

**IN THE PUBLIC PROCUREMENT APPEALS AUTHORITY**

**APPEAL CASE NO. 04 OF 2023-24**

**BETWEEN**

**M/S QWIHAYA GENERAL ENTERPRISES**

**COMPANY LIMITED.....APPELLANT**

**AND**

**NATIONAL DEVELOPMENT CORPORATION.....RESPONDENT**

**DECISION**

**CORAM**

- |                                     |               |
|-------------------------------------|---------------|
| 1. Hon. Justice (rtd) Sauda Mjasiri | - Chairperson |
| 2. Adv. Rosan Mbwambo               | - Member      |
| 3. Mr. Pius Mponzi                  | - Member      |
| 4. Mr. James Sando                  | - Secretary   |

**SECRETARIAT**

- |                        |                              |
|------------------------|------------------------------|
| 1. Ms. Florida Mapunda | - Deputy Executive Secretary |
| 2. Ms. Violet Limilabo | - Senior Legal Officer       |

**FOR THE APPELLANT**

- |                          |                            |
|--------------------------|----------------------------|
| 1. Mr. Mussa Wodi Julius | - Legal Counsel            |
| 2. Mr. Pascal Lutandula  | - Consultant               |
| 3. Mr. Viatus Bahati     | - Managing Director        |
| 4. Mr. Benedicto Mahenda | - Deputy Managing Director |

## **FOR THE RESPONDENT**

1. Ms. Juliana Mushi - Legal Officer
2. Ms. Aretha Msungu - Head of Procurement Management Unit
3. Eng. Godfrey Mahundi - Senior Engineer
4. Eng. Fredrick Girenga - Mining Engineer
5. Ms. Pulkeria Shao - Procurement Officer

The Appeal was lodged by **M/S Qwihaya General Enterprises Company Limited** (hereinafter referred to as "**the Appellant**") against the **National Development Corporation** commonly known by its acronym as "**NDC**" (hereinafter referred to as "**the Respondent**"). The Appeal is in respect of Tender No. PA/068/2022/2023/W/20 for Operating Coal Concessions at Mchuchuma PMLS (hereinafter referred to as "**the Tender**").

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


The Tender was conducted through Restrictive 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 as "**the Regulations**").



On 12<sup>th</sup> April 2023, the Respondent invited tenderers through the Tanzania National electronic Procurement System (TANePS). The deadline for submission of tenders was on 27<sup>th</sup> April 2023. On the deadline, seventeen tenders were received including that of the Appellant.

The received tenders were subjected to evaluation and nine tenders were disqualified at the preliminary evaluation stage including that of the Appellant. The remaining eight tenders were subjected to technical evaluation. After completion of the evaluation process, the Evaluation Committee recommended negotiations to be conducted to five tenderers, namely; M/S Sheby Mix Investment Ltd and M/S Nipo Engineering Company Ltd which quoted the rental fee of the United States Dollars (USD) 5 per Metric Tone (MT), M/S Chusa Mining Company Ltd who quoted the rental fee of USD 4.5 per MT, M/S Kindaini Company Ltd and M/S Cleverland Mine and Service Company which quoted the rental fee of USD 4 per MT. The Evaluation Committee recommended further that M/S Kaserkandis Construction & Transport should be invited for negotiations in the event that negotiations with any of the five tenderers fail to reach an agreement.

The Tender Board at its meeting held on 22<sup>nd</sup> May 2023, deliberated and approved the recommendations of the Evaluation Committee. On 23<sup>rd</sup> June 2023, negotiations successfully took place with the recommended tenderers. On the same date the Tender Board approved the negotiation report.

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On 24<sup>th</sup> June 2023, the Respondent issued the Notice of Intention to award the Tender to all tenderers which participated in the Tender. The Notice informed the Appellant that the Respondent intends to award the Tender to M/S Sheby Mix Investment Ltd, M/S Nipo Engineering Company Ltd, M/S Chusa Mining Company Ltd, M/S Kindaini Company Ltd and M/S Cleverland Mine and Service Company. All the five tenderers were each awarded the Tender at the rental fee of USD 5 per MT for a period of five years. In addition, the Notice informed the Appellant that its tender was not successful due to lack of experience in the related field.

Dissatisfied with the reason for its disqualification, on 27<sup>th</sup> June 2023, the Appellant applied for administrative review to the Respondent. On 1<sup>st</sup> July 2023, the Respondent issued its decision which dismissed the Appellant's application. Aggrieved further on 10<sup>th</sup> July 2023, the Appellant lodged this Appeal to 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 was justified;  
and**
- 2.0 What reliefs, if any, are the parties entitled to?**

#### **SUBMISSIONS BY THE APPELLANT**

The Appellant's submissions were made by Mr. Mussa Wodi Julius, learned counsel. He commenced his submissions on the first issue by stating that,



the Appellant's disqualification contravened the requirement of Clause 27.8 (b) and (g) of the Instructions To Tenderers (ITT).

The learned counsel submitted that on 8<sup>th</sup> May 2023 the Appellant received a letter from the Respondent which required it to submit a copy of a receipt of USD 500. This copy of a receipt was for the amount paid to the Mining Commission for registration of a partnership contract that was submitted as a proof of experience. He contended that the Respondent's request was made pursuant to Clause 27.5 of the ITT.

The learned counsel asserted that the Appellant responded to the Respondent's request through a letter dated 11<sup>th</sup> May 2023, by stating that it did not have a copy of the required receipt. That was due to the fact that the contract between the Appellant and one Lucas Lutandula was entered in 2016, when the Mining Commission was not in existence. Counsel for the Appellant stated further that at the time the contract was entered the Appellant complied with all the requirements for registration at the Resident Mines Office and no registration fee was required. According to the learned counsel the clarifications provided by the Appellant in its letter dated 11<sup>th</sup> May 2023 were sufficient as per the requirements of the Tender. However, if the clarifications were found not to be sufficient the Respondent could have sought for further clarifications.

The learned counsel submitted that on 24<sup>th</sup> June 2023, the Appellant received the Notice of Intention to award the Tender. The Notice stated that the Appellant's tender was disqualified for failing to submit a copy of a receipt of USD 500 paid to the Mining Commission for registration of a

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partnership contract between the Appellant and Lucas Lutandula. Therefore, the Appellant was considered to have failed to demonstrate experience in the related field.

The learned counsel contended that upon being dissatisfied with the Notice of Intention to award, on 27<sup>th</sup> June 2023 the Appellant filed an application for administrative review to the Respondent challenging the reason given for its disqualification. On the 1<sup>st</sup> July 2023, the Respondent issued its decision with respect to the Appellant's complaint. The counsel contended that the Respondent's decision indicated, among others, that the Appellant was disqualified for failure to submit a copy of a receipt of USD 200 as a proof of payment of registration fee for the contract that was submitted in compliance with experience requirement.

The learned counsel submitted that the Respondent issued two different reasons for the Appellant's disqualification. In the Notice of Intention to award the Appellant was disqualified for failure to submit a copy of payment of USD 500 as proof of registration of the contract to the Mining Commission. However, in its decision on the Appellant's application for administrative review, the Respondent has indicated that the Appellant was disqualified for failure to submit a copy of USD 200 as proof of payment for registration of a contract pursuant to Regulations 17 of the Mining (Mineral Rights) Regulations of 2010. The learned counsel contended that due to the different reasons that have been given by the Respondent for the Appellant's disqualification, the Appellant challenges the validity of the Respondent's decision in this regard, as the same is unfair.



The learned counsel submitted that the Respondent's act of disqualifying the Appellant from the Tender process contravened Section 72(1) and (2) of the Act and Regulations 203(1) and 206(1) of the Regulations which require evaluation of tenders to be based on the requirements provided for in the Tender Document. The learned counsel asserted that the reasons for the disqualification of the Appellant were not provided in the Tender Document. He argued that the submission of a copy of a receipt of USD 200 or 500 was not a pre-requisite requirement for substantiating the relevant experience. Had the Respondent required such a criterion to be used for evaluation, it ought to have included it in the Tender Document. In that regard, the Respondent's evaluation process was based on a new criterion and therefore was not conducted in accordance with the law, the learned counsel contended.

The learned counsel submitted that registration fee of USD 200 or 500 is required to be paid if there is a transfer of shares on the mineral right that has already been granted. The relationship between the Appellant and Lucas Lutandula was not for transfer of shares on a mineral right rather it was for collaboration in mineral extractions. The learned counsel elaborated further that the relationship between the Appellant and Lucas Lutandula was not a partnership as contended by the Respondent, rather a normal contractual relationship arising out of mining contract.

The learned counsel submitted further that the Appellant's experience in the mining sector is unquestionable as it has existed for more than 20 years. Counsel asserted that the mining contract between the Appellant and one Lucas Lutandula was entered in 2016. A copy of the contract was





submitted to the Geita Regional Mines Office. At that time there was no requirement for registration. However, copies of the contracts were kept at the Regional Mines Office for purposes of identification.

The learned counsel contended that the Appellant provided sufficient clarifications through its letter dated 11<sup>th</sup> May 2023, that clearly substantiated its experience. Therefore, if the said clarifications were not sufficient, the Respondent was duty bound to seek for more clarifications rather than concluding that the firm lacked the requisite experience. The learned counsel added that the clarifications provided through the letter dated 11<sup>th</sup> May 2023 were confined to the questions asked by the Respondent as the Appellant could not have provided for more clarifications than what was required. According to the counsel doing so would have been a contravention with the requirements of the Tender Document.

The learned counsel concluded his submissions by stating that the Respondent's reason for the disqualification of the Appellant was ambiguous. Therefore, the same is challenged through this Appeal as per Rule 6(a) of the Public Procurement Appeals Rules, GN. 411 as amended (hereinafter referred to as "**the Appeals Rules**").

Finally, the Appellant prayed for the following orders:-

- i. A declaration that the disqualification of the Appellant was not justified;
- ii. Nullify the Notice of Intention to award the Tender;
- iii. Award of the Tender to the Appellant and in the alternative;
- iv. Order for retendering.





## **SUBMISSIONS BY THE RESPONDENT**

The Respondent's submissions were made by Ms. Juliana Mushi, Legal Officer from the Respondent's office. She commenced her submissions by stating that the Appellant was disqualified from the Tender process for failure to comply with the experience requirement. She stated that in order to comply with the experience requirement, the Appellant attached a copy of a contract entered in 2016 between the Appellant and Pascal Lucas Lutandula. After receipt of such a contract, the Respondent sought clarification from the Appellant on the registration of the said contract pursuant to Clause 27.5 of the ITT. According to the Respondent the attached contract was not sufficient to prove the required experience. Therefore, it required the Appellant to submit a copy of a receipt of USD 500 as a payment fee for registration of a submitted contract.

The Respondent submitted that the Appellant failed to substantiate its experience by not submitting a copy of a receipt as was required through its letter dated 11<sup>th</sup> May 2023. Thus, the Respondent disqualified the Appellant from the Tender process pursuant to Clause 27.8 (b) and (g) of the ITT.

The Respondent submitted that Section 9(2) of the Mining Act, No.14 of 2010 (hereinafter referred to as the "**Mining Act**") requires any involvement in the mining activities to be registered at the Regional Mines Offices. She contended that Section 9 of the Mining Act provides guidance as to the procedures that are to be followed in the registration of a mining right. According to the Respondent registration of a mining right is not



confined to only those with mining licences, rather it includes any arrangements leading to mining extractions. According to the Legal Officer, Section 106 of the Mining Act states clearly on the mandatory requirement for registration of any mineral transactions.

The Respondent submitted that Regulation 17 of the Mining (Mineral Rights) Regulations of 2010 provides guidance on the procedures for the registration of a mineral right. The said Regulation requires payment of USD 200 for a registration of any kind of a mineral transaction whereas the current Mineral Rights Regulations provides for a registration fee of USD 500 for any kind of mineral transactions. Thus, there was no ambiguity on the required registration fees as alleged by the Appellant since the changes on the registration fees were a result of the amendments of the relevant laws.

The Respondent contended further that if the Appellant had entered into a contract with Lucas Lutandula prior to the existence of the Mining Commission, it was required to submit proof of registration with the Regional Mines Office which was vested with the powers to do so. The Respondent elaborated further that registrations were done so as to recognize all individuals who are involved in mineral transactions.

The Respondent stated that in order for a contract that deals with a mineral transaction to be registered, an application has to be filed and the relevant fee paid. According to the Respondent such a registration is recognized by the issuance of a letter to the relevant applicant. The Respondent disputed the Appellant's assertion that it could not submit any

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proof of registration since the contracts of this nature are kept in the Regional Mines Offices for record purposes only.

In relation to the ambiguous reasons for disqualification of the Appellant, the Respondent submitted that the reason for disqualification of the Appellant in the Notice of Intention to award and in the Respondent's decision on the Appellant's application for administrative review is the same. The difference is the amount of the registration fee that was caused by the changes of the laws governing the said registrations. The Respondent added that, if the Appellant observed any ambiguities on the requirements of the Tender, it could have sought for clarifications prior to the deadline for submissions of tenders.

The Respondent submitted that since the Appellant failed to provide proof of registration of the contract that was attached to its tender in substantiating the required experience, the Appellant's tender was disqualified for being non-responsive to the Tender requirements. Thus, the Appellant was fairly disqualified from the Tender process.

Finally, the Respondent prayed for the following orders:-

- i) That the remedies sought under Paragraph (5) (i), (ii), (iii) and (iv) of the Statement of Appeal should not be granted, since the Appellant was lawfully disqualified for failure to comply with the requirement of the Tender Document;
- ii) A declaration that the Appellant's disqualification was justified and the Respondent should be allowed to proceed with award of the Tender to the selected tenderers; and



- iii) Any other relief the Appeals Authority may deem fit and just to grant.

## **ANALYSIS BY THE APPEALS AUTHORITY**

### **1.0 Whether the disqualification of the Appellant was justified**

In resolving this issue, the Appeals Authority reviewed the record of Appeal and observed that the Evaluation Report indicated that the Appellant was disqualified at the preliminary evaluation stage for failure to comply with experience requirement. In order to substantiate if the disqualification of the Appellant was justified, the Appeals Authority reviewed the Tender Document and observed that Section VII - Description of Asset, required tenderers to disclose their experience clearly in the mining related field.

In ascertaining if the Appellant complied with the experience requirement as provided in the Tender Document, the Appeals Authority revisited its tender on TANePS. It observed that under a slot where experience was to be demonstrated the Appellant attached a memorandum of understanding and a contract for mining extraction. After reviewing the attached mining contract the Appeals Authority observed that, it indicated that Pascal Lucas Lutandula and Daniel & Siloam Co. Ltd were the rightful owners of a mining site located at Msasa, Chato District QDS 31/4 within Geita Region. It was further observed that Pascal Lutandula and Godfrey Mtiti were issued with a Primary Mining Licence No. 002044LVWZ.

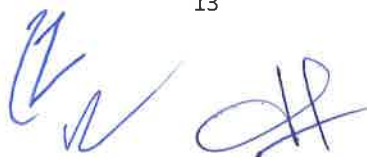
The Appeals Authority observed further that under the said contract the Appellant's role was to finance the mining activities including extracting



mining, hiring employees and provision of equipment that would be used in the extraction of minerals. The contract was signed by the Appellant and Pascal Lucas Luntandula and was witnessed by Advocate Mussa Wodi Julius.

The record of Appeal indicates that, the Respondent on 8<sup>th</sup> May 2023 required the Appellant to submit a copy of receipt of USD 500 paid to the Mining Commissioner as a proof of registration of the submitted contract for operating mining activities. In response thereto, on 11<sup>th</sup> May 2023, the Appellant informed the Respondent that it did not have a copy of the requested receipt since when the attached contract was entered, the Mining Commission was not in existence. In addition, the Appellant stated that in its tender it did not indicate to have a partnership with Pascal Lucas Lutandula, rather the two had a contract for mining extraction. Thus, the contract submitted was a proof of experience in mining extraction. In the said letter the Appellant stated that the contract was registered at the Regional Mines Office. However, no document was provided to prove the said registration.

Clauses 2.7 and 27.5 of the ITT allowed the Respondent to request tenderers to submit within reasonable time necessary information so as to rectify non-conformities or minor omissions. In addition, if a tenderer fails to submit the required information its tender may be rejected. Clauses 2.7 and 27.5 read as follows:-

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*"Clause 2.7 Tenderers shall provide such evidence of their continued eligibility satisfactory to the PE, as the PE shall reasonably request.*

*Clause 27.5 provided that a tenderer is substantially responsive, the PE may request that the Tenderer submit the necessary information or documentation, within a reasonable period of time, to rectify non-material, non-conformities or minor omissions in the tender related to documentation requirements. Such omission shall not be related to any aspect of price of the tender. Failure of the Tenderer to comply with the request may result in the rejection of its tender".*

The Appeals Authority further considered the Appellant's contention that it could not avail a copy of receipt of USD 500 paid for registration of the contract, since the contract was signed in 2016 before the Mining Commission came into existence. The Appeals Authority reviewed Clause 15 of the contract attached to the Appellant's tender and observed that it specifically required a copy of the said contract to be submitted to the Zonal Mines Office for purposes of registration. Clause 15 reads as follows:-

*"**KWAMBA** nakala ya **MKATABA** huu itapelekwa ofisi ya madini ya kanda kwa ufahamisho na utekelezaji na gharama za kupeleka **MKATABA** huu ofisi ya madini ya kanda na zile za kuuhalalisha **MKATABA** huu kwa mjibu wa sheria zitalipwa na **MFADHILI**."*

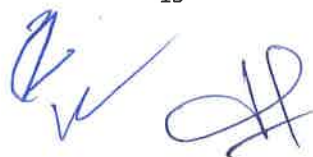




The wording of the above quoted provision indicates clearly that registration of the contract was among the terms and conditions that were to be complied by the parties to the contract. In view of the existence of Clause 15, the Appeals Authority finds that much as the Mining Commission was not in existence, registration of the contracts relating to mining activities were necessary and the same were to be done at the Zonal Mines Offices. In view of the above, the Appeals Authority finds the Respondent's act of seeking proof of registration of the Appellant's submitted contract to be proper.

The Appeal Authority is of the further view that the submitted contract by itself could not substantiate the Appellant's experience in the mining extraction. Therefore, the Appeals Authority finds that proof of registration of the Appellant's contract would have assisted the Respondent to verify the Appellant's experience on the related mining activities.

The Appeals Authority considered the Appellant's complaint that the reasons given by the Respondent for its disqualification were ambiguous. The Appeals Authority revisited the Notice of Intention to award and observed that it indicated that the Appellant was disqualified for failure to attach a copy of a receipt of USD 500 paid for registration of the contract. The Respondent's decision on the application for administrative review indicated that the Appellant's tender was disqualified for failure to submit a copy of receipt of USD 200 that was paid for registration of a contract that proves its experience. The Appeals Authority reviewed the Mining (Mineral Rights) Regulations of 2010 and observed that the application fee for registration of any document was USD 200. However, registration fee of

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USD 500 has been introduced in the current Mining (Mineral Rights) Revocation of the First Schedule) Regulations, GN. No. 47 of 2018. Therefore, the Appeals Authority finds that there was no any ambiguity in the reasons that disqualified the Appellant.

Given the circumstances, the Appeals Authority finds the Respondent's act of disqualifying the Appellant to have complied with the requirement of Regulation 206(2) of the Regulations. The provision reads as follows:-

*"Reg. 206(2) Where a tender is not responsive to the tender document, it shall be rejected by the procuring entity, and may not subsequently be made responsive by correction or withdrawal of the deviation or reservation."*

In view of the above findings, the Appeals Authority concludes the first issue in the affirmative that the disqualification of the Appellant was justified.

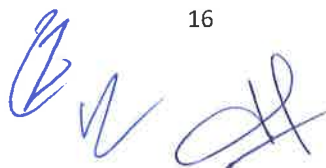
## **2.0 What reliefs, if any, are the parties entitled to?**

Taking cognizance of the findings hereinabove, the Appeals Authority hereby dismiss the Appeal for lack of merit and order the Respondent to proceeds 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 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 11<sup>th</sup> day of August 2023.

**HON. JUSTICE (rtd) SAUDA MJASIRI**

  
.....  
**CHAIRPERSON**

**MEMBERS: -**

**1. ADV. ROSAN MBWAMBO**.....  


**2. MR. PIUS MPONZI**.....  
