

IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY
AT DAR ES SALAAM

APPEAL CASE NO. 14 OF 2015-16

BETWEEN

M/S UPIMAC CONSULTANCY SERVICES LTD.....APPELLANT

AND

PRIME MINISTER'S OFFICE- REGIONAL ADMINISTRATION

AND LOCAL GOVERNMENT (PMO-RALG)..... RESPONDENT

DECISION

CORAM

- | | |
|-------------------------------------|------------|
| 1. Hon. Vincent K.D Lyimo, J. (rtd) | -Chairman |
| 2. Mr. Louis P. Accaro | -Member |
| 3. Ms. Monica P. Otaru | -Member |
| 4. Mr Ole-Mbille Kissioki | -Secretary |

SECRETARIAT

- | | |
|---------------------------|----------------|
| 1. Ms. Violet S. Limilabo | -Legal Officer |
| 2. Mr. Hamisi O. Tika | -Legal Officer |

FOR THE APPELLANT

1. Mr. W. S. R. Nyabongo - Chief Executive Officer
2. Mr. Andrew M. Sewajugo - Director
3. Mr. Muwanchi Peter - Advocate – Akamba and Advocates
4. Mr. Apolot Majid - Legal Officer

FOR THE RESPONDENT

1. Mr. Khalist M. Luanda - Director of Local Government
2. Mr. David T. Mwangosi - Director, Procurement Management Unit
3. Mr. David B. Shemgale - Project Coordinator, World Bank Group
4. Mr. Gilbert W. Mfinanga - Sub-Project Coordinator

This decision was scheduled for delivery today 7th January 2016, and we proceed to deliver it.

This Appeal was lodged by M/s UPIMAC Consultancy Services Ltd Capital (hereinafter referred to as “the Appellant” against the Prime Minister’s Office-Regional Administration and Local Government commonly known by its acronym PMO-RALG (hereinafter called “the Respondent”).

The said Appeal is in respect of Tender NO. ME/022/2014/2015/C/40 for Provision of Consultancy Services for the Assessment of Urban Local Government Authorities for the Urban Performance Grant for Financial Years

2016/2017 and 2017/2018, Supported by the Urban Local Government Strengthening Program (ULGSP) (hereinafter referred to as "the tender").

According to the documents submitted to the Public Procurement Appeals Authority (hereinafter called "the Appeals Authority"), as well as oral submissions by the parties during the hearing, the facts of the Appeal may be summarized as follows:

On 10th July 2015, the Respondent issued a Request for Proposal (hereinafter called "RFP") and invited ten (10) short listed consultancy firms to submit their Technical and Financial Proposals for the tender.

The deadline for the submission of Proposals was 11th September 2015, whereby six (6) proposals were received from the following consultancy firms:

1. M/s Mzumbe University;
2. M/s CRISIL Risk & Infrastructure Solutions in Association with Crown Tech Consult Ltd;
3. M/s Globe Accountancy Services 2013 in Association with Daima Associates Ltd;
4. M/s Ernest & Young in Association with Afribase Consultants Ltd;
5. M/s Engineering Research Associates Ltd; and
6. M/s UPIMAC Consultancy Services Ltd.

The Technical Proposals were subjected to evaluation which was conducted in two stages namely; preliminary and technical evaluation. At the

preliminary evaluation, the proposal by M/s Mzumbe University was found to be non-responsive for failure to comply with the requirement of the RFP. The remaining five (5) proposals were subjected to technical evaluation.

During the technical evaluation stage, the proposal by M/s Globe Accountancy Services 2013 in association with Daima Associates Ltd was disqualified for scoring 72.23 % which was below the minimum technical scores of 75 %. The remaining four (4) consultancy firms scored above the Minimum and were invited for opening of their respective Financial Proposal which took place on the 20th October 2015.

For some reasons, during evaluation of Financial Proposals, the Evaluation Committee disqualified three (3) firms for non compliance with the RFP. The remaining Financial Proposal by M/s CRISIL Risk & Infrastructure Solutions in association with Crown Tech Consult Ltd was checked for arithmetic errors then evaluated and recommended for award of the Tender. The recommendation was approved by the Tender Board on 2nd November 2015.

The Evaluation Committee recommended award of the tender to M/s CRISIL Risk & Infrastructure Solutions in Association with Crown Tech Consult Ltd at a contract price of USD. 1,139,200.00 Exclusive of local taxes subject to successful negotiations.

The Respondent through its letter Ref: No. 2/FA.297/4916/01 dated 5th November 2015, informed all tenderers including the Appellant of its intention to award the tender to M/s CRISIL Risk & Infrastructure Solutions

in association with Crown Tech Consult Ltd. At the same time, the Respondent informed the Appellant the reason for its disqualification; that its Technical and Financial Proposal did not comply with the requirement of Clause 26.3 of the RFP –that “the letter of Authorization be duly authorized to bind the consultant to the contract and that the name and position held by each person signing the authorization must be typed or printed below the signature”.

Dissatisfied, the Appellant applied for administrative review by its letter Ref. No. UPIMAC /ULGSP/2015 dated 8th November 2015 and on 20th November 2015, the Respondent issued a decision by dismissing the Appellant’s complaints in its entirety for lack of merits.

Aggrieved by the decision, on 27th November 2015, the Appellant filed his Appeal to this Appeals Authority.

SUBMISSIONS BY THE APPELLANT

The Appellant asserted that they complied with authorization requirement by filling Form No. 5A8 by typing the name and signature as per the format provided on pages 64 and 65 of the RFP. Further, they asserted that nowhere in the RFP the Power of Attorney was mentioned; neither in the Proposal Data Sheet (PDS) nor in the Special Condition of Contract. They insisted that their proposal complied with the requirements of Clauses 36.1 and 36.2 of the RFP and that is why they scored 91.32 % and were invited to the opening of Financial Proposals.

The Appellant raised one ground of Appeal that their firm was unfairly disqualified, arguing as follows:-

- i. That, the purpose of Authorization Letter was to give irrevocable authority to the donee to perform all the activities on behalf of the company which was complied with through the Appellant's Power of Attorney. Then other details of typing the name of secretary and Director signing for and on behalf of the company could have been cured by Regulations 207 (1 and (2) of the Public Procurement Regulations GN. No. 446 of 2013 (hereinafter referred to as "GN. No. 446/2013"). Thus, the Power of Attorney was used as excuse for disqualifying them after they had passed the technical evaluation stage.
- ii. Regarding the evaluation process, the Appellant asserted that after application of the formula they believed to have scored the highest, entitling them to be awarded the Tender. To their surprise, they received a Letter of Intention to award the Tender to another firm.
- iii. That, the evaluation criteria were the guideline to be followed in awarding points which were followed as a result of which the Appellants scored 91.32 % therefore, other issues of typing name, printing and signing on behalf of the Company were not of significance to disqualify them.

During the hearing, the Appellant informed the Appeals Authority that, they find the reason for their disqualification being unfairly, arbitrarily ridiculous and too trivial at this point on the following grounds:

First, that they were prequalified by the Respondent and met all conditions thus were shortlisted for the RFP.

Secondly, the Appellant at all times met the requirements of RFP up to end of the evaluation and was responsive as per Clause 36. 1 and 36.2 of the RFP. To their surprise the Respondents Ministerial Tender Board created an alien criterion wrongly basing on Clause 26.3 of the RFP which was a general condition. To them this was unfair and it was intended to eliminate the Appellant from the tender process.

The Appellant argued further that, their firm had scored the highest marks of 91.32 % in the technical evaluation which means they had complied with the requirements of Regulation 299 and 300 of GN. No. 446 /2013, consequently as a combination of Technical and Financial Proposals, they believed they should have been awarded the score of 88.6 %.

Additionally, the Appellant submitted that, according to Regulation 202 of GN. No. 446/2013, tenderers are subjected to technical evaluation after passing the preliminary evaluation, which means they were substantially responsive pursuant to Regulation 202 (5) of GN. No. 446/2013. Thereby wondering why the Technical proposal which passed the technical stage could thereafter be found to be non-responsive at financial evaluation, suggesting presence of unfairness or bias.

Thirdly, regarding the Power of Attorney, the Appellant submitted that, nowhere in the RFP, Power of Attorney was a major requirement and in any case, that, their Power of Attorney complied with the requirement by authorizing Mr. W. S. R. Nyambongo to act on behalf of the Appellant. Further to that, Clause 4.1 of the RFP requires the same to be confirmed after award of the Tender. If the same did not meet the requirement, then the Respondent should have sought for clarification in terms of Regulation 207 of GN. No. 446/2013. Arguing further, the Appellant insisted that they had attached the Memorandum and Articles of association (MEMARTS) of their Company showing the signature of the authorized person so the Respondent could have cleared any doubt by referring to those documents.

In the circumstances, the Appellant insisted that, they were unfairly, arbitrarily and illegally disqualified.

Finally the Appellant prayed for the following reliefs:-

- i. A declaration that it was not only unfair but also arbitrarily and illegally disqualified;
- ii. The Respondents halts the intended wrongful award of the tender and proceed to conclude the evaluation process using the right set criteria to award the contract to the lowest evaluated tenderer;
- iii. Costs including;
 - a)Appeal filing fees
 - b)Transport
 - c)Feeding and accommodation and
- iv. Any other relief the Appeals Authority deems fit to grant.

THE RESPONDENT'S SUBMISSION

The Respondent's submission in reply to the ground of appeal are summarised as follows:-

- i. That, the Appellant was disqualified for non compliance with the requirements of Clause 26.3 of the RFP and that the Ministerial Tender Board approved the technical evaluation report basing on wrong information. The Respondent submitted further that, being responsive in one stage does not guarantee the tenderer that he would be responsive in the next stage.
- ii. That, absence of duly prepared and signed Power of Attorney renders the documents void irrespective of whether that fact has been brought to the attention of the Tender Board or not. The fact that the issue of Power of Attorney was not raised at the technical evaluation stage could not invalidate it or be taken as a defense on part of the Appellant.
- iii. That, Power of Attorney was a requirement in both Technical and Financial proposals as per Clause 26.3 of the RFP, so failure to comply with renders the proposals non responsive.

During the hearing, the Respondent admitted that, the Appellant qualified for both pre-qualification as well as technical evaluation. But then, the anomaly was discovered during opening of the Financial Proposals. In this Appeal the Respondent asserted that the Appellant had been invited for opening of Financial Proposals notwithstanding that they had not complied

with Clause 26.3 of the RFP. That, the Evaluation Committee at the financial evaluation stage had powers to consider issues pertaining to technical evaluation.

Finally the Respondent prayed for dismissal of the Appeal for lack of merits.

ANALYSIS BY THE APPEALS AUTHORITY

In determining this appeal, the Appeal Authority is of the view that there are two triable issues, namely;

- 1.0 Whether the Appellant was fairly disqualified; and
- 2.0 To what reliefs, if any, are the parties entitled to.

Having identified the issues the Appeals Authority proceeded to determine them as follows:-

- 1.0 Whether the Appellant was fairly disqualified

In resolving this issue the Appeals Authority, revisited the RFP, Evaluation report vsi-a-vis the applicable law. In so doing, it has been observed that Clauses 36, 38 and 40, provide for various stages of evaluation of the proposals; Technical, Financial as well as combined Technical and Financial proposals. According to the ITC, Clause 36 formed the basis for Technical Proposal evaluation and Clause 38 was the basis for Financial Proposal

evaluation while Clause 40 was the basis for the combined Technical and Financial Proposal evaluation.

The Appeals Authority revisited the evaluation report and observed that, during preliminary evaluation five (5) proposals including that of the Appellant were found to be in compliance with RFP and were subjected to technical evaluation whereby Technical proposals were given scores for each criteria and sub-criteria indicated in the PDS. It was further noted that, the Appellant's tender scored 91.32% qualifying them for Financial opening. Surprisingly, the Appellant's Financial proposal was disqualified for non compliance with the requirements of Clause 36.3 of the RFP.

The Appeals Authority took cognizance of the Appellant's contention that the Respondent used an alien criterion not provided for in the RFP to disqualify them, thus revisited the Evaluation Report and observed that the requirements of Clause 36.3 used by the Respondent to disqualify the Appellant was a general provision. If the Respondent required it to be a mandatory requirement he could have qualified it under the provision of evaluation criteria and sub-criteria for allocating marks as per Clause 32.1 and 32.2 of the RFP, modified by Clause 36.2 of the PDS read together with Regulations 289 (1) and (2) (c) and 299 (1) and (2) of GN. No. 446/2013. For purpose of clarity the said provisions are reproduced hereunder:-

ITC Clause 36.1 provides:-

"The Procuring Entity shall evaluate and rank the Technical Proposals on the basis of their responsiveness to the Terms of

Reference, applying the evaluation criteria, sub criteria, and points system specified in ITC Sub-Clause 36.2”.

36.2 Technical Proposals shall be evaluated and ranked applying the evaluation criteria, sub criteria and points system specified in the PDS. Each responsive Technical Proposal will be given a technical score (St). A Technical Proposal shall be rejected if it does not respond to important aspects of the RFP, and particularly the Terms of Reference or if it fails to achieve the minimum technical score indicated in the PDS.”

Reg. 289 (1) “The Instruction to consultants shall-

(a) Contain all necessary information to help consultants to prepare responsive proposals, and shall manifest the transparency in the selection procedure by providing information on the evaluation process and by indicating the evaluation criteria, and factors and the minimum passing score”.

(2) The instruction to consultants shall include the following aspects of the assignment:

(c) details of the selection procedure to be followed including:

(i) a list of technical evaluation criteria and weight given for each criterion”.

Reg. 299 (1) "the evaluation of technical proposal shall be carried out on the basis of principal criteria to which merit points are accorded so that each proposal is scored out of a hundred and the firms shall be ranked by order of merit on the basis of the highest score.

(2) subject to regulation 297 (1), a procuring entity shall evaluate each technical proposal taking into account several criteria which had previously been disclosed in the request for proposal".

The Appeals Authority could not apprehend the Respondent's argument that the Appellant was disqualified for non compliance of Clause 26.3 of the RFP at the financial stage, because the same was in deed an alien criterion. It should be noted that, during technical evaluation, one criterion could not be sufficient to disqualify a firm. Rather, it could have minimized the number of points required for qualification. Further, the Respondent's act of disqualifying the Appellant on matters relating to legal status while he had undergone pre-qualification process was contrary to the requirement of Regulation 286 (3) of GN. No. 446/2013 which states that, the criteria used for in pre-qualification shall not be applied during the follow up evaluation of technical proposal.

The Appeals Authority also does not agree with the Respondent's submission that Power of Attorney was a mandatory requirement. The Appeals Authority observes that, Clause 4.1 of the RFP allows a Lead Member in a joint venture, consortium or association to confirm the Power

of Attorney at the time of contract award. How come a single consultancy firm could not do the same and be required to confirm at the preliminary stage. The Appeals Authority is of the view that the requirements so embedded in the RFP are evidence of double standards, potentially capable of discriminatory practices and should not be allowed to stand.

From the above, the Appeals Authority is of the firm view that, the Appellant was unfairly disqualified basing on alien criterion.

Accordingly, the Appeals Authority concludes the first issue in the affirmative.

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

Having analyzed the contentious issue in dispute, the Appeals Authority finds it prudent to consider prayers by the parties.

To start with the first prayer of declaration that the Appellant was unfairly, arbitrarily and illegally disqualified. The Appeals Authority has held that the Appellant was unfairly disqualified, and it finds it unnecessary to go into issues of arbitrariness and illegality in the circumstances.

With regard to the second prayer, of halting of the intended award of the Tender and order the Respondent to proceed with the evaluation process, the Appeals Authority took cognizance of the findings in the first issue, and hereby nullifies the intended award of the Tender and orders the Respondent to re-evaluate the Financial Proposals of the invited four (4) firms using the proper criteria set in the RFP.

On the issue of costs, the Appeals Authority has power to issue reasonable compensation at its discretion under S.97 (5) (f) of the Public Procurement Act, 2011 (hereinafter referred to as "the Act"). Considering that the Respondent's omission amounted to a wrongful act, the Appeals Authority orders the Respondent to pay reasonable compensation to the Appellant a sum of TZS 1,200,000.00 as per the following breakdown:

Appeal's filing fees-----TZS. 200,000.00

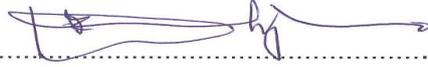
Transport and Accomodation-----TZS. 1,000,000.00 for two members of the Appellant upon proof that they have travelled from Uganda.

From the above findings and conclusions, the Appeals Authority nullifies the intended award of the tender to M/s CRISIL Risk & Infrastructure Solutions in association with Crown Tech Consult Ltd and orders the Respondent to re-evaluate the financial proposal of four firms as approved by the Ministerial Tender Board and to compensate the Appellant as shown above. Appeal Allowed.

The decision of this Authority is binding upon the parties and may be executed in any court of competent jurisdiction in terms of Section 97 (8) of the Act.

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

This Decision is delivered in the presence of the Appellant and the Respondent this 7th January 2016.



JUDGE (rtd) V.K.D. LYIMO
CHAIRMAN

MEMBERS:

1. MR. L. P. ACCARO..... 
2. MS. M. P. OTARU..... 