore were recommended for shortlisting. The shortlisted applicants were:-

- i) M/S China Railway Major Bridge Engineering Group Co. Limited (CRMBEG) in joint venture with M/S Wuhan Engineering Co. Limited (WUHAN);
- ii) M/S China Construction Third Engineering Bureau Group Co. Limited; and
- iii) M/S China National Chemical Engineering No. 13 Construction Co. Limited.

The list of the shortlisted applicants was submitted to the Tender Board at its meeting held on 1st December 2022. After deliberations, the Tender Board approved the recommended list of the shortlisted applicants.

The results of the Pre-qualification were communicated to all applicants through letters dated 13th December 2022. The said letters did not give reasons for disqualification of the applicants. A letter from M/s Arab Contractors Tanzania Ltd dated 15th December 2022 was received by the Respondent requesting the latter to avail the former with reasons for the disqualification. On 19th December 2022 the Respondent

accordingly responded to the letter, stating that M/s Arab Contractors Tanzania Ltd was not among the applicants who participated in the Pre-qualification.

On 21st December 2022 the Appellant wrote a letter to the Respondent requesting to be availed with reasons for its disqualification. On 28th December 2022 the Respondent replied by informing the Appellant that it has been disqualified because her joint venture partner, M/S Engineering for the Petroleum & Process Industries (ENPPI) failed to comply with statutory requirement of providing proof of social security contributions as per the requirements of Clause 2.5 of Section IV-Qualification Criteria and Requirements contained in the Pre-qualification Document.

After receiving the reason for its disqualification, the Appellant claimed to have submitted its Appeal to this Appeals Authority through an email on 9th January 2023. However, the Appeals Authority never received the said Appeal. On 18th January 2023 the Appellant filed this Appeal to the Appeals Authority.

The Respondent's statement of reply was preceded by five points of Preliminary Objections (PO) on points of law to wit:-

" (a) *That, the Appeal is untenable and unmaintainable in law for want of the decision of the Procuring Entity (the accounting officer's decision) capable of being appealed against;*

(b) *That, the Appeal is incurably incompetent for want of legal authorization to institute the instance Appeal;*

- (c) That, the Appeal is unmaintainable in law for being instituted by a person/entity who was not a party in the pre-qualification proceedings;*
- (d) That, the Appeal is untenable in law on the basis that the Appellant does not have the right to Appeal against the Pre-qualification results; and*
- (e) That, the Appeal is time barred in terms of Rule 9 of the Public Procurement Appeals Rules G.N No. 411 of 2014 as amended."*

When the appeal was called on for hearing the Appellant was represented by Ms. Patricia Robert, an assistant to the Managing Director and Ms. Nazmeen Mustafa, Business Development Manager. Mr. Christian Chiduga, Litigation Services Manager and Mr. Shija Charles, Senior Legal Officer represented the Respondent.

The Respondent made submissions in chief on the points of preliminary objections. Amongst other points of Preliminary Objections, the Respondent submitted that, the Appellant participated in the pre-qualification as a joint venture of two companies, namely M/S the Arab Contractors (Osman Ahmed Osman and Co.) and M/S Engineering for the Petroleum & Process Industries. To the contrary, this Appeal was filed by M/S the Arab Contractors (Osman Ahmed Osman and Co.) only. The Respondent submitted that, the Appellant under the name of M/S Arab Contractors (Osman Ahmed Osman and Co.) was not an applicant in the

pre-qualification and therefore not capable of filing this Appeal. The Appellant responded to the submissions made by the Respondent.

Following some questions posed by the Appeals Authority, the Appellant conceded to one of the preliminary objections that *"the Appeal is unmaintainable in law for being instituted by a person/entity who was not a party in the pre-qualification proceedings"*. The Appellant stated that the Appeal should have been instituted by the joint venture companies M/S the Arab Contractors (Osman Ahmed Osman and Co.) and M/S Engineering for the Petroleum & Process Industries and not M/S Arab Contractors (Osman Ahmed Osman and Co.) only.

Following this admission, the Respondent quickly prayed for dismissal of the Appeal with costs. The Appellant on its part while confirming that the consequences of the admission is dismissal of the appeal asked to be relieved of costs.

Based on the nature of the defects of the Appeal, the Appeals Authority is of the view that the consequence of upholding the conceded PO is to struck out the Appeal and not to dismiss it.

The Appeals Authority have considered the Respondent's prayer for costs. However, no details have been provided for the Appeals Authority to assess the costs. In the premises, the request for costs is declined.

In view of the above, the Appeals Authority hereby struck out the Appeal and make no order as to costs.

It is so ordered.

This Ruling is binding and can be enforced in accordance with Section 97(8) of the Public Procurement Act No. 7 of 2011 as amended (hereinafter referred to as "**the Act**").

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

This Ruling is delivered in the absence of the parties though were duly notified, this 9th day of February 2023.

ADVOCATE ROSAN MBWAMBO



Ag. CHAIRPERSON

MEMBERS: -

1. MS. NDEONIKA MWAIKAMBO.



2. DR. WILLIAM KAZUNGU.



