

IN THE PUBLIC PROCUREMENT APPEALS AUTHORITY

APPEAL CASE NO. 48 OF 2023 - 2024

BETWEEN

**M/S QINGDAO SINO-TANZANIA
TRADING COMPANY LTD.....APPELLANT**

AND

**TANZANIA – ZAMBIA RAILWAYS
AUTHORITY (TAZARA) RESPONDENT**

DECISION

CORAM

- | | |
|-------------------------------------|---------------|
| 1. Hon. Justice (Rtd) Sauda Mjasiri | - Chairperson |
| 2. Adv. Rosan Mbwambo | - Member |
| 3. Mr. Rhoben Nkori | - Member |
| 4. Mr. James Sando | - Secretary |

SECRETARIAT

- | | |
|-------------------------|------------------------------|
| 1. Ms. Florida Mapunda | - Deputy Executive Secretary |
| 2. Ms. Agnes Sayi | - Senior Legal Officer |
| 2. Ms. Violet Limilabo | - Senior Legal Officer |
| 3. Mr. Venance Mkonongo | - Legal Officer |

FOR THE APPELLANT

- | | |
|--------------------------|-------------------------------|
| 1. Mr. Eric Ringo | - Advocate, Fin and Law |
| 2. Mr. George Bega | - Advocate, Fin and Law |
| 3. Mr. Zuberi Kigwangala | - Advocate, Fin and Law |
| 4. Ms. Sui Yan | - Manager, Appellant's Office |



FOR THE RESPONDENT

- | | |
|------------------------|------------------------|
| 1. Ms. Mercy Chimtawi | - Senior Legal Counsel |
| 2. Mr. Marwa Magori | - Supplies Manager |
| 3. Ms. Tusajigwe Ndile | - Supplies Officer |

This Appeal was lodged by **M/S Qingdao Sino-Tanzania Trading Company Ltd** (hereinafter referred to as "**the Appellant**") against **Tanzania - Zambia Railways Authority** commonly known by its acronym as **TAZARA** (hereinafter referred to as "**the Respondent**"). The Appeal is in respect of Tender No. AE/130/2023/2024/G/05 for Supply of Spare Parts and Materials for Rehabilitation of One Shunting Locomotive (hereinafter referred to as "**the Tender**").

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**").

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

On 1st May 2024, the Respondent through National e-Procurement System (NeST) invited eligible tenderers to participate in the Tender. The deadline for submission of tenders was on 27th May 2024. By the deadline, only two tenderers namely, M/S Beijing Yangtintaige Railways Equipment



Technology Development Company Ltd and the Appellant submitted their tenders.

The received tenders were then subjected to evaluation. After completion of the evaluation process, the evaluation Committee recommended award of the tender to M/S Beijing Yangtintaige Railways Equipment Technology Development Company Ltd. The recommended contract price was USD 579,960.38 equivalent to Tanzania Shillings One Billion Five Hundred Fourteen Million Five Hundred Ninety One Thousand Three Hundred Ten and Eighteen Cents only (TZS.1,514,591,310.18) CIF Dar es salaam port. The Tender Board approved the award of the Tender to M/S Beijing Yangtintaige Railways Equipment Technology Development Company Ltd at its meeting held on 7th June 2024 as was recommended by the Evaluation Committee.

On 14th June 2024, the Respondent issued a Notice of Intention to award that informed the Appellant about the Respondent's intent to award the Tender to M/S Beijing Yangtintage Railways Equipment Technology Development Co. Ltd. The Notice also stated that the Appellant's tender was not found to be the lowest evaluated tender in financial evaluation stage.

Dissatisfied with the reason given for its disqualification, on 14th June 2024 the Appellant applied for administrative review to the Respondent. On 20th June 2024, the Respondent issued its decision which rejected the Appellant's application for administrative review. Aggrieved further, on 27th June 2024, the Appellant filed this Appeal before the Appeals Authority.



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

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's submissions were led by Mr. Zuberi Kigwangala assisted by Mr. George Bega, learned advocates. The leading counsel commenced by adopting the Statement of Appeal to form part of his submissions. In submitting on the 1st Issue, learned counsel made reference to the first ground of appeal where it is stated that the Tender was conducted through NeST and the Appellant was among the two tenderers which participated in the Tender. He expounded that to participate in the Tender the Appellant downloaded the Tender Document provided in NeST. According to Regulation 3 of the Regulations, the term "Tender Document" means a written or electronic document or request for proposal which invites tenderers to participate in the tender process. The learned counsel stated that the Tender Document provided the evaluation criteria to be used by the procuring entity in conducting evaluation of a specific tender.

The learned counsel contended that the Appellant downloaded the Tender Document to prepare its tender for submission to the Respondent. In reviewing the downloaded Tender Document, the Appellant observed that it provided the list of the spare parts and materials to be supplied for the



Tender. The listed items were 115 which were found from pages 50 to 53 of the Tender Document. The Appellant asserted that it worked on the list before it filled in the information on slots provided in NeST.

The learned counsel submitted that during filling in of the information in NeST the Appellant realized that there were new items in a slot for Conformance to Technical Specifications and Standards apart from those provided in the Tender Document. The new items were 25, 26, 27, 28, 32, 35, 38, 46, 51, 53, 64, 78, 85, 86, 87, 92, 93, 94, 96, 102, 104, 105, 107 and 110. The learned counsel expounded that item 94 was a duplicate of item 93 and these two items were not found in the Tender Document. In addition, item 79 was a duplicate of item 40 in the Tender Document but the two items were not found in the slot for Conformance to Technical Specifications and Standards. The Appellant asserted that the new items in the said slot caused challenges in pricing. This was due to the fact that the Appellant was constrained with time to obtain prices for all the listed items especially the newly introduced ones. In view of this fact the Appellant claimed to have been prejudiced of its rights of submitting a competitive tender price.

The learned counsel stated that the Respondent in its decision to the Appellant's application for administrative review admitted that the Tender Document had duplicated items. This admission was also made in the Respondent's reply to the Statement of Appeal that there was a mismatch and / or duplication of the items provided in the Tender Document and in the slot for Conformance to Technical Specifications and Standards. The

A handwritten signature in blue ink, consisting of stylized, cursive letters, likely representing the name of the Appellant or a representative.

learned counsel submitted that Section 74(1) of the Act requires the evaluation committee to evaluate the tenders on common basis to determine costs to the procuring entity. He added that Regulation 212 of the Regulations requires a successful tenderer to be obtained by not only considering the submitted price but also compliance with other requirements provided in the Tender Document. Hence, in evaluating the Tender, the Evaluation Committee was required to consider the evaluation criteria provided in the Tender Document and not only tenderer's quoted prices.

The learned counsel contended that since there was a discrepancy on the listed items provided in the Tender Document and those in the slot for Conformance to Technical Specifications and Standards, the Appellant highly doubted if the evaluation process was conducted in accordance with the criteria provided in the Tender Document. The learned counsel stated that Section 4A(1) and (2) of the Act requires the tender processes to be conducted in a manner that maximizes integrity, competition, accountability, economy, efficiency, transparency and value for money.

The learned counsel submitted that if the evaluation of tenders was conducted in accordance with the requirements provided in the Tender Document, the Appellant would have been found to have the lowest evaluated price as its tender was prepared by considering all the requirements provided in the Tender Document. In support of his argument in this regard, the learned counsel cited ***PPAA Appeal No. 25 of 2017-18 between M/S Secularms (T) Limited and Tanzania***




Electric Supply Company Limited. In the referred Appeal, the Appeals Authority held that for a tenderer to be declared responsive, it should comply with the requirements provided in the Tender Document. Thus, the Appellant urged the Appeals Authority to apply this position in the cited Appeal on the matter at hand.

Regarding the Appellant's price being higher to that of the proposed successful tenderer, the learned counsel reiterated his earlier position that the newly introduced items led the Appellant's quoted price to be higher.

The learned counsel submitted that by the time the Appellant realized that there were new items, it could not seek for clarification from the Respondent as the window had already been closed. The Appellant contended that the clarification window was closed three days before the deadline for submission of tenders.

In addressing the second ground of Appeal, the learned counsel submitted that the Appellant's tender was seen to be incomplete immediately after it was successfully submitted due to discrepancy on the lists of items provided in the Tender Document and those in the slot for Conformance to Technical Specifications and Standards. He contended that after the Appellant filled in all the required information, it successfully submitted its tender to the Respondent through NeST. However, the Appellant noted from the slot for Conformance to Technical Specifications and Standards that some of the items on the technical part had red dots. The learned counsel stated that the items with red dots were the newly introduced items.



The learned counsel submitted that for a tender to be considered responsive, it ought to have complied with 115 items during technical evaluation before consideration of the quoted price. When conducting evaluation of this Tender, the Respondent ought to have considered the list of 115 items provided in the Tender Document. To the contrary, the Respondent considered the items provided in the slot for Conformance to Technical Specifications and Standards whereby some were duplicated and others were new. The learned counsel stated that had the evaluation process been conducted properly, the Respondent would have realized that none of the tenders complied with the technical requirements as provided in the Tender Document. Thus, none among the two tenders deserved to be subjected to financial evaluation, the learned counsel contended.

In support of his argument on this point, the learned counsel cited ***PPAA Appeal Case No. 3 of 2017-18 between Datahouse Tanzania Limited and LAPF Pensions Fund***. In the referred Appeal the Appeals Authority stated that price comparison is done on tenders which passed preliminary and technical evaluation stages. The Appellant contended that in this Tender, tenderers' quoted prices were considered without thorough evaluation of the technical requirements.

The learned counsel further expounded that Regulation 202(5) of the Regulations indicates clearly that for a tender to be considered responsive the same must conform to all the terms, conditions and specifications provided in the tender document without material deviation or reservation. Therefore, he contended that in this Tender none of the tenderers



complied with the new criteria provided in the slot for Conformance to Technical Specifications and Standards in order to be eligible for award of the Tender.

The learned counsel submitted that since the evaluation of the tender was not conducted in accordance with the criteria provided in the Tender Document, it is evident that the Appellant's disqualification was not justified. He asserted further, that the Respondent's conduct in this Tender process contravened the law as it was marred with irregularities.

Based on the above submissions the Appellant prayed for the following reliefs: -

- a) The Respondent's decision to award the Tender to the proposed successful tenderer be nullified;
- b) The Respondent be ordered to re-start the Tender process; and
- c) Costs of this Appeal be borne by the Respondent.

REPLY BY THE RESPONDENT

The Respondent's submissions were made by Ms. Mercy Chimtawi, Senior Legal Counsel. She commenced on the first issue by adopting the Written Statement of Reply. She provided the background of this Appeal by stating that the Tender was advertised on 1st May 2024. The deadline for submission of tenders was on 27th May 2024. On the deadline, the Respondent received two tenders from the Appellant and the proposed successful tenderer. The received tenders were subjected to evaluation. After completion of the evaluation process, award was recommended to



the successful tenderer. The Appellant was informed about the Respondent's decision of intending to award the Tender to the proposed successful tenderer through the Notice of Intention to award issued on 14th June 2024. The Notice stated that the Appellant's tender was ranked the second, thus it was not considered for award. Being dissatisfied, the Appellant through a letter dated 18th June 2024 applied for administrative review to the Respondent. The Respondent issued its decision on 20th June 2024 that rejected the Appellant's application for administrative review. Thus, the Appellant lodged this Appeal.

In response to the first ground of Appeal, the legal counsel submitted that the Tender Document listed 115 items. The referred items were uploaded in NeST by the user department which owns the project. She elaborated that when all the requirements of the Tender were uploaded in NeST, the Tender Document was generated and was available to tenderers. The Tender Document contained all the requirements as were uploaded by the user department. However, the listed items that appeared in the slot for Conformance to Technical Specifications and Standards contained 115 items, amongst them 26 were omitted and 26 were duplicated. However, on the Price Schedule where tenderers were required to fill in the prices for the items, all 115 items appeared as uploaded by the user department. The legal counsel stated that the Respondent was not aware that the items were duplicated, until after the deadline for submission of tenders.

The legal counsel submitted that before the deadline for submission of tenders, the Respondent received a request for clarification from tenderers



on the challenge experienced in complying with technical specifications. Since the Respondent was unable to view NeST on the tenderers' window to establish what hindered tenderers to comply with technical specifications, it directed the tenderers to seek guidance from the Public Procurement Regulatory Authority (PPRA), believing that the raised challenge could have been on the tenderers' window.

The legal counsel submitted that the challenge of duplication and omission that occurred in the slot for Conformance to Technical Specifications and Standards did not disadvantage the tenderers to participate in this Tender. The legal counsel expounded further that during technical evaluation stage, the duplicated and omitted items did not affect the tenderers' rights as they were all considered to have passed. She added that the technical evaluation was conducted based on the requirements provided in the Tender Document. Hence, all tenderers were found to have passed this stage.

On the second ground of Appeal, the legal counsel contended that the Price Schedule contained all 115 items as provided by the user department. There was no omission or duplication of the listed items. In complying with the price schedule requirements, all tenderers filled in the prices as required. During financial evaluation, tenderers were assessed as to whether their quoted prices complied with Price Schedule requirements. At this stage, all tenderers' quoted prices were found to be in order and ranked accordingly. During ranking the Appellant's quoted price was ranked the second. Therefore, it was not recommended for award.



The legal counsel stated that much as there was a duplication or omission of the items on the technical requirements due to NeST's misbehavior, the tenderers' rights in this Tender process were not prejudiced. All tenderers were fairly evaluated as per the requirements provided in the Tender Document.

The legal counsel submitted that on 5th June 2024, in the midst of the evaluation process, the Respondent received a letter from the Appellant. The letter reminded the Respondent on the existing good relationship between them. The Appellant did not raise any concerns on the duplication and omission of the items which occurred in NeST, and whether it affected it when preparing its tender. The Respondent never replied to the Appellant's letter as it believed that the Appellant intended to influence the Respondent's decision regarding the Tender.

The legal counsel distinguished all the cases cited by the Appellant by stating that all tenders were evaluated in accordance with the requirements provided in the Tender Document. She added that evaluation of tenders was carried out in three stages namely, preliminary, technical and financial evaluation stage. Each tenderer was subjected to all the stages of evaluation in accordance with the criteria provided in the Tender Document. Thus, the legal counsel disputed the Appellant's allegation that the evaluation process was not conducted in accordance with the requirements provided for in the Tender Document.

In view of the above submissions, the Respondent prayed for the following reliefs: -



- i) The Respondent's decision to award the tender to the proposed successful tenderer be upheld;
- ii) The Respondent to be allowed to proceed with the Tender process;
- iii) The Appeal be dismissed in its entirety with costs; and
- iv) Any other relief that the Appeals Authority may deem fit and just to grant.

ANALYSIS BY THE APPEALS AUTHORITY

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

In resolving this issue, the Appeals Authority took cognizance of the fact that the Respondent conceded that there was a duplication and omission of some of the items in the Tender Document and in the slot for Conformance to the Technical Specifications and Standards. The Respondent stated that the list of spare parts to be supplied as provided in the slot of Conformance to the Technical Specifications and Standards had a discrepancy due to the system misbehavior which led 26 items to be duplicated and 26 items to be omitted.

The Appeals Authority considered the parties' contentious arguments whereby on one hand the Appellant asserted that the duplication of items on the technical requirements and the introduction of new items on Price Schedule had competitively affected the rights of tenderers in the disputed Tender process. On the other hand, the Respondent submitted that much as it concedes on the duplication and omission of some of the items on the



part of technical requirements, insisted that such a discrepancy has neither affected the tenderers' rights nor the evaluation process of the Tender.

In ascertaining the validity of the parties' contentious argument in this regard, the Appeals Authority revisited the tender in NeST. It observed that on the slot named Conformance to Technical Specifications and Standards tenderers were required to indicate their compliance to the list of spare parts provided.

Upon reviewing the slot on Conformance to Technical Specifications and Standards in the Appellant's tender, the Appeals Authority observed that there were 26 items which had red dots. The 26 items were 2, 5, 6, 10, 18, 27, 28, 32, 35, 40, 49, 51, 53, 64, 76, 77, 83, 85, 86, 87, 92, 96, 97, 102, 105 and 111. These listed items did not indicate if the Appellant complied with the offered technical specifications of the spare parts to be supplied.

The Appeals Authority revisited the tender of the proposed successful tenderer in NeST. It observed that at the slot for Conformance to Technical Specifications and Standards, there were 28 items with red dots. These were 1, 6, 8, 13, 15, 17, 18, 22, 28, 43, 45, 49, 52, 55, 56, 63, 64, 65, 69, 76, 80, 83, 86, 89, 90, 96, 100 and 105. Likewise the listed items did not indicate if the successful tenderer complied with the technical specifications of the spare parts offered.

The Appeals Authority reviewed the evaluation report and observed that evaluation was conducted into three stages namely, preliminary, technical



and financial. During the preliminary evaluation stage all the tenderers were found to be responsive and subjected to technical evaluation. The evaluation report shows that all tenderers were also found to have complied with all technical requirements during the technical evaluation and were subjected to financial evaluation.

The Appeals Authority reviewed the Price Schedules submitted by tenderers in NeST. It observed that all tenderers submitted prices for 115 items. However, some of the listed items on the Price Schedule were not included in the Tender Document. The Appeals Authority observed further that the submitted prices on Price Schedules included prices of items that tenderers did not specify compliance with offered technical specifications.

The record of Appeal indicates that during the evaluation process, the Respondent did not consider the impact of the system discrepancy. It evaluated the tenders according to what was submitted by tenderers without due consideration of the requirements provided in the Tender Document.

In view of the above, the Appeals Authority finds the Respondent's conduct in this regard to have contravened Section 72 (1) and (2) of the Act and Regulation 203(1) of the Regulations which require evaluation of tenders to be based on the terms and conditions prescribed in the Tender Document. Section 72 (1) and (2) of the Act and Regulation 203 of the Regulations read as follows: -



"72.- (1) The basis for tender evaluation and selection of the successful tenderer shall be clearly specified in the tender document.

(2) The tender documents shall specify factors, in addition to price, which may be taken into account in evaluating a tender and how such factors may be quantified or otherwise evaluated.

203.- (1) The tender evaluation shall be consistent with the terms and conditions prescribed in the tender documents and such evaluation shall be carried out using the criteria explicitly stated in the tender documents".

(Emphasis supplied)

The Appeals Authority also observed from NeST that before the deadline for submission of tenders, one tenderer sought clarification on the challenge faced that is, it could not specify 'comply' or 'not comply' on some of the items in the Conformance to Technical Specifications and Standards slot. In response therefore, the Respondent directed the tenderers to consult PPRA. The Appeals Authority is of the considered view that the tenderers' requests for clarification on the raised point should have alerted the Respondent that there is a challenge in the system. Therefore the Respondent had a duty to find a solution.

In view of the above findings, the Appeals Authority finds the Respondent's Tender process to have been marred with irregularities. Thus, the



Appellant's disqualification and award proposed to the successful tenderer were not proper in the eyes of the law.

Under the circumstances the Appeals Authority concludes the first issue in the affirmative that the disqualification of the Appellant's tender was not justified.

2.0 What relief, if any, are the parties entitled to?

In view of the above findings, the Appeals Authority hereby upholds the Appeal and orders the Respondent to re-start the Tender process in observance of the law. We make no order as to costs.

It is so ordered.

This decision is binding and can be enforced in accordance with Section 97(8) of the Act.

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

This decision is delivered in the presence of the parties this 1st day of August 2024.

HON. JUSTICE (rtd) SAUDA MJASIRI



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CHAIRPERSON

MEMBERS: -

1. ADV. ROSAN MBWAMBO


2. MR. RHOBEN NKORI
