

**IN THE PUBLIC PROCUREMENT APPEALS AUTHORITY**

**APPEAL CASE NO. 44 OF 2024 - 2025**

**BETWEEN**

**M/S BOGETA ENGINEERING LTD..... APPELLANT**

**AND**

**MTAMA DISTRICT COUNCIL ..... RESPONDENT**

**DECISION**

**CORAM**

- |                                   |               |
|-----------------------------------|---------------|
| 1. Hon. Judge (Rtd) Awadh Bawazir | - Chairperson |
| 2. Dr. William Kazungu            | - Member      |
| 3. Mr. Raphael Maganga            | - Member      |
| 4. Mr. James Sando                | - Secretary   |

**SECRETARIAT**

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

**FOR THE APPELLANT**

- |                      |   |
|----------------------|---|
| 1. Eng. John Bogomba | - Managing Director                                 |
| 2. Mr. John Mahegere | - Director of Administration<br>and Human Resources |
| 3. Mr. Shafii Zuberi | - Accountant  |

## FOR THE RESPONDENT

- |                       |  |
|-----------------------|--|
| 1. Mr. Yusuf Msosa    | - Legal Officer                              |
| 2. Mr. Seleman Kaisi  | - Ag. Head of Procurement<br>Management Unit |
| 3. Mr. Pius Mutechura | - Head of Infrastructure Division            |

This Appeal has been lodged by **M/S Bogeta Engineering Limited** (hereinafter referred to as "**the Appellant**") against **Mtama District Council** (hereinafter referred to as "**the Respondent**"). It is in respect of Tender No. 76G1/2024/2025/W/13 for construction of Mtama Bus Stand (hereinafter referred to as "**the Tender**").

Based on the documents provided to the Public Procurement Appeals Authority (hereinafter referred to as "the Appeals Authority"), the background of this appeal can be summarized as follows: -

The Tender was done through the National Competitive Tendering method as specified in the Public Procurement Act, No. 10 of 2023 (hereinafter referred to as "**the Act**") and the Public Procurement Regulations, GN. No. 518 of 2024 (hereinafter referred to as "**the Regulations**").

Eligible tenderers were invited by the Respondent to participate in the Tender through the National e-Procurement System of Tanzania (NeST) on 2<sup>nd</sup> April 2025. By 09<sup>th</sup> April 2025, five tenders were received by the Respondent including that of the Appellant. They were subjected to an evaluation process by the Respondent's Evaluation Committee which recommended award of the Tender to M/S Chibechi Construction Company Limited (the proposed successful tenderer) for a contract price of Tanzania



shillings Eight Hundred Thirty-Seven Million Seven Hundred Thirty-Three Thousand only (TZS.837,733,000/-) VAT exclusive for a completion period of 365 days. Thereafter, on 28<sup>th</sup> April 2025, the Tender Board approved the award as recommended.

On 21<sup>st</sup> May 2025, the Respondent issued a Notice of Intention to award which notified the Appellant the intention to award the contract to the proposed successful tenderer. Furthermore, the Notice stated that the Appellant's tender was found ineligible for award due to the following reasons: -

- i) General Experience in construction activities: the attached document did not justify compliance with the required criterion.
- ii) Specific Experience: the submitted information did not comply with the Respondent's requirement in terms of the specified experience period and value of executed contracts.
- iii) Method Statement: the information submitted was not relevant to the Respondent's requirements.
- iv) Key Personnel: the submitted information for key personnel did not satisfy the Respondent's requirements.

Dissatisfied with its disqualification, on 22<sup>nd</sup> May 2025, the Appellant applied for administrative review to the Respondent. However, the Respondent did not issue a decision as required by the law. Consequently, the Appellant filed this Appeal before the Appeals Authority on 2<sup>nd</sup> June 2025.

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

- 1.0 Whether the disqualification of the Appellant's tender was justified; and**
- 2.0 To what reliefs if any are the parties entitled to?**

### **SUBMISSIONS BY THE APPELLANT**

The Appellant faults the Respondent's disqualification of its tender on the following grounds: -

- i) General and Specific experience.
- ii) Method Statement.
- iii) Key Personnel.
- iv) Award to the highest tenderer.

The Appellant's submissions were made by Eng. John Bogomba, the Managing Director.

Firstly, Eng. Bogomba disputes the Appellant's disqualification for the alleged non-compliance with the general and specific experience criteria as provided in the Tender Document. He narrated that the Appellant's company was incorporated in 2004 and had twenty-one (21) years of experience in the construction industry. During this period, the company executed a total of thirty-six (36) projects that are significantly more valuable than the Respondent's project. It was his argument that the executed projects complied with the general and specific experiences criteria required by this Tender.



Eng. Bogomba added that in compliance with the criterion on general experience in construction activities, tenderers were required to demonstrate their experience in construction of reinforced rigid pavement roads. The Appellant submitted fourteen contracts whereby two amongst them complied with the requirements of the Tender Document. The relevant executed contracts were those with the Kampala International University and the Kilwa District Council. He elaborated that the referred contracts were executed beyond the duration specified in the Tender Document. However, it was his view that this does not negate the fact that the Appellant has experience in the construction of reinforced rigid pavement roads.

On the specific experience criterion, Eng. Bogomba submitted that the Appellant had attached to its tender nine contracts which demonstrate specific experience in construction projects which are like the Tender under Appeal. He argued that had the Respondent's evaluators been competent, they would not have disqualified the Appellant's tender as all uploaded contracts in NeST demonstrated the Appellant's competence. In view of his argument on this point, Eng. Bogomba urged us to find the disqualification on this ground to be unjustified.

**Secondly**, the Appellant challenges its disqualification for failure to comply with the Method Statement requirement. Eng. Bogomba averred that this requirement was not one of the mandatory criteria for the Tender and should not have led to the Appellant's disqualification. He said that the Respondent provided a format for this criterion in NeST of which the

Appellant abided and submitted a Method Statement. Therefore, it was his view that the Respondent should not have disqualified the Appellant's tender on this criterion.

Thirdly, the Appellant disputes its disqualification for failure to comply with the key personnel criterion in the Tender Document. Eng. Bogomba submitted that the Tender Document required tenderers to submit four key personnel to wit: a Structural Engineer, a Materials Engineer, a Site Technician and a Site Foremen. In compliance with this requirement, the Appellant submitted details and qualifications of a Project Manager, an Electromechanical Engineer and a Site Engineer.

Eng. Bogomba conceded that in complying with this key personnel criterion, the Appellant submitted detailed information of three personnel instead of four as required by the Tender Document. It was his view that such failure should not have outweighed the other three key personnel the company had submitted. It was his other argument that the failure was not fatal as the Respondent ought to have assessed whether the anomaly warranted a disqualification of the tender while it could have invited the Appellant for negotiations where the noted anomaly would have been rectified. Therefore, it was his submission that the Appellant's disqualification on this point was inappropriate.

Fourthly, the Appellant challenges the proposal of an award to the proposed successful tenderer for the reason that the firm has a higher price. Eng. Bogomba submitted that the proposed successful tender had offered a higher price compared to the Appellant's. He stated that in

awarding the Tender to the proposed successful tenderer, the Respondent would spend over TZS 300,000,000.00. He argued that had the Respondent not disqualified the Appellant's company on account of the minor anomalies, but instead award the Tender to it, the former would have saved a substantial amount which could be used for execution of other government projects.

Based on the above submissions, he prayed for the following reliefs: -

- (i) Review of the Tender award process and award the contract to the Appellant; and
- (ii) Costs of the Appeal to the tune of TZS 4,200,000.00 be borne by the Respondent which includes, subsistence allowances, hotel reservations, travel tickets and incidental costs.

### **REPLY BY THE RESPONDENT**

The Respondent's reply submissions were made by Mr. Yusuf Msosa, legal officer.

In reply to the first ground of Appeal, he pointed out that the Appellant was disqualified for failure to comply with experience criteria. He said that the Tender Document required tenderers under the general experience in construction activities criterion to demonstrate their experience in construction of reinforced rigid pavement roads. Under the specific experience criterion, tenderers were required to submit two contracts executed from 1<sup>st</sup> January 2022 to 22<sup>nd</sup> March 2025 and that each to have a value of not less than TZS 300,000,000.00. In complying with this requirement, the Appellant submitted fourteen contracts under the general

experience in construction activities and nine contracts under the specific experience criterion. He averred that none of the attached contracts complied with the experience requirements.

The legal officer went on to submit that the Appellant had claimed to have more than twenty-one years' experience in the construction industry and had executed several projects with significantly higher values than the Tender under Appeal. He queried that if indeed the Appellant possessed the required experience, it should have demonstrated by complying with the provided requirements in the Tender. In the contrary, it totally failed to do so in its tender submitted in NeST leading to its disqualification.

In response to the second ground of Appeal, the legal officer submitted that under the Method Statement criterion, tenderers were required to submit clear details on how works will be executed and completed in accordance with the proposed program. He stated that during the evaluation process stage, it was observed that the Appellant had submitted an occupational safety and health policy which did not demonstrate how the works would be executed and completed. Therefore, it was his submission that the Appellant's disqualification on this point was justified as it failed to comply with the requirements provided in the Tender Document.

In reply to the third ground of Appeal, the legal officer stated that tenderers were required to submit details and qualifications of the required key personnel which included a structural engineer, a materials engineer, a site technician and a site foreman. He stated that in complying with this



criterion the Appellant submitted qualifications and details of three key personnel: namely, a project manager, an electromechanical engineer and a site engineer. During evaluation the Appellant was found to have failed to comply with this criterion as it submitted detailed qualifications of three key personnel instead of four that were required. Thus, it was his view that the Appellant was properly disqualified for its failure to comply with this criterion.

Responding to the fourth ground of Appeal claiming that the Respondent could have saved a substantial amount of money for execution of other projects had the contract been awarded to the Appellant, the legal officer submitted that the Appellant could not have been considered for award as its tender was disqualified at the technical evaluation stage. He averred that in order for a tender to be considered for award, it should have been found responsive at the commercial and technical evaluation stages. Then, its price would be considered during the financial evaluation stage. He stated that since the Appellant's tender did not reach the financial evaluation stage, its price could not have been subjected to price comparison with others for it to be considered for award. In view of this position, the legal officer urged us to disregard the Appellant's assertions on this point.

In rebuttal to the Appellant's prayers, the legal officer submitted that the sum of TZS 4,200,000.00 pressed by the Appellant is unrealistic under the circumstances of this Appeal. He averred that the attached payment vouchers and receipts show that the actual costs incurred for purposes of

this Appeal was TZS 850,000.00 only. He wound up his submission by averring that since the Appellant's tender was fairly disqualified for failure to comply with the requirements provided in the Tender Document, its Appeal is devoid of merit and therefore is not entitled to any costs. In view of this argument, he prayed for dismissal of the Appeal with costs.

### **ANALYSIS BY THE APPEALS AUTHORITY**

#### **1.0 Whether the disqualification of the Appellant's tender was justified**

Having heard the parties, we commence by considering the first ground of Appeal. In its submissions, the Appellant contended to have complied with the general experience in construction activities and specific experience as required by the Tender Document whilst the Respondent rebutted the assertions by stating that the experience provided did not comply with the requirements provided in the Tender Document.

In ascertaining the validity of the parties' arguments, we reviewed Item 1 of Section IV - Qualification and Evaluation Criteria which provides guidance on the requirements of general experience in construction activities and specific experience. It read as follows: -

***"General experience in construction activities (SCORE: N/A)***

*General construction experience: Experience under construction contracts in the role of prime contractor, JVCA member, sub-contractor or management contractor for at least the duration stated.*

*(In case of joint Venture, compliance requirements are: Each member-must meet requirements)*

<i>Key construction activities</i>	<i>CONTRACTOR WHO SHOULD BE CONSTRUCTED RAGED PAVEMENT ROADS"</i>
------------------------------------	---

***"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 duration. (In case of Joint Venture, compliance requirements are: All Parties – Must Meet requirements). In the case of JVCA, the value of contracts completed by its members shall not be aggregated to determine whether the requirement of the minimum value of a single contract has been met. Instead, each contract performed by each member shall satisfy the minimum value of a single contract as required for single entity. In determining whether the JVCA meets the requirement of total number of contracts, only the number of contracts completed by all members each of value equal or more than the minimum value required shall be aggregated.*

<i>Specific Experience</i>	<i>Reged pavement roads</i>
<i>Specific Experience Start Year</i>	<i>2022-01-01</i>
<i>Specific Experience End Year</i>	<i>2025-03-22</i>

<i>Number Specific Experience Contracts</i>	<i>2</i>
<i>Value of each Specific Experience Contract in the specified tender currency</i>	<i>300,000,000"</i>

The above provisions state clearly that for the general experience criterion in construction activities, tenderers were required to demonstrate their experience in construction of reinforced rigid pavement roads. And for the specific experience criterion, tenderers were required to submit two contracts executed from 1<sup>st</sup> January 2022 to 22<sup>nd</sup> March 2025 with each having a value of not less than TZS 300,000,000.00.

In substantiating whether the Appellant complied with the above criteria, we reviewed its tender in NeST and observed that under the general experience in construction activities criterion, the Appellant attached fourteen contracts, however none complied with the requirements of the Tender. We further reviewed the Appellant's tender to ascertain its compliance with the specific experience criterion and found that it attached nine contracts but all of them failed to meet requirements of the Tender Document as they were executed beyond the specified duration.

We then considered the Appellant's assertion that contracts executed with Kampala International University and Kilwa District Council complied with the experience requirement for this Tender. We reviewed the Appellant's contract with Kampala International University and observed that it was for construction of five blocks for the school of health sciences. The contract was entered on 24<sup>th</sup> February 2011 and was completed on 24<sup>th</sup> February

2016 with a contract value of USD 861,491.00. After reviewing this contract, we observed that the commencement date was outside the duration specified in the Tender Document. For a contract to be considered as having complied with the requirement of the Tender, its commencement and completion were to be within the specified duration or if not completed by 25<sup>th</sup> March 2025, the completion should be 80% or more. Thus, since the commencement date of the contract was not within the specified duration, we find it did not comply with the requirements of the Tender.

We further reviewed the Appellant's contract with Kilwa District Council and noted that it was for construction of an Abattoir at Kilwa Masoko. The contract was entered on 20<sup>th</sup> August 2011 and completed on 03<sup>rd</sup> July 2012 with a value of TZS 876,412,652.8. After reviewing this contract, we observed that it also does not fall within the duration specified in the Tender Document.

In view of these observations, we reject the Appellant's assertion that it complied with the experience requirement as provided in the Tender Document. And we agree with the Respondent that the Appellant's disqualification on this ground was proper.

We then considered the third ground of Appeal where the Appellant disputes its disqualification for failure to comply with the key personnel requirement. On the one hand, the Appellant alleged to have complied with the said criterion while on the other hand the Respondent denied it

and stated that it submitted details qualifications of three key personnel instead of four which were required.

In ascertaining the validity of the parties' rival arguments, we reviewed Item 3 of Section IV - Qualification and Evaluation Criteria which provides guidance on key personnel criterion. It reads as follows: -

***"Key Personnel: (Score N/A)***

*Tenderer should provide details of their personnel with adequate qualifications as required by the procuring entity.*

<i>Categories of Key Personnel</i>	<i>Structural Engineer, Material Engineer, Site Technician and Site Foremen</i>
<i>Education Level</i>	<i>Form 4 certificate</i>
<i>Experience of Key Personnel</i>	<i>3</i>
<i>Number of Required Personnel</i>	<i>1</i>

In reviewing the Appellant's tender in NeST, we noted that in the key personnel slot, the Appellant had listed the names of one John Kengere Bogomba as a project manager, Joseph Bareli Kuboja as an electromechanical engineer and John Joseph Kabuche as a site engineer. The Appellant listed three key personnel instead of the four that were required. In view of this fact, we find the Appellant's disqualification for failure to comply with the key personnel requirement to be proper as it failed to comply with the requirements of the Tender.

We further considered the Appellant's contention that it should have been invited for negotiations to rectify the noted anomalies in its tender. We find guidance on this point in regulation 232(5) of the Regulations that reads as follows: -

***"r.232 (5) Majadiliano yatafanyika kwa mzabuni mwenye zabuni yenye bei ya chini zaidi iliyofanyiwa tathmini kwa bidhaa, huduma au kazi za ujenzi, au mzabuni mwenye zabuni yenye bei ya juu zaidi iliyofanyiwa tathmini ya ukusanyaji wa mapato kwa zabuni za ushindani wa kitaifa na kimataifa."***

(Emphasis supplied)

The provision requires negotiations to be done with the lowest evaluated tenderer. As the Appellant's tender was disqualified at the technical evaluation stage, its tender was not the lowest evaluated and therefore not eligible for negotiations.

Regarding the Appellant's assertion that the Respondent would have saved TZS 300,000,000.00, had the Tender being awarded to the Appellant, we reviewed regulation 219 (a) of the Regulations which requires a tender to be awarded to the lowest evaluated tenderer in case of goods, works or services, or the highest evaluated tenderer in case of revenue collection, but not necessarily the lowest or highest submitted price. It reads as follows: -

*"r.219. Zabuni iliyoshinda itakuwa-*

*(a) zabuni yenye bei ya chini zaidi iliyofanyiwa tathmini ikiwa ni bidhaa, kazi za ujenzi au huduma, au bei ya juu zaidi ya zabuni iliyofanyiwa tathmini ikiwa ni ukusanyaji wa mapato, isipokuwa si lazima iwe bei ya chini zaidi au bei ya juu zaidi iliyowasilishwa, kwa kuzingatia kigezo cha ukomo wowote wa upendeleo utakaotumika".*

(Emphasis supplied)

Based on the record of Appeal and the above provision of the law, we note that the Appellant was not the lowest evaluated tenderer as its tender was disqualified during the technical evaluation. Consequently, we agree with the Respondent's contention that the claim is irrelevant and we hereby reject it as being devoid of merit.

Given the above findings, we hold that the Respondent's disqualification of the Appellant's tender on the two grounds of Appeal to wit; the failure to comply with the experience and the key personnel requirements were proper and in accordance with regulations 210(1) and 213(1) and (2) of the Regulations. They read as follows: -

***"r.210 (1) Tathmini ya zabuni itaendana na vigezo na masharti yaliyoanishwa kwenye nyaraka za zabuni na itafanywa kwa kutumia vigezo vilivyoainishwa kwenye nyaraka za zabuni.***



"r.213.- (1) Uamuzi wa taasisi nunuzi wa ukidhi wa zabuni utazingatia yaliyomo kwenye zabuni bila kutegemea ushahidi wa nje ya nyaraka zilizowasishwa.

**(2) Pale ambapo zabuni haikidhi masharti ya nyaraka ya zabuni itakataliwa na taasisi nunuzi, na haitaweza kukidhi masharti kwa kufanyiwa marekebisho au kusahihishwa ukiukwaji huo."**

(Emphasis supplied)

Given the above findings, we find the above grounds sufficient to dispose of this appeal and we need not belabor on the rest.

Having said all and done, we conclude the first issue in the affirmative that the disqualification of the Appellant's tender was justified.

## **2.0 To what reliefs, if any, are the parties entitled to?**

Taking cognizance of the above findings, we hereby dismiss the Appeal for lack of merit. The Respondent is allowed to proceed with the Tender process in compliance with 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 125 of the Act is explained to the parties.

This decision is delivered in the presence of the Appellant and in the absence of the Respondent though duly notified this 27<sup>th</sup> day of June 2025.

**HON. JUDGE (rtd) AWADH BAWAZIR**



.....

**CHAIRPERSON**

**MEMBERS: -**

**1. DR. WILLIAM KAZUNGU**.....

**2. MR. RAPHAEL MAGANGA**.....