

IN THE PUBLIC PROCUREMENT APPEALS AUTHORITY

APPEAL CASE NO. 04 OF 2021-22

BETWEEN

M/S MEKON ARCH CONSULT LTD APPELLANT

AND

DAR ES SALAAM INSTITUTE OF TECHNOLOGY..... RESPONDENT

RULING

CORAM

- | | |
|-------------------------------------|---------------------------|
| 1. Hon. Justice (rtd) Souda Mjasiri | - Chairperson |
| 2. Eng. Stephen Makigo | - Member |
| 3. Adv. Rosan Mbwambo | - Member |
| 4. Ms. Florida Mapunda | - Ag. Executive Secretary |

SECRETARIAT

- | | |
|------------------------|------------------------|
| 1. Ms Agnes Sayi | - Senior Legal Officer |
| 2. Ms. Violet Limilabo | - Senior Legal Officer |

FOR THE APPELLANT

- | | |
|---------------------------------|---------------------|
| 1. Dr. Moses Elisante Mkony | - Managing Director |
| 2. Ms. Dorothy Subilaga Mahunja | - Administrator |
| 3. Ms. Diana Rwegasira | - Legal Officer |



FOR THE RESPONDENT

1. Mr. Nelson E. Ndelwa - Legal Officer
2. Mr. David R. Kakoti - Ag. Head Procurement Management Unit
3. Dr. Johnson Malisa - DIT – Institute Consultancy Bureau Manager
4. Mr. Oswald Beatus - Estate Officer

This Appeal was lodged by **M/S Mekon Arch Consult Ltd** (hereinafter referred to as "**the Appellant**") against **Dar es Salaam Institute of Technology** commonly known by its acronym as **DIT** (hereinafter referred to as "**the Respondent**"). The Appeal is in respect of Tender No. TZ-DIT-MWZ-156676-CS-QCBS for the Provision of Consultancy Services for Development of Master Plan, Design and Supervision of the Proposed Academic Block, Teaching Block, Workshop/Laboratories, Tannery, Effluent Treatment Plant (ETP) and Visitor Flat and Hostel Buildings at Dar es Salaam Institute of Technology Mwanza Campus in Mwanza Region (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 Respondent has received financing from the International Development Association (IDA) in a form of a credit to the Government of Tanzania. Amongst the requirement of the loan agreement is for the

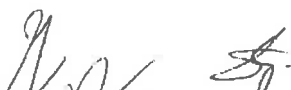


Tender to be conducted in accordance with the World Bank Procurement Regulations for IPF Borrowers, issued in July, 2016 and Revised in November 2017.

On 22nd April 2021, the Respondent issued a Request for Proposal (RFP) to eight (8) shortlisted firms including the Appellant. The said RFP indicated that the selection process for this Tender would be in accordance with the Quality and Cost Based Selection (QCBS) procedures. The deadline for submission of proposals was set for 03rd June 2021. By the deadline only seven (7) proposals were received, including that of the Appellant.

The received proposals were subjected to evaluation which was conducted in two phases, namely; evaluation of technical and financial proposals. The technical proposals were evaluated in two stages, namely; preliminary and detailed evaluation. Each responsive technical proposal was given scores based on the earmarked criteria and sub-criteria. The pass mark stated in the RFP was 75 points out of 100. At the preliminary evaluation stage, the proposals of three (3) firms, the Appellant inclusive were disqualified for being non-responsive to the RFP.

The Respondent by a letter dated 22nd July 2021, informed the Appellant that its technical proposal was not responsive to the requirements provided in the RFP. The Appellant on its proposal indicated the tender validity period of one hundred and eleven (111) days instead of one hundred and twenty (120) days as required by the RFP.



Dissatisfied, on 2nd August 2021, the Appellant applied for administrative review to the Respondent challenging the reason given for its disqualification. On 4th August 2021, the Respondent issued its decision which dismissed the Appellant's application for administrative review for being filed out of time. Aggrieved further, on 13th August 2021 the Appellant lodged this Appeal before the Appeals Authority.

After the Appeal was lodged, the Appeals Authority notified the Respondent about the existence of the Appeal and required it to submit its reply. In reply to the Appellant's Statement of Appeal, the Respondent also raised a preliminary objection (PO) on two points of law to wit: -

- i) **The Authority lacks jurisdiction to entertain procurement appeals emanating from a procurement governed by the World Bank Procurement Regulations, of July 2016 as Revised in November 2017;**
- ii) **The Appeal is bad in law for contravening Rule 8 (1) and 10 (1) of the Public Procurement Appeals Authority Rules, 2014.**

During the hearing the learned counsel for the Respondent prayed to withdraw the second PO. Thereafter, the Appeals Authority directed the parties to address it on both the PO and the merits of the Appeal. In so doing the following issues were framed: -

- a) ***Whether the Appeals Authority has jurisdiction to entertain the Appeal;***



b) Whether the disqualification of the Appellant's tender is justified; and

c) What reliefs, if any, are the parties entitled to

SUBMISSIONS BY THE RESPONDENT ON THE PO

The learned counsel for the Respondent submitted that, the Appeals Authority lacks jurisdiction to entertain this Appeal as the Tender process was conducted under the World Bank Procurement Regulations. The learned counsel expounded that, according to the Financing Agreement the procurement for the project was to be conducted under the World Bank Procurement Regulations. The Respondent when floating this Tender indicated in the Request For Proposal letter as well as in the RFP that, the tender will be conducted in accordance with the World Bank Procurement Regulations for IPF Borrowers issued in July, 2016 and Revised in November, 2017.

The learned counsel added that, the World Bank Procurement Regulations specified avenues which consultants should follow when dissatisfied with the tender process. According to the said Procurement Regulations, this Appeals Authority is not empowered to entertain procurement related complaints. In view of Section 5.96 read together with Annex III of the World Bank Procurement Regulations, a consultant who is dissatisfied with the tender process is required to first submit its complaint to the borrower. After a borrower issues its decision and a consultant is still dissatisfied, the



latter is required to seek a debriefing with the World Bank's accredited Manager in the borrower's country. Therefore, lodging an appeal to the Appeals Authority is inappropriate as it lacks jurisdiction to entertain it.

The learned counsel further stated that, according to Section 4 (1) of the Public Procurement Act, No. 7 of 2011 as amended (hereinafter referred to as "**the Act**") any grant agreement entered into by the Government with an international financing institution the requirement of such treaty or agreement shall prevail. The learned counsel submitted that, this tender has resulted from the Financing Agreement entered between International Development Association (IDA) and the Government of Tanzania on 8th February 2019. Paragraphs 17 and 85 of the said agreement state in clear terms that, the procurement for the intended projects would be conducted pursuant to the World Bank Procurement Regulations.

In support of his argument, the learned counsel cited ***Appeal Case No. 31 of 2015-16 between M/S Sivan Design D. S Ltd against Permanent Secretary, Prime Minister's Office.*** In the said Appeal, at the second paragraph, page 10, the Appeals Authority stated that it had no mandate to entertain the Appeal relating to the Appellant's disqualification as the review procedures to be followed were in accordance with Clause 15 of the World Bank Procurement Guidelines. The said provision requires consultants who are dissatisfied with borrower's (procuring entity's) response to submit a complaint to the Regional Procurement Manager of the Borrowing country.

The learned counsel concluded his argument by praying that, the Appeal be dismissed with costs as the Appeals Authority lacks jurisdiction to entertain the same.

REPLY BY THE APPELLANT ON THE PO

In response to the PO, the Appellant submitted that in the disputed Tender, consultants were guided by the RFP. According to Clause 1b of the Instruction to Consultant Data Sheet, the applicable law for this Tender was the laws of Tanzania. The Appellant submitted further, that much as Clause 1b has specified the applicable law, Clause 35(1) of the Instruction to Consultant Data Sheet has provided that procedures for submission of procurement related complaints are to be in accordance with Procurement Regulations for IPF Borrowers (Annex III).

The Appellant submitted further that, Annex III of the World Bank Procurement Regulations is silent on what procedure should be invoked by a consultant who is dissatisfied with the decision of the procuring entity (the borrower). Clause 3.6 of Annex III provides guidance on resolution of a complaint by a borrower, however the same is silent on what steps should be taken by a consultant who is dissatisfied with the borrower's decision. Due to such a lacuna, the Appellant opted to invoke the provisions of the Act by lodging an Appeal to this Appeals Authority as the Tender was governed by both the laws of Tanzania and the World Bank Procurement Guidelines.

The Appellant further stated that, the document relied upon by the Respondent which provides guidance on the review procedures was not supplied to the Appellant at the time the RFP was issued. The Appellant added that, even at the pre bid meeting the Respondent did not elaborate to consultants on the review procedures which were applicable in this Tender. Thus, the Respondent relied on a document which was not known to the Appellant.

The Appellant concluded its argument by praying that, the PO be rejected and the Appeal be heard on merit.

On his brief rejoinder, the learned counsel for the Respondent submitted that, Clause 35.1 of the Instruction to Consultant Data Sheet specified clearly that procedures for review were in accordance with Annex III of the World Bank Procurement Regulations. Since the Appellant was issued with RFP document, it ought to have complied with the review procedure as provided therein. Thus, the Appellant's contention that, it was not aware of the review procedures is baseless.

With regard to the applicability of the Tanzanian law, the learned counsel submitted that, this would be applicable during the contract execution and not at the tendering stage. The Appellant was aware that at the tendering stage, the applicable law was the World Bank Procurement Regulations as it was so specifically stipulated in the RFP issued to the consultants. The

learned counsel concluded his argument by stating that, the PO has merit hence the Appeal be dismissed with costs.

Having submitted on the PO, parties proceeded to submit on the merits of the Appeal as hereunder: -

SUBMISSIONS BY THE APPELLANT ON THE MERITS OF THE APPEAL

The Appellant's grounds of appeal stated in the Statement of Appeal as well as oral submissions during the hearing may be summarized as follows:-

1. That, the Appellant disputes its disqualification from the Tender process on the ground that it failed to comply with the bid validity requirement. The Appellant conceded that the bid validity period for the Tender was one hundred and twenty (120) days. However, when preparing its technical proposal it mistakenly presented the bid validity period of one hundred and eleven (111) days. The Appellant claimed that the anomaly was just a human error or an arithmetic error and the same could have been corrected. In expounding its argument the Appellant made reference to the Tender process on the same project conducted by the Respondent with respect to Dar es Salaam Campus. It stated that, in that Tender the Appellant's proposals were found with some errors and it was accorded an opportunity to correct them. Thus, since it is the same project the

Respondent ought to have treated the Appellant's proposals in the same way as Dar es Salaam Campus Tender.

2. That, the bid validity period anomaly found on its tender was not a major deviation which would have resulted to its disqualification. The Appellant ought to have been accorded an opportunity to rectify the noted anomaly.
3. That, the Respondent erred for not entertaining the Appellant's complaint for the reason that the same was filed beyond the stipulated time limit. According to Clause 23.3 of the Instruction to Consultants Data Sheet, financial proposals were to be opened after a lapse of ten (10) business days from the date the notice of exclusion from the procurement process was issued. The notice of exclusion was issued on 22nd July 2021 and the financial proposals were opened on 30th July 2021 before the expiry of the stipulated period. Thus, it was improper for the Respondent to refuse to entertain the Appellant's complaint as the same was submitted within the stipulated time limit.
4. Finally, the Appellant prayed for the following orders: -
 - i. Re-evaluation of technical proposals; and
 - ii. Costs associated with the preparation of proposal.

**REPLY BY THE RESPONDENT ON THE MERITS OF THE
APPEAL**

The Respondent's reply to the Appellant's grounds of Appeal as well as oral submissions may be summarized as follows: -

1. That, the Appellant was disqualified from the Tender process after it was found that its technical proposal has indicated the bid validity period of 111 days instead of 120 days as required in the RFP. The Appellant's non - compliance with the bid validity period requirement was a major deviation as it contravened Clause 12.1 of the Instruction to Consultant Data Sheet.

The learned counsel for the Respondent expounded its argument by indicating that, the Tender was conducted under the World Bank Procurement Regulations. Section II of the Procurement Guidance – Evaluation Criteria of the said Regulations provides that: -

“Justification to reject must therefore be based on the existence of one or more major deficiencies or deviations which cannot be permitted to be rectified or accepted in any case, and rejection would be justified and sustainable. A material deviation is one which:

- a) has an effect on the validity of the bid;***
- b)***
- c)***

M. A. / S.

Thus, the Appellant's non-compliance of the bid validity period requirement was a major deviation. Hence, its Tender was disqualified.

2. With regard to the Respondent's failure to entertain the Appellant's complaint, the Respondent submitted that, the complaint was not entertained because it was submitted out of the required appropriate procurement stage as per Clause 3.26 of the World Bank Procurement Regulations for IPF Borrowers which provides that, "*Procurement-related complaint (Complaints) should be submitted to the Borrower in a timely manner, at the appropriate stage of the procurement process*".

The Appellant was informed about its technical proposal being unsuccessful through a letter dated 22nd July 2021. The Appellant was further informed through the same letter that the financial proposal was to be opened on 30th July 2021. Therefore, any complaint was supposed to be submitted to the Respondent within the period from 22nd July 2021 to 30th July 2021. The Appellant's complaint was submitted to the Respondent via email on 3rd August 2021 and a hard copy on 4th August 2021, thus beyond the stipulated time limit.

Furthermore, the learned counsel added that the opening of financial proposal was not fast tracked as claimed by the Appellant. The

opening of the same was conducted in accordance with paragraph 7.3 (h)(i) of Annex XII of the World Bank Procurement Regulations.

3. That, on 4th August 2021, the Respondent informed the Appellant that its complaint could not have been entertained for being filed out of time. On 6th August 2021, the Appellant submitted another complaint to the Respondent through a letter with Ref. No: MAC/DIT/21/SF6. On receipt of the second complaint, the Respondent decided to notify the World Bank on 12th August, 2021 by submitting the complaint in Systematic Tracking of Exchanges in Procurement (STEP) under complaints World Bank's reviews, as per Clause 3.27 of section III of the World Bank Procurement Regulations. The said Clause requires all complaints to be recorded by the Borrower in the appropriate tracking and monitoring system, as agreed between the Bank and the Borrower. The Respondent added that, the procurement complaints were dealt with pursuant to Clause 3.2 to 3.6 of the World Bank Procurement Regulations.
4. The Respondent's reply to the Appellant's reliefs were as follows: -
 - i. The claimed re-evaluation of technical proposals should not be honored at this stage as procurement process has reached an advanced stage whereby financial proposals have been opened and evaluated pending notification of award of the contract. Re-evaluation of the technical proposals will not change the position that



the Appellant's failure to comply with bid validity period was a major deviation. Nonetheless, other firms which had a similar error on validity period did not submit complaints which implies that they accepted the errors; and

- ii. Costs associated with the preparation of proposals are non-refundable.
5. Finally, the Respondent prayed that the Appeals Authority rejects the Appeal and grant any remedial order which it may deem just.

ANALYSIS BY THE APPEALS AUTHORITY

In relation to the PO, the main issue for determination is ***whether the Appeals Authority has jurisdiction to entertain the Appeal.***

In resolving this issue, the Appeals Authority revisited the documents submitted before it and observed that the Tender under Appeal emanated from the Financing Agreement entered between the Government of Tanzania and International Development Association for East Africa Skills for Transformation and Regional Integration Project. Article V Section 5.13 read together with Paragraphs 17 and 85 contained in the Definition Appendices to the Financing Agreement state clearly that the procurement for the projects under the Agreement would be governed by the World Bank Procurement Guidelines. The provisions read as follows: -

Section 5.13 *"All goods, works, and services required for the Project and to be financed out of the proceeds of the Loan shall be procured in accordance with the requirements set forth or referred to in the Procurement Regulations and the provisions of the Procurement Plan."*

Paragraph 17 *"Procurement Regulations" means, for purposes of paragraph 87 of the Appendix to the General Conditions, the "World Bank Procurement Regulations for IPF Borrowers," dated July 2016, revised November 2017."*

Paragraphs 85 *"Procurement Regulations" means the "World Bank Procurement Regulations for Borrowers under Investment Project Financing" as further defined in the Loan Agreement."*

(Emphasis provided)

The Appeals Authority reviewed Section 4 (1) of the Act which provides as follows: -

Section 4 (1) *"To the extent that this Act conflicts with an obligation of the United Republic under or arising out of -*

(a) Any treaty or other form of agreement to which the Government is a party with one or more other states or political sub-divisions of such states; or



(b) Any grant agreement entered into by the Government with an inter-governmental or international financing institution in which the Government is the beneficiary,

the requirement of such treaty or agreement shall prevail, but in all other respects, the procurement shall be governed by this Act".

(Emphasis provided)

Having established that the applicable rules for this Tender is the World Bank Procurement Regulations, the Appeals Authority revisited the RFP document issued by the Respondent and observed that Clause 5 of the Request For Proposal letter clearly specified that the Tender would be conducted under the World Bank Procurement Regulations. The said clause reads as follows: -

Clause 5 "A firm will be selected under Quality and Cost Based Selection (QCBS) procedures and in a Full Technical Proposal (FTP) format as described in this RFP, **in accordance with the Bank's "Procurement Regulations for IPF Borrowers, issued in July, 2016 and Revised in November, 2017 ("Procurement Regulations")."**

(Emphasis provided)

The Appeals Authority observed further that, Clause 35.1 of the Instruction to Consultants Data Sheet provides guidance on the procedures to be followed by a consultant who is dissatisfied with the tender process. The said clause reads as follows: -

Clause 35 (1) "***The procedures for making a Procurement-related complaint are detailed in the "Procurement Regulations for IPF Borrowers (Annex III)***." If a Consultant wishes to make a Procurement-related complaint, the Consultant shall submit its complaint following these procedures, in writing (by the quickest means available, such as by email or fax), to:

For the attention: Prof. Preksedis Marco Ndomba,
Title/position: Principal
Client: Dar es Salaam Institute of Technology (DIT)
Email address: principal@dit.ac.tz

In summary, a Procurement-related complaint may challenge any of the following:

- 1. The terms of this Request for Proposal;*
- 2. **The Client's decision to exclude a Consultant from the procurement process prior to the award of contract;** and*
- 3. The Client's decision to award the contract".*

(Emphasis provided)



Given the above provisions, the Appeals Authority is of the settled view that, the Tender under Appeal was conducted in accordance with the World Bank Procurement Regulations. The World Bank Procurement Regulations also provide for procedures for dealing with procurement related complaints.

The Appeals Authority considered the Appellant's argument that both the World Bank Procurement Regulations and the Act were applicable in this Tender. Given the position under Section 4(1)(b) of the Act, the procurement regulations specified under Financing Agreement prevail over the laws of the United Republic of Tanzania. Thus, the governing law for this Tender is the World Bank Procurement Regulations.

In view of the above findings, the Appeals Authority agrees with the Respondent that the Appeals Authority lacks jurisdiction to entertain this Appeal.

Under the circumstances, the Appeals Authority hereby uphold the preliminary objection and dismiss the Appeal. Each party is to bear its own costs.

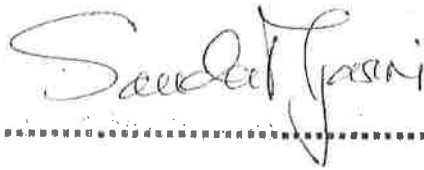
It is so ordered.



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

This Ruling is delivered in the presence of the Appellant and the Respondent this 3rd day of September 2021.

HON. JUSTICE (RTD) SAUDA MJASIRI



CHAIRPERSON

MEMBERS:

1. **ENG. STEPHEN MAKIGO**

2. **ADV. ROSAN MBWAMBO**

