IN THE PUBLIC PROCUREMENT APPEALS AUTHORITY

APPEAL CASE NO. 05 OF 2021-22

BETWEEN

M/S AMTEC CONSULTING COMPANY LIMITED.....APPELLANT

AND

TANZANIA NATIONAL ROADS AGENCY- (TANROADS)

KATAVI.....RESPONDENT

DECISION

CORAM

1. Hon. Justice (rtd) Sauda Mjasiri - Chairperson
2. CPA. Fredrick Rumanyika - Member
3. Ms. Ndeonika Mwaikambo - Member
4. Ms. Florida Mapunda - Ag. Executive Secretary

SECRETARIAT

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

FOR THE APPELLANT

1. Mr. Jameson Kasati - Director

FOR THE RESPONDENT

1.	Mr. Aumsuri Jacob	- Head of Procurement Management Unit
2.	Mr. Yakobo E. Makigo	- Project Manager

The Appeal was lodged by **M/S AMTEC Consulting Company Limited** (hereinafter referred to as **"the Appellant"**) against the Tanzania National Roads Agency – Katavi (**TANROADS – Katavi)** (hereinafter referred to as **"the Respondent"**). The Appeal is in respect of Tender No. AE/001/2021-22/KTV/W/01 for Installation of Street Illuminations along Kawajense (Mpanda) – Mnyamasi JCT and Kibaoni – Majimoto Regional Roads, R.561 and R.548 (Paved Sections) (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 National Competitive Bidding procedures specified in the Public Procurement Act, No. 7 of 2011 as amended in 2016 (hereinafter referred to as **"the Act"**) and the Public Procurement Regulations, GN. No. 446 of 2013 as amended by GN. No. 333 of 2016 (hereinafter referred to as **"the Regulations"**).

On 24th June 2021, the Respondent through Tanzania National e-Procurement System (TANePS) invited qualified tenderers to submit their

tenders. Deadline for submission was 9th July 2021 whereby six (6) tenderers submitted their tenders.

Tenders were then subjected to evaluation which was conducted into three stages namely; preliminary, technical and detailed evaluation. During preliminary evaluation two tenders were disqualified for being non responsive to the Tender Document.

According to the evaluation report, the remaining four tenders were subjected to technical evaluation and after completion of that process three tenders, including that of the Appellant were disqualified for failure to comply with the requirements of the Tender Document. Detailed evaluation was conducted in respect of the remaining tender by M/S Sungwa Contractor Enterprises Ltd and it was found to have complied with all the requirements of the Tender Document. The Evaluation Committee recommended award of the Tender to M/S Sungwa Contractor Enterprises Ltd at a contract price of Tanzanian Shillings Five Hundred Fifty Four Million Nine Hundred Four Thousand (TZS 554,904,000.00) only VAT inclusive.

The Tender Board at its meeting held on 4th and 5th August 2021, deliberated and approved the award as recommended by the Evaluation Committee.

On 9th August 2021, the Respondent issued the Notice of Intention to award the Tender to all tenderers who participated in the Tender process. The Respondent informed them that, it intends to award the Tender to M/S

Sungwa Contractor Enterprises Ltd at a contract price of Tanzanian Shillings Five Hundred Fifty Four Million Nine Hundred Four Thousand (TZS 554,904,000.00) only VAT inclusive.

The Notice also informed the Appellant that its tender was disqualified for two reasons namely: -

i. Failure to comply with annual volume of construction as per Clause 31(a) (ii) of the Tender Data Sheet (TDS); and

ii. Failure to comply with adequate working capital as per Clause 31(c) of the TDS.

Dissatisfied, on 12th August 2021, the Appellant applied for administrative review to the Respondent challenging the reasons given for its disqualification. On 16th August 2021, the Respondent issued its decision dismissing the Appellant's application for review.

Aggrieved further, on 23rd August 2021, the Appellant filed this Appeal to the Appeals Authority.

When the matter was called on for hearing, parties agreed on the following issues which were approved by the Members of the Appeals Authority: -

1. **Whether the disqualification of the Appellant's tender was justified; and**

2. **What reliefs, if any, are the parties entitled to.**

Having framed the issues, parties proceeded to submit as hereunder: -

SUBMISSIONS BY THE APPELLANT

The Appellant's grounds of appeal as stated in the Statement of Appeal as well as oral submission during the hearing may be summarized as follows:-

1. That, the Appellant was among the tenderers who participated in the Tender. According to the Notice of Intention to award the Tender, the Appellant's tender was disqualified for failure to comply with requirements regarding annual volume of construction and working capital.

2. That, the Appellant disputed its disqualification with regard to non-compliance with annual volume of construction. According to it, the requirement of annual volume of construction was provided for under Clause 31(a) (ii) of the TDS. Specifically, tenderers were required to provide a proof of having annual volume of construction in any two (2) years of the last five (5) years amounting to TZS 400,000,000/-. In complying with such a requirement the Appellant attached two certificates of completion of works of a similar nature and audited financial statements for the year 2018, 2019, and 2020. The certificates of completion were for the year 2020 with an annual volume of TZS 955,383,010.00. The audited financial statements had annual volume of TZS 1,055,556,714.00, TZS 1,332,640,352.00 and TZS 2,331,993,361.00 respectively. The Appellant attached audited financial statements as evidence of annual volume of construction since letters of acceptance and contract agreements were not considered as

supporting documents. Thus, the Respondent ought to have considered the Appellant's audited financial statements, and not to have disqualified it for non-compliance with annual volume of construction requirement.

3. That, the Appellant challenged its disqualification regarding non-compliance with the working capital requirement. In expounding its argument the Appellant submitted that, according to Clause 31(c) of the TDS tenderers were required to have a working capital of not less than TZS 65,000,000.00 in form of cash or lines of credit. In complying with that requirement the Appellant attached a bank statement from CRDB Bank and GT Bank showing a balance of TZS 23,454,404.46 and 17,546,539.94 respectively. Total cash was TZS 41,000,944.40. The Appellant also attached a Credit Facility Agreement from ECO Bank which was signed on 2nd December 2020 and was valid for a period of one year. The line of credit indicated a loan amount of TZS 230,000,000.00 for Local Purchase Order/Invoice Discount. The line of credit was intended to be used for various projects including the tender under Appeal. Thus, it was improper for the Respondent not to recognize the line of credit just because it was issued beyond the two weeks from the opening date.

4. That, the Appellant disputes its disqualification based on the ground that it lacked essential equipment. According to the Notice of Intention to award, the Appellant was disqualified for two grounds and lack of

essential equipment was not amongst them. This new ground was introduced by the Respondent in its decision issued in respect of the Appellant's application for administrative review. The above notwithstanding, the Appellant conceded that as a proof of availability of a crane truck, the Appellant attached a lease agreement entered with Xfinity Company Ltd. However, a registration card was not attached to prove that the said crane truck is owned by Xfinity Company Ltd.

5. Finally, the Appellant prayed for the following orders:-

   i. The Respondent to render the Appellant's tender successful; and

   ii. Since the Appellant's tender was the lowest, saving the Respondent more than TZS 70,000,000.00, the Respondent should proceed to award the Tender to the Appellant.

REPLY BY THE RESPONDENT

The Respondent's reply to the Appellant's grounds of Appeal as well as oral submissions may be summarized as follows:-

1. With regard to the annual volume of construction, the Respondent submitted that, Clause 31(a)(ii) of the TDS specified clearly that the required minimum annual volume of construction work in any two years of the last five years was TZS 400,000,000.00 in each year. The Appellant attached to its tender two certificates of completion, one

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issued by Mpanda Municipal Council with a contract sum of TZS 783,220,610.68 and the other one issued by Muhimbili National Hospital with a contract sum TZS 172,162,400.00. The Appellant also attached a contract for the project in respect of power supply to the water sources for Bariadi Urban Water Supply and Sanitation Authority. However, the contract amount was not known and a completion certificate was not attached. Thus, the contract was disregarded.

The Respondent submitted further that, the Appellant attached to its tender audited financial statements as proof of its compliance with the annual volume of construction works requirement. The Respondent disregarded the said audited financial statements as it was clearly indicated in the TANePS that in complying with the annual volume of constructions requirement, tenderers were required to submit relevant certificates of completion. The Appellant had two relevant certificates of completion for the year 2020 with a value of TZS 955,383,010.68. The Appellant complied with the annual volume of construction for one year while the requirement was to have an annual volume of construction of TZS 400,000,000.00 for each of the two years in the last five years. Thus, the Appellant's tender was disqualified for non-compliance.

2. That, the Appellant was disqualified from the Tender process for failure to comply with the adequate working capital requirement of TZS 65,000,000.00 as provided under Clause 31(c) of the TDS. The Appellant attached to its tender a CRDB Bank Statement dated 6th July

2021 of TZS 23,454,404.46, GT Bank Statement dated 8th July 2021 of TZS 17,532,224.14 and USD 6.20. The total cash at the time of tender opening was TZS 41,000,944.44. The Appellant also attached a Credit Facility Agreement dated 2nd December 2020 from ECO Bank amounting to TZS. 120,000,000.00. The credit facility attached was not issued within the period of two weeks prior to the deadline for submission of tenders as required and it related to other activities and not the Tender under Appeal. Therefore, the Appellant's tender was disqualified for having a working capital of TZS 41,000,944.44 below the required working capital of TZS 65,000,000.00.

3. With regard to non-compliance with essential working equipment, the Respondent submitted that according to Clause 31(b) of TDS tenderers were required to prove availability of essential working equipment by attaching registration cards or proof of ownership. The Appellant attached registration cards of available vehicles except for the crane truck. The Appellant also attached to its tender a leasing agreement with Xfinity Company Ltd for lease of the crane truck with registration No. T 683 DGY. No registration card was attached as a proof that the said crane truck is owned by Xfinity Company Ltd. Thus, the Appellant's tender was found not to have complied with this requirement as well.

4. That, the Appellant failed to comply with Clause 31(d)(1) of the TDS which related to Technical Personnel (Site Manager or Site Agent). The clause required tenderers to provide curriculum vitae (CV) of a Site

Manager who is a registered electrical engineer with a minimum qualification of a degree in electrical engineering and at least three years working experience in works of a similar nature and volume. The CV was to be attached with the relevant documents. The Appellant failed to comply with such a requirement since no certificates were attached as proof of professional registration or academic qualifications.

5. Finally, the Respondent prayed for the following orders:-

    i. That, the Appellant was fairly disqualified for failure to comply with annual volume of construction works, working capital, essential equipment, and technical personnel; and

    ii. The Respondent is not bound to accept the lowest or any tender as per Section I of the Invitation for Tenders.

ANALYSIS BY THE APPEALS AUTHORITY

1. Whether the disqualification of the Appellant's tender was justified.

In resolving this issue, the Appeals Authority reviewed the Appeal record and observed that, the Notice of Intention to award the Tender dated 9th August 2021, indicated that the Appellant's tender was disqualified for failure to comply with annual volume of construction and adequate working capital requirements as provided under Clause 31(a) (ii) and (c) of the

TDS. However, according to the evaluation report the Appellant's tender was disqualified at the technical evaluation stage for four reasons namely:-

(i) failure to comply with annual volume of construction works;

(ii) failure to comply with adequate working capital of TZS 65,000,000.00;

(iii) failure to comply with essential equipment; and

(iv) failure to comply with qualifications of technical personnel.

In order to substantiate if the reasons given for the disqualification of the Appellant were justified, the Appeals Authority deemed it prudent to analyze each of them as hereunder:-

(i) Annual Volume of Construction Works

Clause 31(a)(ii) of the TDS states clearly that the required annual volume of construction works in any 2 years for the last 5 years was TZS 400,000,000.00. For purposes of clarity Clause 31(a)(ii) is reproduced hereunder: -

TDS 31 "Post-qualification criteria: Tenderers financial, technical and production capabilities

a. Experience of the firm: -

(i) ....

(ii) The minimum required annual volume of construction work for the successful bidder in any 2 of the last 5 years shall be

Tshs. 400,000,000.00 each year (should be supported by copies of relevant documents; Note that letter of acceptance and contract agreement are not supporting documents)."

(Emphasis provided)

In order to ascertain if the Appellant complied with the above quoted provision, the Appeals Authority revisited its tender and observed that it had attached an acceptance letter in respect of a contract agreement of TZS 172,164,400.00 from Muhimbili National Hospital signed on 25th June 2019. As a proof of completion of the said project, the Appellant attached a certificate of completion from Muhimbili National Hospital issued on 9th March 2020. The Appellant also attached a contract of TZS 689,234,137.40 with Mpanda Municipal Director signed on 2nd January 2020. As a proof of completion of the said project, the Appellant attached a certificate of completion from Mpanda Municipal Council with a revised contract sum of TZS 783,220,610.68 issued on 13th September 2020. The Appellant also attached A Form of agreement entered with Bariadi Urban Water Supply and Sanitation Authority. The said Form of Agreement lacked a contract price and there was no proof that the same was completed.

The Appeals Authority observed further that, the Appellant had also attached audited financial statements for the years 2018, 2019 and 2020. Having reviewed them, it was observed that, the Appellant had several sources of revenue, thus it was not possible to establish the amount earned from the construction industry.

The Appeals Authority reviewed the TANePS portal and observed that in compliance with annual volume of construction works requirement tenderers were required to upload relevant completion certificates in any two years of the last five years.

The Appellant had attached on its tender two completion certificates with a total value of TZS 955,383,010.68 for the year 2020. No other certificates of completion were attached. This means, the Appellant had an annual volume of construction works in the year 2020 only, while the requirement was to have a minimum annual volume of construction works of TZS 400,000,000.00 in any two years of the last five years.

The Appeals Authority considered the Appellant's argument that, the Respondent in evaluating the annual volume of construction works ought to have considered the Appellant's audited financial statements. Having reviewed Clause 31(a)(ii) of the TDS and the TANePS portal, the Appeals Authority is of the settled view that, in complying with annual volume requirement, tenderers were required to upload relevant completion certificates which would be showing a minimum annual volume of construction works of TZS 400,000,000.00 in any two years of the last five years. Thus, the audited financial statements did not serve the purpose under the circumstances.

In view of our findings hereinabove, the Appeals Authority is of the settled view that, the Appellant failed to comply with the requirement of annual volume of construction works.

(ii) Adequate Working Capital

Clause 31(c) of the TDS required tenderers to prove availability of working capital of not less than TZS 65,000,000.00. The said Clause 31(c) is reproduced hereunder: -

(c) "*Financial capability: -*

Evidence of access to financial resources to meet the qualification requirements of not less than Tshs. 65,000,000.00 which are to be in cash, line of credit, etc. *should be supported by copies of relevant documents from reliable, sustainable and recognized financial institution e.g* ***Current Bank statement within two weeks back from the opening date****. Note that: fuel and construction material agreement shall not fall under evidence of adequate working capital."*

(Emphasis provided)

In compliance with the above mentioned criterion, the Appellant had attached a CRDB Bank Statement dated 6th July 2021 with a closing balance of TZS 23,454,404.46, a GT Bank Statement dated 8th July 2021 with a balance of TZS 17,532,224.14 and GT Bank Statement also dated 8th July 2021 with a total of USD 6.20 which is equivalent to TZS 14,315.80. The balance from CRDB and GT Bank statements amounted to TZS 41,000,944.44.

The Appeals Authority observed further that, the Appellant had attached a Credit Facility Agreement from ECO Bank signed on 2nd December 2020. The said Credit Facility indicates that it was for purposes of taking over the

existing loan facility from KCB Bank, discounting up to 80% of the invoice and Local Purchase Orders issued by its clients and to cover issuance of performance guarantee and advance payment guarantee for various projects on the signed contracts.

During the hearing members of the Appeals Authority required the Appellant to clarify how would the Credit Facility be applicable in this Tender. In response thereof, the Appellant stated that, the sum of TZS 230,000,000 which was earmarked for discounting of up to 80% of the invoice and Local Purchase Orders would also be used for this Tender.

The Appeals Authority having reviewed the Credit Facility Agreement is of the firm view that, the same cannot be relied upon as proof of financial capability. This is due to the reason that, the Credit Facility was issued on 2nd December 2020 and its purposes were well defined. Furthermore, it is not possible for a Credit Facility which was issued in December 2020 to have targeted to finance a project in respect of a tender which was floated in June 2021. Credit facilities are normally issued for specific purposes and objectives. Therefore, the Appellant's argument that the Credit Facility could have also been used for this Tender is baseless.

In view of the above, the Appeals Authority finds the Appellant to have failed to comply with the financial capability requirement for having a working capital of TZS 41,000,944.44 instead of TZS 65,000,000.00 as was required in the Tender Document.

(iii) Essential Equipment

Clause 31(b) of the TDS required tenderers to provide proof of the availability of essential equipment or working tools. The said Clause reads as follows: -

> *b.* *"Essential Equipment/Tools: -*
>
> ***The essential equipment/ tools to be made available for the contract by the successful Bidder*** *(proposals for timely acquisition or own, lease, hire, etc.* ***should be supported by registration card or proof of ownership****) shall be:-*
>
> *(i) One supervision vehicle;*
>
> *(ii)* ***Crane truck****; and*
>
> *(iii) All Equipment that will facilitate the works to be completed on time."*
>
> (Emphasis added)

The Appellant's tender was disqualified for failure to attach a registration card which proves ownership of a crane truck. In order to substantiate the validity of the Appellant's disqualification in this regard, the Appeals Authority reviewed its tender and observed that it had attached motor vehicles registration cards for the vehicles it owns. It had also attached an Equipment Lease Agreement dated 15th January, 2021 between the Appellant and Xfinity Company Ltd for an 8 Tones Isuzu Canter with registration No. T 683 DGY (crane truck). Pictures of the said Isuzu Canter were also attached. However, the registration card was not attached.

During the hearing the Appellant was required to clarify whether or not it complied with the essential equipment requirement. In response thereof, the Appellant conceded that a registration card of a crane truck was not attached as required.

Given the circumstances, the Appeals Authority is of the firm view that, in the absence of the registration card of the crane truck, it was not possible to substantiate the ownership of the said vehicle despite the availability of the lease agreement with Xfinity Company Ltd.

Therefore, the Appeals Authority finds the Appellant to have failed to comply with the requirement of submitting a registration card for a crane truck being an essential equipment.

(iv) Technical personnel

Clause 31(d)(1) of the TDS provides in clear terms the qualifications of the of the Site Manager or Site Agent. The said clause reads as follows: -

(d) "Technical personnel

1. ***A Site Manager/Site Agent who is qualified and experienced registered Electrical Engineer with minimum qualifications of degree in Electrical Engineering (or Equivalent) and a minimum of three years experience in works of similar nature and volume.*** *Furthermore the candidate should submit a recently signed curriculum vitae (should be supported by copies of relevant documents)."*

(Emphasis added)

According to the evaluation report, the Appellant's tender was disqualified on this ground for failure to attach registration and academic certificates of one Mr. Samwel Ndomba a proposed Site Manager. In order to establish the validity of the Respondent's acts, the Appeals Authority reviewed the Appellant's tender and observed that, the Appellant attached a Curriculum Vitae (CV) of Mr. Samwel Ndomba as a Site Manager. In support of his CV a copy of Licence No.0082 for an Electrical Installation Contractor Class A issued by Energy and Water Utilities Regulatory Authority (EWURA) was attached. No copies of academic certificates and / or registration certificates with a relevant professional body were attached.

During the hearing the Appellant was reluctant to address this ground. According to the Appellant the issue relating to Technical Personnel was a new ground for its disqualification which was not stated in the Notice of Intention to Award the Tender served on the Appellant. This ground was introduced in the Respondent's reply to the Appellant's grounds of appeal in respect of the Appeal filed before the Appeals Authority.

The Appeals Authority reviewed the Appellant's tender and observed that neither copies of the academic certificates nor registration certificates of the relevant professional body were attached to the Appellant's tender to substantiate the qualifications of the proposed Site Manager. Therefore, the Appeals Authority finds the Appellant to have failed to comply with requirements under Clause 31(d)(1) of the TDS.

Given the above findings the Appeals Authority finds the Respondent's act of disqualifying the Appellant to be proper and in accordance with Regulation 206 of the Regulations which states as follows: -

> Reg. 206(1) "***The procuring entity's determination of a tender's responsiveness shall be based on the contents of the tender*** *itself without recourse to the extrinsic evidence.*
>
> *(2)* ***Where a tender is not responsive to the tender document, it shall be rejected by a procuring entity****, and may not subsequently be made responsive by correction or withdrawal of the deviation or reservation."*
>
> (Emphasis supplied)

Under the circumstances the Appeals Authority concludes the first issue in the affirmative that the disqualification of the Appellant's tender was justified.

We would like to mention in passing that even though the Evaluation Report in respect of the Tender was very comprehensive and clearly stated the grounds for the Appellant's disqualification, the Respondent in its letter dated 9th August 2021 notifying the Appellant that its Tender had been disqualified, did not state all the reasons for its disqualification. Instead only two grounds were mentioned that is: -

(i) Annual Volume of Construction Works; and

(ii) Adequate Working Capital

In making its decision on the Appellants application for review, the Respondent introduced the third ground relating to essential equipment. Finally, in its Statement of Reply to the Appellant's grounds of appeal the Respondent introduced the fourth ground relating to Technical Personnel.

The Respondent was required to clearly state all the grounds for the disqualification of the Appellant as indicated in the evaluation report in line with Regulation 231 (4) of the Regulations which states as follows: -

> Reg. 231 (4) "*The notice referred to in sub-regulation (2) shall contain-*
>
> *(b) name of the successful tenderer;*
>
> *(c) the contract sum and completion or delivery period;*
>
> *(d)* ***reasons as to why the tenderers were not successful.***"
>
> (Emphasis supplied)

This is very important in order to establish openness and transparency.

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

Taking cognizance of the findings hereinabove that, the Appellant's disqualification is justified, the Appeals Authority hereby dismiss the Appeal. The Respondent is allowed to proceed with the Tender process. Each party is to bear its own costs.

It is so ordered.

This Decision is binding on the Parties and may be executed in terms of Section 97 (8) of the Act.

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

The Decision is delivered in the presence of the parties this 13th day of September 2021.

HON. JUSTICE (rtd) SAUDA MJASIRI

.....

CHAIRPERSON

MEMBERS:

1. CPA. FREDRICK RUMANYIKA.....

2. MS. NDEONIKA MWAIKAMBO.....