

IN THE PUBLIC PROCUREMENT APPEALS AUTHORITY

APPEAL CASE NO. 18 OF 2024 - 2025

BETWEEN

**M/S CHINA JIANGXI INTERNATIONAL ECONOMIC AND
TECHNICAL COOPERATION CO. LTD.....APPELLANT**

AND

TABORA MUNICIPAL COUNCIL.....RESPONDENT

RULING

CORAM

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|-------------------------------------|---------------|
| 1. Hon. Justice (Rtd) Sauda Mjasiri | - Chairperson |
| 2. Eng. Stephen Makigo | - Member |
| 3. Dr. William Kazungu | - Member |
| 4. Mr. James Sando | - Secretary |

SECRETARIAT

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

FOR THE APPELLANT

- | | |
|-------------------------|-----------------------------------|
| 1. Mr. Jeremia Mtobesya | - Advocate - Sweet and Conrad LLB |
| 2. Mr. Peng Chao | - Country Representative |
| 3. Mr. Prosper Mtui | - Quantity Surveyor |



FOR THE RESPONDENT

- | | |
|-------------------------|---------------------------------------------------------------------------------|
| 1. Ms. Leticia Malyato | - Ag. Head of Legal Unit |
| 2. Eng. Subira Manyama | - District Manager – Tanzani Rural
and Urban Roads Agency
(TARURA) Tabora |
| 3. Mr. Sylvester Mhumpa | - Head of Procurement
Management Unit |

The Appeal was lodged by **M/S China Jiangxi International Economic and Technical Cooperation Co. Ltd** (hereinafter referred to as "**the Appellant**") against **Tabora Municipal Council** (hereinafter referred to as "**the Respondent**"). The Appeal is in respect of Tender No. 8524/2023/2024/W/50 for Construction of Inala Regional Bus Terminal and Upgrading of CBD Market in Tabora Municipality (hereinafter referred to as "**the Tender**").

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: -

The Tender was conducted through the International Competitive Tendering method as specified in the World Bank's "Procurement Regulations for IPF Borrowers" Fourth Edition, November 2020 (hereinafter referred to as "**the World Bank's Procurement Regulations**"). In addition, the Tender was guided by the Public Procurement Act, No. 7 of 2011 as amended (hereinafter referred to as "**the Act**") which was



repealed and replaced by the Public Procurement Act, No.10 of 2023 with effect from 16th June 2024. Furthermore, it was guided by the Public Procurement Regulations, GN. No. 446 of 2013 as amended (hereinafter referred as "**the Regulations**") which was repealed and replaced with the Public Procurement Regulations, GN. No. 518 of 2024 effective from 01st July 2024.

On 19th January 2024, the Respondent through National e-Procurement System of Tanzania (NeST) invited eligible tenderers to participate in the Tender. The deadline for submission of tenders was set on 5th March 2024. On the deadline, the Respondent received seven tenders including that of the Appellant.

The received tenders were opened and subjected to evaluation. After completion of the evaluation process, the evaluation committee recommended award of the Tender to M/S China Jiangxi Corporation for International Economic and Technical Cooperation. The recommended contract price was Tanzania Shillings Sixteen Billion Eight Hundred Ninety-Nine Million Five Hundred Eighty-Three Thousand Two Hundred Ninety-Seven and Nineteen cents only (TZS 16,899,583,297.19) VAT Exclusive. On 7th June 2024, the Respondent's Tender Board approved the award of the Tender as recommended by the Evaluation Committee.

On 1st June 2024, the Respondent issued the Notice of Intention to award the Tender. The Notice stated that the Respondent intended to award the Tender to the Appellant at the contract price of TZS 16,899,583,297.19. On 8th June 2024, the Respondent issued an award letter to the Appellant.

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The letter also required the Appellant to furnish the performance security in the form of Bank Guarantee within 14 days. On 21st August 2024, the Appellant submitted the performance security to the Respondent. The performance security was issued in the name of M/S China Jiangxi International Economic and Technical Cooperation Co. Ltd.

On 2nd November 2024, the Respondent issued the second Notice of Intention to award the contract. The Notice stated that the Respondent intended to award the contract to M/S Sihotech Engineering Company Ltd. The contract price was Tanzania Shillings Nineteen Billion Nine Hundred Fifty-Two Million Nine Hundred Fifty-Five Thousand Nine Hundred Ninety-Five and Five cents only (TZS 19,952,955,995.05) VAT Exclusive. The Notice stated that the award made to the Appellant was nullified because during tendering it did not provide current company details as found in the database of Business Registration and Licensing Agency (BRELA).

Dissatisfied with the reason given for nullification of award, on 4th November 2024, the Appellant applied for administrative review to the Respondent. However, there was no response from the Respondent. Hence, on 19th November 2024, the Appellant filed this Appeal to the Appeals Authority.

In this Appeal, the Appellant disputes the Respondent's decision of issuing the second Notice of Intention to award while the Tender had already been awarded to the Appellant and the performance security was furnished as required. The Appellant stated that Section 60(5) and (7) of the Act requires that once an award of the contract has been issued, parties should

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proceed with the signing of the contract. The provisions do not allow the reversal of the Tender process after the award has been communicated to a tenderer and performance security has been furnished. However, the Respondent reversed the process and conducted due diligence in contravention of the law.

The Appellant stated that the discrepancy of names that appears in NeST and the legal documents submitted were beyond its control. The Appellant contended that it was first registered as a foreign firm by BRELA in 2015 under the name *M/S China Jiangxi Corporation for International Economic and Technical Cooperation*. In 2017, the Appellant's company passed a board resolution which changed the name of the company to *M/S China Jiangxi International Economic and Technical Cooperation Co. Ltd.* BRELA was notified by the Appellant about the change of name and it effected this change from 10th February 2021. The Appellant added that since NeST picks the registration information from the relevant authorities and a tenderer is only required to enter the registration number, therefore the Appellant cannot be penalized if NeST failed to pick the Appellant's changed name. Thus, nullification of the Appellant's award on this point was improper.

After receiving this Appeal, the Appeals Authority notified the Respondent about the existence of the Appeal and required it to submit a Statement of Reply. In response to the grounds of Appeal, the Respondent stated that the company which participated in this Tender did not exist as the Appellant changed its name from 29th December 2017. The change was



registered by BRELA on 10th February 2021 before NeST came into operation. Thus, when registering itself in NeST and participating in this Tender, the Appellant was expected to use its changed name. To the contrary, the Appellant participated in the Tender using the old name which did not exist. In proving its qualification, the Appellant attached the documents under the new name which is not recognized in this Tender. During due diligence the Respondent observed discrepancy in the Appellant's name. Thus, it could not have proceeded to sign a contract with it. Therefore, the award made to it was nullified.

When the matter was called on for hearing and at the time of framing up the issues, the Appeals Authority informed the parties that as per the record of Appeal, there is a point of law to be determined before embarking on the substantive merits of the Appeal. This was about the bid validity period of the Tender. In view of this observation, the following issues were framed which covered both the point of law raised *suo motu* by the Appeals Authority and the substantive merits of the Appeal. The issues were: -

- 1.0 Whether there is a valid Tender for determination by 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.**

Having framed the issues, the Appeals Authority required the parties to address the first issue which relates to a point of law before embarking on the substantive merits of the Appeal.

SUBMISSIONS BY THE APPELLANT ON THE POINT OF LAW

The Appellant's submissions on the first issue were made by Mr. Jeremia Mtobesya, learned counsel for the Appellant. He commenced by stating that, the tender validity period for the Tender was 120 days from the Tender opening date which was on 5th March 2024. Counting from the Tender opening date, the tender validity period expired on 3rd July 2024. Before the expiry of the tender validity period, on 1st June 2024, the Respondent issued the Notice of Intention to award the contract to the Appellant. The said Notice was followed with notification of award to the Appellant which was issued on 8th June 2024.

The learned counsel submitted that Section 71 of the Act requires evaluation of tenders, approval by the tender board and award notification to be performed within the specified tender validity period. He elaborated that before expiry of the tender validity period, the Respondent had already completed the evaluation process, obtained the tender board's approval of award and communicated award of the contract to the Appellant. This meant that before expiry of the tender validity period, the Respondent had completed all the processes which were to be finalized before 3rd July 2024.

The learned counsel submitted that since there was no complaint that was filed after the Respondent had issued the Notice of Intention to award the



contract to the Appellant, then the Respondent's act of issuing award of the contract to the Appellant complied with Section 60(5) of the Act. Thus, the Respondent was required to proceed with the signing of the contract as per Section 60(7) of the Act. He contended that because the award of the contract was already communicated to the Appellant, the Respondent should not have reversed the Tender process by conducting the due diligence.

The learned counsel submitted that after being awarded the Tender, on 21st August 2024, the Appellant submitted the performance security to the Respondent. He stated that since award of the contract was made within the tender validity period and the performance security was already submitted to the Respondent, the Tender is still valid. According to the learned counsel once the performance security was in place, the bid validity period had no relevance. Consequently, the remaining task of signing the contract was not required to be finalized within the tender validity period.

The learned counsel contended further that while waiting for the signing of the contract, the Appellant received a second Notice of Intention to award the contract from the Respondent. The Notice indicated that the Respondent intended to award the Tender to another tenderer. He stated that the second Notice of Intention to award contravened the law, as the same was issued after the tender validity period had expired. The Respondent was required to proceed with the signing of the contract with the Appellant whose award was made within the tender validity period and in compliance with the law.

A handwritten signature or set of initials, possibly reading 'L.S.', is written in dark ink at the bottom right of the page.

The learned counsel stated that the Respondent in its Statement of Reply had indicated that it requested an extension of the tender validity period through a letter dated 5th July 2024. The learned counsel submitted that the Appellant did not receive the request for extension of the tender validity period. In addition, if the referred request was made as alleged by the Respondent, the same was issued after expiry of the initially specified tender validity period which ended on 3rd July 2024. He stated that all the Respondent's subsequent acts after 3rd of July 2024, were a nullity in the eyes of the law.

The learned counsel argued that since the award was made to the Appellant before expiry of the tender validity period on 3rd July 2024, the Appeals Authority should declare the award made to the Appellant to be valid and nullify all the Respondent's subsequent acts thereafter.

Finally, the Appellant prayed that if the Appeals Authority finds that there was no valid Tender for determination, it should order the Respondent to proceed where it ended on 8th June 2024 as by that time the Respondent's acts were within the Tender validity period.

SUBMISSIONS BY THE RESPONDENT ON THE POINT OF LAW

The Respondent's reply submissions were made by Ms. Leticia Malyato, Acting Head of Legal Unit. She commenced by stating that, there was a valid Tender for consideration by the Appeals Authority before signing of the contract. However, the Respondent discovered that the name of the Appellant had some Issues after it submitted the performance security.



That is, the name in the performance security was different from the one used for this Tender. Thus, award made to it was nullified.

The legal officer stated that the tender validity period specified for this Tender was 120 days. The Tender opening took place on 5th March 2024. Counting from the Tender opening date, the tender validity period expired on 3rd July 2024. In addition, the tender security was valid for twenty-eight (28) days beyond the specified tender validity period. Thus, before the tender security expired, on 5th July 2024 the Respondent requested tenderers to extend the tender validity period. Only the proposed successful tenderer, M/S Sihotech Engineering Company Ltd accepted the request for extension. Thus, the Tender is valid for determination by the Appeals Authority.

However, after being asked by the Appeals Authority on the requirement of the law on the tender validity period and how extension of the same could be done, Ms Malyato conceded that the tender validity period expired on 3rd July 2024. She submitted that after expiry of the Tender validity period, the Respondent was not required to proceed with the Tender. That is, all the Respondent's subsequent acts that were conducted after expiry of the tender validity period were a nullity in the eyes of the law. In view of this development, the legal officer stated that there is no valid Tender for determination by the Appeals Authority.

REJOINDER BY THE APPELLANT

In his brief rejoinder, the learned counsel reiterated his submissions in chief on this point. He further stated that by 8th June 2024, the contract



had already been awarded to the Appellant. Thus, if the Appeals Authority would find that the tender expired on 3rd July 2024, it should then order the Respondent to proceed where it ended on 8th June 2024. By that time all the Respondent's acts were valid and within the tender validity period.

ANALYSIS BY THE APPEALS AUTHORITY ON THE POINT OF LAW

1.0 Whether there is a valid Tender for determination by the Appeals Authority

In resolving this issue, the Appeals Authority reviewed Clauses 18.1 and 18.2 of the Instruction To Bidders (ITB) read together with Clause 16 of the Bid Data Sheet (BDS). The clauses indicate that the tender validity period for this Tender was 120 days. The Appeals Authority further reviewed Section 71 of the Act read together with Regulation 191(3) of the Regulations which read as follows: -

"71. The procuring entity shall require tenderers to make their tenders and tender securities including tender securing declaration valid for periods specified in the tendering documents, sufficient to enable the procuring entity to complete the comparison and evaluation of the tenders and for the appropriate tender board to review the recommendations and approve the contract or contracts to be awarded whilst the tenders are still valid.

191(3) The period fixed by a procuring entity shall be sufficient to permit evaluation and comparison of

tenders, for obtaining all necessary clearances and approvals, and for the notification of the award of contracts and finalise a contract but the period shall not exceed one hundred and twenty days from the final date fixed for submission of tenders”.

(Emphasis supplied)

The above quoted provisions clearly indicate that tenderers were required to make their tenders valid for a period specified in the Tender Document. In addition, a procuring entity is required to specify the tender validity period that would be sufficient to enable it to complete the evaluation of tenders. Furthermore, the time specified should be sufficient for the appropriate Tender Board to review the recommendations and approve award of the contract. In addition, the specified period should allow the procuring entity to issue notification of award and to finalize the contract.

In ascertaining if the Tender under Appeal is still valid, the Appeals Authority took cognizance of the fact that the Respondent conceded that the tender validity period expired on 3rd July 2024. However, since the Appellant disputes the interpretation as when the tender validity period expired and the tender stages that were to be completed within such a period, the Appeals Authority finds it proper to consider the Appellant's contention in this regard.

In the course of doing so, the Appeals Authority reviewed the record of Appeal. It observed that the tender validity period which was specified for this Tender under Clause 16 of the BDS was 120 days from the tender

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opening date. The Tender opening took place on 05th March 2024. Counting from the Tender opening date, the tender validity period expired on 03rd July 2024. The Appeals Authority observed from the record of Appeal that by 3rd July 2024, the Respondent had completed the evaluation process, obtained internal approvals, issued the Notice of Intention to award which was subsequently followed by Notification of award of the contract to the Appellant.

After reviewing the record of Appeal *vis-à-vis* the requirements of Section 71 of the Act read together with Regulation 191(3) of the Regulations, the Appeals Authority observed that the tender validity period specified for this tender was required to cover all the tender processes from the Tender opening date up to finalization of the contract. According to Section 60(11) of the Act read together with Regulation 233(3) of the Regulations, a contract is deemed to have been finalized when signed by the parties. Section 60(11) of the Act and Regulation 233(3) of the Regulations read as follows: -

"60(11) A procurement contract shall enter into force when the formal contract is signed by the parties to the contract.

233(3) A procurement contract shall enter into force when a written acceptance of a tender is communicated to the successful tenderer and a formal contract is signed by the parties."

From the record of Appeal, it is crystal clear that by 3rd July 2024, when the tender validity period expired, the contract for this Tender was not finalized. The Appeals Authority considered the Appellant's contention that by 8th June 2024, it had already been awarded the contract, thus the Tender is still valid. Based on the requirements of Section 71 of the Act and Regulation 191(3) of the Regulations that the tender validity has to cover the period from the tender opening date up to the signing of the contract, the Appeals Authority finds that there was no valid Tender in place since the contract was yet to be finalized in terms of Section 60(11) of the Act by the time the tender validity period expired. Therefore, the Appeals Authority rejects the Appellant's proposition in this regard.

The Appeals Authority considered the Respondent's proposition before conceding that the tender validity period had expired. The Respondent stated that it requested tenderers to extend the tender validity period through a letter dated 5th July 2024. It further contended that M/S Sihotech Engineering Company Ltd was the only tenderer which accepted the request for extension. The Appeals Authority wishes to enlighten the parties that Regulation 191(4) of the Regulations requires the request for extension of the tender validity period to be made prior to the expiry of the initially specified validity period. Regulation 191(4) of the Regulations reads as follows: -

"191(4) *In exceptional circumstances, prior to the expiry of the original period of effectiveness of tenders, a procuring entity may request tenderers to extend*



the period for an additional specified period of time."

(Emphasis supplied)

As observed hereinabove that the tender validity period for this Tender expired on 3rd July 2024, the request for extension of the same was to be made prior to the expiry of the initially specified period. Thus, the Appeals Authority observed that the Respondent's act of requesting tenderers to extend the tender validity period after it had already expired, to have contravened Regulation 191(4) of the Regulations.

Given the circumstances, the Appeals Authority concludes the first issue in the negative that there is no valid tender for determination by the Appeals Authority.

Taking cognizance of our findings hereinabove, the Appeals Authority would not delve into the remaining issues. The Appeals Authority hereby dismiss the Appeal due to the expiry of the tender validity period and orders the Respondent to re-start the Tender process in compliance with the law. Each party to bear its own costs.

It is so ordered.

This Ruling 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.

Handwritten signature and initials in blue ink, appearing to be 'J. T. S.' with a flourish.

This Ruling is delivered in the presence of the Appellant and in absence of the Respondent though duly notified parties this 19th day of December 2024.

HON. JUSTICE (rtd) SAUDA MJASIRI


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CHAIRPERSON

MEMBERS: -

1. ENG. STEPHEN MAKIGO.....

2. DR. WILLIAM KAZUNGU.....