

IN THE PUBLIC PROCUREMENT APPEALS AUTHORITY

APPEAL CASE NO. 11 OF 2024-2025

BETWEEN

M/S NIMACO TANZANIA LTD.....APPELLANT

AND

MUHIMBILI NATIONAL HOSPITALRESPONDENT

DECISION

CORAM

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

SECRETARIAT

- | | |
|-------------------------|------------------------------|
| 1. Ms. Florida Mapunda | - Deputy Executive Secretary |
| 2. Ms. Agnes Sayi | - Principal Legal Officer |
| 3. Ms. Violet Limilabo | - Senior Legal Officer |
| 4. Mr. Venance Mkonongo | - Legal Officer |

FOR THE APPELLANT

- | | |
|---------------------------|-----------------------------|
| _____ - Managing Director | _____ 1. Mr. Nicolaus Tundo |
| 2. Mr. Aniceth Mabula | - Project Manager |

FOR THE RESPONDENT

- | | |
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| 1. Ms. Veronica Hellar | - State Attorney |
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recommended award of the Tender to M/S NGE Security Ltd. On 12th August 2024, the Respondent issued the Notice of Intention to award the Tender. The Notice stated that the Respondent intended to award the Tender to M/S NGE Security Ltd. In addition, the Notice indicated that the Appellant's tender was not considered for award as it was not the lowest evaluated tender in terms of financial evaluation.

Dissatisfied, on 13th August 2024, the Appellant applied for administrative review to the Respondent challenging the award proposed to M/S NGE Security Ltd. The Appellant contended that the proposed successful tenderer lacked a valid permit from the Ministry of Home Affairs which was one of the mandatory documents for the Tender.

The record of Appeal indicates that there was no response from the Respondent on the Appellant's application for administrative review. However, on 23rd August 2024, the Respondent notified tenderers about the withdrawal of the earlier issued Notice of Intention to award. Furthermore, tenderers were informed that all the submitted tenders would be subjected for re-evaluation. After completion of the re-evaluation process, the Appellant's tender was found to be the lowest evaluated and was therefore subjected to post-qualification.

The post-qualification of the Appellant's tender was conducted on 27th August 2024. After completion of that process, the Appellant's tender was

contract. Thus, the Respondent post-qualified the second lowest evaluated tenderer, M/S Integrity Security Company Ltd. After the post-qualification process was completed, M/S Integrity Security Company Ltd was recommended for award of the Tender. The Tender Board approved the

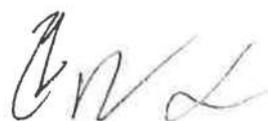


Evaluation Committee's recommendations of award of the Tender to M/S Integrity Security Services Ltd at its meeting held on 24th September 2024. The recommended contract price was TZS 29,943,999.50 VAT inclusive per month.

On 24th September 2024, the Respondent notified the Appellant that its tender was not considered for award due to its poor performance on the

justified, and

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

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SUBMISSIONS BY THE APPELLANT

The Appellant's submissions were made by Mr. Nicolaus Tungaraza, Managing Director and Mr. Aniceth Mabula, Project Manager. The Appellant commenced by stating the background of the matter that it participated in the Tender by submitting its bid on 5th July 2024. The Tender opening took place on 9th July 2024. The Appellant stated that on 12th August 2024, it received the Notice of Intention to award the Tender. The Notice indicated that the Respondent intended to award the Tender to M/S NGE Security Ltd. The Notice stated further that the Appellant's tender was not considered for award as it was the second lowest evaluated tender.

The Appellant stated that it was dissatisfied with the Respondent's intention to award the Tender to M/S NGE Security Ltd. This was due to the reason that the proposed firm lacked a valid permit from the Ministry of Home Affairs which was among the mandatory documents for the Tender. Thus, on 13th August 2024, the Appellant applied for administrative review to the Respondent. The Appellant contended that on 23rd August 2024, it received a notification from the Respondent which stated that the earlier issued Notice of Intention to award had been revoked and the tenders were subjected to re-evaluation.

The Appellant submitted that on 24th September 2024, it received a letter from the Respondent which stated that its tender was disqualified at the post-qualification stage for having poor performance in the current

October 2024, the Appellant filed an application for administrative review to the Respondent. On 3rd October 2024, the Respondent issued its decision which rejected the Appellant's application for administrative review. Thus, the Appellant filed this Appeal.

The Appellant stated that In this Appeal it challenges its disqualification at the post-qualification stage as the ground used to disqualify its tender was beyond the requirement provided in the Tender Document. The Appellant submitted that it is the current service provider at the Respondent's office and during the whole contract period it has never received a reprimand

Thus, the Appellant terminated their employment contracts. Aggrieved with the termination, the terminated security guards have been writing several letters to the Respondent with intention of tarnishing the Appellant's image.

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The Appellant submitted that after receipt of the letters from the Respondent which required the payment of the claimed salary arrears, it entered into a specific agreement with the terminated security guards on the payment modality. Thus, the Appellant effected the payment as agreed. The Appellant stated that its act of effecting the payment of salary arrears to some of the security guards who disputed termination of their employment cannot be termed as poor performance as alleged by the

the security guards on some of the security posts. Hence, this led to a number of challenges including the escaping of the patients. The Appellant denied the Respondent's assertion in this regard by stating that, the Appellant has never received a warning from the Respondent regarding the

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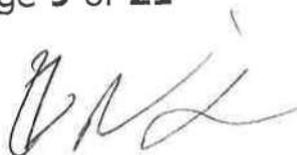
escaping of the patients. In addition, as per the nature of the Respondent's hospital, it is difficult to identify the in-patients, out-patients and other people as there are no specific uniforms. The Appellant further added that there was no requirement in the current contract for the Appellant to ensure that patients do not escape from the Respondent's premises. Hence, the Appellant contended that Respondent's act of

The Appellant submitted that the Respondent's decision to disqualify the Appellant's tender was based on the security report that was prepared by the Respondent alone. The Appellant contended to have never been given

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access of the said report during the whole contract period. The Appellant stated that the usual practice in other offices where the Appellant provides similar kind of services, the security report before being considered final, is deliberated by the two parties to the contract. However, that was not the

ii) An order that the Appellant be reinstated in the Post Qualification.

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REPLY BY THE RESPONDENT

The Respondent's submissions were led by Ms. Veronica Hellar, learned State Attorney. She commenced on the first issue by stating that the Respondent conducted the post-qualification process in accordance with Section 55 (1) and (2) of the Act. She added that Regulation 231(2) of the Regulations requires post-qualification criteria to be specified in the Tender Document. In the Tender under Appeal, the post-qualification criteria were specified under Clause 34 of the ITT.

The learned State Attorney submitted that according to Clause 34 of the ITT, criteria for post-qualification were those specified under Section IV: Qualification and Evaluation Criteria. She elaborated that Section IV: Qualification and Evaluation Criteria specified several evaluation criteria including those relating to experience. On specific experience tenderers were required to demonstrate their experience in performing contracts of similar nature by attaching the previous or ongoing contracts from 1st January 2021 to 31st December 2023.

The learned State Attorney submitted that in demonstrating compliance with the specific experience requirement, the Appellant attached several contracts including the existing contracts with the Respondent. She contended that during evaluation, the Appellant's tender was found to be the lowest evaluated tender, hence, it was subjected to post-qualification. During post-qualification, the Appellant's tender was found to be non-responsive for poor performance in the current contract.

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The learned State Attorney stated that the Appellant is the current service provider at the Respondent's office. During the execution of the ongoing contract there were several challenges which were observed on the Appellant's part. These included delay in effecting payment of salaries to the employed security guards and absenteeism of the security guards on the security posts which caused escaping of patients as well as theft of hospital's equipment.

The learned State Attorney elaborated that following the Appellant's under-performance, the Respondent wrote several letters reminding it to adhere to the terms and conditions of the contract. The letters were as follows: -

- i) Ref. No. MNH/SEC/REQ/2022/06 of 8th November 2022;
- ii) Ref. No. MNH/SEC/REQ/2022/07 of 14th November 2022; and
- iii) Ref. No. MNH/CHD.257/399/01/11 of 19th December 2022.

The Appellant claimed to have replied to the reprimand letters issued to it. However, the Respondent denied having received the Appellant's response and the pointed out anomalies were still continuing.

The learned State Attorney submitted that despite the reprimand letters

payments for the months of May, June and July 2023. The deductions were based on the non-attendance of the security guards. The learned State Attorney stated that the Appellant never challenged the deductions made. Hence, that sufficed to prove the Appellant's poor performance.



Regarding the absenteeism of the security guards on some of the security posts, the learned State Attorney submitted that as per the Schedule of Requirement the Appellant was required to offer security services for 24 hours in all the security posts. Hence, the Appellant's contention that in some of the security posts security guards were to be available for only 12

The learned State Attorney disputed the Appellant's argument that the Respondent delayed in effecting monthly payments. She stated that the Respondent has been timely making the monthly payments. However, the

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Appellant has been delaying in paying the salaries of its security guards. As a result, a challenge of security guards' absenteeism persisted. Hence, the learned State Attorney urged the Appeals Authority to disregard the

Appeals Authority
Regulation 231 (1) and (2) of the Regulations which read as follows: -

"55. -(1) *Pale ambapo wazabuni hawajafanyiwa uchambuzi wa sifa wa awali, taasisi nunuzi itajiridhisha iwapo*

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mzabuni ambaye zabuni yake imeonekana kuwa ni zabuni iliyofanyiwa tathmini yenye bei ya chini zaidi kwa ununuzi au zabuni iliyofanyiwa tathmini yenye bei ya juu zaidi kwa uondoshaji mali, ana sifa za kisheria, uwezo na rasilimali za kumwezesha kutekeleza kwa ufanisi

(a) uzoefu na utendaji kazi wa nyuma kwa mikataba linganifu;

(b) ufahamu wa mazingira asilia ya kazi;



- (c) uwezo wa wafanyakazi;
- (d) vifaa vya ujenzi au uzalishaji, ikiwa vinahusika;
- (e) uwezo wa kifedha wa kutekeleza mkataba;
- (f) mikataba inayoendelea kutekelezwa na mzabuni;
- (g) uwezo wa kisheria wa kufanya maamuzi juu ya haki, majukumu na wajibu;
- (h) uzingatiaji wa sheria za afya na usalama, kodi na ajira, ikiwa unahusika;
- (i) kumbukumbu za mashauri ya kimahakama; au
- (j) vigezo vingine vyovyote vinavyohusika".

The above quoted provisions state clearly that a procuring entity is allowed to conduct post-qualification to the lowest evaluated tenderer to ascertain its capabilities to execute the contract. The provisions require that should the procuring entity wish to conduct post-qualification, it has to specify in the tender document as well as the criteria to be considered.

In substantiating if post-qualification was allowed to be conducted in this Tender, the Appeals Authority reviewed Clause 34.1, 34.3 and 34.6 of the ITT which read as follows: -

"34.1 After determining the lowest-evaluated tender, if pre-qualification was not undertaken, **the PE shall carry out the post-qualification of the Tenderer using only the**

Evaluation Criteria.

34.3 The PE will determine to its satisfaction whether the Tenderer that is selected as having submitted the



lowest evaluated responsive Tender is eligible and meets the qualifying criteria in Section IV: Qualification and Evaluation Criteria.

34.6 A PE may seek independent references of a tenderer and the results of reference checks may be used in determining award of contract”.

The above quoted sub-clauses allow the Respondent to conduct post-

“Specific Experience (SCORE: N/A)

Specific and Contract Management Experience: A minimum number of similar contracts based on the physical size, complexity, methods/technology and/or other characteristics



described in the PE Requirements on contracts that have been satisfactorily and substantially completed (substantial completion shall be based on 80% or more of completed assignments under the contract) as a prime contractor/supplier/service provider, joint venture member, management contractor/supplier/service provider or sub-contractor/supplier/service provider for mentioned

Respondent. The listed contracts fell within the specified period and each had a value that exceeded TZS 100,000,000 specified in the Tender Document.

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The record of Appeal indicates that during evaluation the Appellant's tender was found to be the lowest evaluated tender having complied with the requirements specified in the Tender Document. After establishing that the Appellant's tender was the lowest evaluated tender based on the information provided in NeST, the Respondent subjected the Appellant to post-qualification pursuant to Clause 34 of the ITT. According to the record of Appeal, the Respondent conducted post-qualification to verify the authenticity of the Appellant's information provided in NeST.

The post-qualification report indicates that when executing the current contract, the Appellant was found with several shortfalls including absenteeism of the security guards at the security posts, the Appellant's failure to timely pay salaries to its employees and security guard's act of leaving the security posts unattended.

The Appeals Authority reviewed the record of Appeal and observed that the Respondent had written several letters to the Appellant indicating its dissatisfaction with the offered services. These letters were dated 8th November 2022, 14th November 2022 and 19th December 2022. It was further noted that the contract entered between the Appellant and the Respondent on 29th July 2022 required the Respondent to pay the Appellant a sum of TZS 23,337,450.00 VAT inclusive per month. However,

Order issued on July 2023 indicates the Appellant's monthly payment for June 2023 was TZS 22,404,023.00. The Official Order issued on August 2023 indicates that the Appellant's monthly payment for July was TZS 23,108,908.00. All the three Official Orders indicated that the Appellant's



monthly payments for May, June and July 2023 had deductions. The Respondent through its letter dated 3rd October 2024 to the Appellant pointed out that the deductions on May, June and July 2023 were due to the Appellant's security guards absenteeism on the security posts.

During the hearing of this Appeal, the Appellant conceded that there were deductions on its monthly payments for May, June and July 2023. The Appellant asserted to have been dissatisfied with the deductions made by the Respondent. However, it did not officially challenge the Respondent's conduct in this regard since it wanted to maintain harmony at the work place.

The Appeals Authority further considered the Appellant's argument regarding absenteeism of the security guards at the security posts. The Appellant contended that there were some security posts where security guards were not required to be available for 24 hours. The Appeals Authority reviewed the Activity Schedule of the current contract. It observed that Item 1 of the referred Activity Schedule stated categorically that the Respondent required the provision of the security services for 24

during post-qualification was fabricated. Having reviewed the record of Appeal and parties' arguments, the Appeals Authority observed that the disqualification of the Appellant was not only based on the security report

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but also on other evidence like reprimand letters, deductions on payment and Appellant's concession on absenteeism of the security guards on security posts.

In view of the above observations, the Appeals Authority is of the settled view that the Appellant's performance in respect of the current contract was unsatisfactory. Under the circumstances the Appeals Authority finds the Respondent's act of disqualifying the Appellant's tender during post-qualification to be proper and in accordance with Section 55(2) of the Act.

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

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

Taking cognizance of the above findings, the Appeals Authority hereby dismiss the Appeal for lack of merit. The Respondent is ordered to proceed with the Tender process in observance of the law. We make no order as to costs.

It is so ordered.

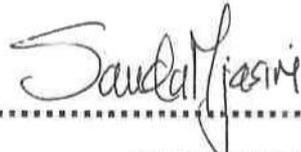
This decision is binding and can be enforced in accordance with Section 121(7) of the Act.

The Right of Judicial Review as per Section 120 of the Act is exhausted by the parties.



This decision is delivered in the absence of both parties though duly notified this 31st day of October 2024.

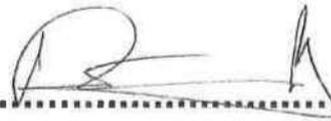
HON. JUSTICE (rtd) SAUDA MJASIRI



.....
CHAIRPERSON

MEMBERS: -

1. ADV. ROSAN MBWAMBO.....



2. MS. NDEONIKA MWAIKAMBO.....

