

IN THE PUBLIC PROCUREMENT APPEALS AUTHORITY

APPEAL CASE NO. 10 OF 2023-24

BETWEEN

M/S SEC MORE INVESTMENT LIMITED.....APPELLANT

AND

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

RULING

CORAM

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

SECRETARIAT

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

FOR THE APPELLANT

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| 1. Mr. Shigi Magese | - Legal Officer |
| 2. Mr. Emmanuel Simon | - Managing Director |

FOR THE RESPONDENT

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| 1. Mr. Erigh Rumisha | - State Attorney – Office of
Solicitor General |
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| 2. Ms. Eliza Lukwaro | - State Attorney - DIT |
| 3. Mr. David Kivembele | - Head of Procurement
Management Unit- DIT |
| 4. Ms. Juliet Mwihambi | - Principal Procurement Assistant-
DIT |

This Appeal was lodged by **M/S Sec More Investment Ltd** (hereinafter referred to as "**the Appellant**") against the 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-351910-GO-RFB (PA.015/WB-EASTRIP-P163399/TZ-DIT-MWZ-351910-GO-RFB/2022-2023/MWZ/WB/G/07) For Procurement of Equipment and Machines for Leather Processing (Supply, Installation and Commission) Lot 1, 2 and 3 for the Center of Excellence in Leather Processing and Allied Technology (CELPAT) 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 Tender was conducted through the National Competitive Bidding Procedures as specified in the World Bank's Procurement Regulations for IPF Borrowers, Fourth Edition, issued in November 2020 (hereinafter referred to as the "**World Bank Procurement Regulations**").

The Respondent through the Government of the United Republic of Tanzania (hereinafter referred to as "**the Borrower**") has received a financing from the International Development Association (IDA) "the Bank" in the form of a credit (hereinafter called a Credit towards the Cost of East Africa Skills for Transformation and Regional Integration Project (EASTRIP). The Respondent as an implementing agency intends to apply a portion of the proceeds to execute the project. Therefore, the Respondent issued the Tender Document as an employer responsible for administering the project.

On 9th May 2023, the Respondent through Tanzania National electronic Procurement System (TANePS) invited tenderers to participate in the Tender. The deadline for submission of tenders was set on 20th June 2023. On the deadline the Respondent received five tenders including that of the Appellant.

The received tenders were then subjected to evaluation which was conducted into three stages namely; preliminary, technical and financial evaluation. After completion of the evaluation process, the Evaluation Committee recommended award of the Tender for Lot 1 and 3 to M/S Evolve Company Ltd. The recommended contract prices for Lots 1 and 3 were Tanzanian Shillings One Billion One Hundred Ninety Million Five Hundred Thousand only (TZS 1,190,500,000.00) and Tanzanian Shillings Seven Hundred Thirteen Million Five Hundred Seventy Seven Thousand Ninety Four and One Cent only (TZS 713,577,094.01) respectively VAT inclusive subject to negotiations. Lot 2 was not awarded as there was no tenderer which complied with the requirements of the Tender.

The Tender Board at its meeting held on 13th July 2023 approved the recommendations of the Evaluation Committee subject to negotiation. Negotiation successfully took place on 21st July 2023.

On 26th July 2023, the Respondent issued the Notice of Intention to award to all tenderers which participated in the Tender. The Notice informed tenderers that the Respondent intended to award the Tender to M/S Evolve Company Ltd for Lot 1 at the contract price of Tanzanian Shillings One Billion One Hundred Thirty Two Million Nine Hundred Two Thousand Five Hundred Sixty Nine Thousand and Forty Eight Cents (TZS 1,132,902,569.48) VAT Inclusive. In addition, for Lot 3 at the contract price for Tanzanian Shillings Five Hundred Seventy Million Three Hundred Fifty Eight Thousand One Hundred Eighty Six and Twelve Cents (TZS 570,358,186.12) VAT inclusive. Furthermore, the Notice informed the Appellant that its tender was disqualified for failure to attach anti- bribery policy to its form of undertaking on anti-bribery and corruption.

Dissatisfied with the reason given for its disqualification, on 31st July 2023 the Appellant applied for administrative review to the Respondent. On 4th August 2023, the Respondent issued its decision which rejected the Appellant's application for administrative review. The Respondent's decision informed the Appellant that the submitted Anti Bribery Policy was not as per the format provided in Section VI of the Request for Bids. In addition, the Respondent indicated to have disqualified the Appellant's tender for submitting audited financial statements for three years instead of five years as required by Item 3.1 (a) of Section III- Evaluation and

Qualification Criteria. Aggrieved further, on 17th August 2023, the Appellant lodged this Appeal before the Appeals Authority.

The Appeals Authority notified the Respondent about the Appeal and required it to file its statement of reply. In response thereof, the Respondent raised a Preliminary Objection (PO) on a point of law to wit that: -

The Public Procurement Appeals Authority has no jurisdiction to determine this Appeal.

When the matter was called on for hearing, the Appeals Authority informed the parties that due to the time limitation in the determination of appeals, it would hear both the PO and the merits of the Appeal. Therefore, the following issues were framed: -

- 1.0 Whether the Appeals Authority has jurisdiction to entertain the Appeal;**
- 2.0 Whether the Appellant's disqualification was justified; and**
- 3.0 What reliefs, if any, are the parties entitled to?**

After framing the issues, the Appeals Authority required the parties to address the raised PO relating to the first issue, before embarking on the substantive merits of the Appeal.

SUBMISSIONS BY THE RESPONDENT ON THE PO

The Respondent's submissions were made by Mr. Erigh Rumisha, learned State Attorney from the Office of the Solicitor General. He commenced his submissions by addressing the PO first. He stated that jurisdiction of this



Appeals Authority is one of the fundamental matters that is to be considered prior to the determination of the appeal. Jurisdiction goes to the root of the subject matter. The learned State Attorney stated that jurisdiction is governed by law and the nature of the disputed matter. However, it could not depend on the wishes of the parties.

In support of his argument, the learned State Attorney cited the case of ***Sospeter Kahindi versus Mbeshi Mashine***, Civil Appeal No. 56 of 2017 Court of Appeal of Tanzania at Mwanza, (unreported). In this case, the court made reference to the case of ***Shyam Thanki and Others versus New Palace Hotel*** [1971] 1 EA at 202 where it was held that:

*"All the courts in Tanzania are created by statute and their **jurisdiction is purely statutory**. It is an elementary principle of law that parties cannot by consent give a court jurisdiction which it does not possess."*

[Emphases Added]

The learned State Attorney submitted that in the instant Tender, Clause 47.1 of the Bid Data Sheet (**BDS**) states clearly that disputes that might arise out of the Tender process shall be resolved as per the World Bank Procurement Regulations for IPF Borrowers. According to the referred World Bank's Procurement Regulations, a tenderer who is dissatisfied with its disqualification is required to seek a debriefing with the Borrower in accordance with paragraphs 5.81 to 5.82 of the World Bank's Procurement Regulations. Upon being dissatisfied with the Borrower's decision thereof,

a tenderer may seek a debriefing with the World Bank's country office pursuant to paragraph 5.96 of the World Bank's Procurement Regulations.

The learned State Attorney stated further that Clause 44.1, 44.2, 44.3 and 44.4 of the Instructions to Bidders (ITB) provide guidance on dispute resolution at the procuring entity's stage which is commonly referred in the World Bank's Procurement Regulations as debriefing by the Borrower. The learned State Attorney elaborated that, if a tenderer would be dissatisfied with the Borrower's decision on the requested debriefing, it may invoke paragraph 5.96 of the World Bank Procurement Regulations and request for a debriefing with the World Bank's country Office. The learned State Attorney contended that, since the procurement dispute resolution procedures were provided in the Request for Bid and World Bank Procurement Regulations which governs the Tender under Appeal, the Appellant ought to have exhausted the available remedies instead of filing an Appeal before the Appeals Authority.

In support of his argument the learned State Attorney cited the case of ***Paris A. A. Jaffer and others versus Abdallah Ahmed Jaffer and 2 others*** (1996)TLR 116, where the Court held that:-

"Where the law provides extra Judicial machinery along side a judicial one for resolving a certain cause, the extra judicial in general be exhausted before recourse is made to the judicial process."

The learned State Attorney submitted further that the Appeals Authority has taken a similar legal approach for the tenders which are governed by the World Bank Procurement Regulations. The Appeals Authority's position



in this regard was stated in the case of ***M/S China Electric Power Equipment and Technology Company Ltd and Tanzania Electric Supply Company Ltd***, Appeal Case No. 6 of 2023-24. In the referred Appeal Case, the Appeals Authority stated that disputes arising out of the tender that is governed by the World Bank Procurement Regulations, were to be resolved as per the said regulations. Based on that observation the Appeals Authority dismissed the Appeal as it had no jurisdiction to determine the matter where the dispute resolution procedures had been well articulated in the Tender Document.

The learned State Attorney insisted that the cited case of ***M/S China Electric Power Equipment and Technology Company Ltd versus Tanzania Electric Supply Company Ltd*** (supra) is a recent decided case of the Appeals Authority. Therefore, the position stated therein should be maintained so as to avoid conflicting decisions on the same matter. The position that the court or tribunal should not have a conflicting decision on the same matter was stated in the case of ***V.L.C Tanzania Ltd versus National Insurance Corporation and another***, 2003 (TLR) 212 where the court held that "*The court of the same rank should not give a conflicting decision*".

The learned State Attorney in emphasizing his submissions, also cited the case of ***M/S Mekon Arch Consult Ltd versus Dar es Salaam Institute of Technology***, Appeal Case No. 4 of 2021-22 whereby the Appeals Authority upheld the preliminary objection and dismissed the Appeal for lack of jurisdiction based on the same reason advanced in the present Appeal.



The learned State Attorney finalized his submissions by citing the case of ***Sunshine Furniture Co. Ltd versus Maersk (China) Shipping Co. Ltd and Nyota Tanzania Ltd***, Civil Appeal No. 98 of 2016, Court of Appeal of Tanzania at Dar es Salaam (unreported), where the court held that, under these circumstances, the only remedy available is to dismiss the Appeal.

The learned State Attorney therefore, prayed for dismissal of the Appeal.

THE APPELLANT'S REPLY ON THE PO

The Appellant's submissions were made by Mr. Shigi Magese, a Legal Officer and Mr. Emmanuel Simon, the Managing Director, both from the Appellant's office. Mr. Shigi Magese commenced his submissions by stating that the Appeals Authority has jurisdiction to entertain the Appeal. Regulation 5.96 of the World Bank Procurement Regulations relied upon by the Respondent deals with complaints that would arise after publication of the notice of award of the contract.

He contended that in the Tender under Appeal the Respondent issued the Notice of Intention to award the Tender. After receipt of such a notice and being dissatisfied with the reason for its disqualification, the Appellant filed a complaint to the Respondent as required. Upon receipt of the Respondent's decision thereof, the Appellant filed this Appeal before the Appeals Authority. The Appellant submitted that it could not have filed its complaint to the World Bank's country office, since paragraph 5.96 of the World Bank Procurement Regulations requires complaints that are to be filed should arise out of the publication of the notice of award of contract. In relation to the Tender under Appeal, the contract award notice has not



been published. Thus, the Appellant could not have filed its Appeal to the World Bank's country office.

In that regard, the Appeals Authority has jurisdiction to entertain the Appeal. Therefore, the Appellant prayed that the raised PO should be dismissed.

REJOINDER BY THE RESPONDENT

In his brief rejoinder, the learned State Attorney submitted that the Appeals Authority has already given its proper interpretation of Regulation 5.96 of the World Bank Procurement Regulations in the case of *M/S China Electric Power Equipment and Technology Company Ltd versus Tanzania Electric Supply Company Ltd* (supra). In addition, the learned State Attorney stated that Section 4(1) (b) of the Public Procurement Act of 2011, as amended (hereinafter referred to as "**the Act**") requires a tender arising out of any grant agreement or any financial arrangement where the Government is the beneficiary and that such treaty or agreement requires a procurement to be conducted under specific rules other than the laws of the country, the requirement of such agreement or treaty should prevail.

The learned State Attorney contended that from the available record it is clear that the Tender is a result of the financing agreement where the Respondent is the beneficiary. Thus, taking into consideration that the Loan Agreement requires the Tender process to be conducted in accordance with the World Bank Procurement Regulations, such a



requirement prevails over the requirement under the Act. Thus, the jurisdiction of this Appeals Authority cannot be invoked.

ANALYSIS BY THE APPEALS AUTHORITY ON THE PO

1.0 Whether the Appeals Authority has jurisdiction to entertain the Appeal

In resolving this issue, the Appeals Authority reviewed the record of Appeal and observed that Clause 44 of the ITB read together with Clause 47. 1 of the BDS provide guidance on the procedures to be followed in filing a complaint. Clause 44 of the ITB and Clause 47.1 of the BDS read as follows: -

"44.1 On receipt of the Purchaser's Notification of Intention to award referred to in ITB 40.1, an unsuccessful Bidder has three (3) Business Days to make a written request to the Purchaser for a debriefing. The Purchaser shall provide a debriefing to all unsuccessful Bidders whose request is received within this deadline.

44.2 Where a request for debriefing is received within the deadline, the Purchaser shall provide a debriefing within five (5) Business Days, unless the Purchaser decides, for justifiable reasons, to provide the debriefing outside this timeframe. In that case, the Standstill period shall automatically be extended until five (5) Business Days after such debriefing is provided. If more than one debriefing is so delayed, the standstill period shall not end earlier than five (5) Business Days after the last debriefing



takes place. The Purchaser shall promptly inform, by the quickest means available, all Bidders of the extended standstill period.

44.3 Where a request for debriefing is received by the Purchaser later than the three (3) Business Day deadline, the Purchaser should provide the debriefing as soon as practicable, and normally no later than fifteen (15) Business Days from the date of publication of Public Notice of Award of contract. Request for debriefing received outside the three (3) day deadline shall not lead to extension of the standstill period.

44.4 Debriefing of unsuccessful Bidders may be done in writing or verbally. The Bidders shall bear their own costs of attending such a debriefing meeting.

BDS 47.1 The procedures for making Procurement-related Complaint are detailed in the Procurement Regulations for IPF Borrowers (Annex III). If a bidder wishes to make a Procurement - related Complaint, the Bidder should submit its complaint following these procedures, in writing (by the quickest means available, that is either by email or fax)..."

(Emphasis Added)

Having observed that the Tender under Appeal was conducted under the World Bank Procurement Regulations, the Appeals Authority reviewed the said Regulations and observed that Regulations 5.81, 5.82 and 5.96 of the



World Bank Procurement Regulations provide guidance on the procedures for handling disputes arising out of procurement processes. Regulations 5.81, 5.82 and 5.96 read as follows:-

"Debriefing by the Borrower

5.81 On receipt of the Borrower's Notification of Intention to Award referred to under Paragraphs 5.72 to 5.74 (Goods, Works and Non-consulting Services), or Paragraphs 5.75 to 5.77 (Consulting Services), an unsuccessful Bidder/Proposer/Consultant has three (3) Business Days to make a written request to the Borrower for a debriefing. The Borrower shall provide a debriefing to all unsuccessful Bidders/Proposers/Consultants whose request is received within this deadline".

"5.82 Where a request for debriefing is received within the deadline, the Borrower is required to provide a debriefing within five (5) Business Days, unless the borrower decides for justifiable reasons, to provide debriefing outside this time..."

"Debriefing by the Bank

5.96 If, after publication of the Contract Award Notice, a Bidder/Proposer/Consultant who has not received a satisfactory explanation from the Borrower as to why its Bid/Proposal was not successful, may request a meeting with the Bank. Such request should be addressed to the Accredited Practice Manager for the Borrower's country, who will arrange a meeting at the



appropriate level and with relevant staff. The purpose of such meeting is not to discuss the Bids/Proposals of competitors or, in the case of prior review contracts, the Bank's position that has been conveyed to the Borrower".

(Emphasis supplied)

The above cited provisions provide a clear guidance on procedures to be followed in resolving disputes arising out of the tender processes that have been conducted in accordance with these Regulations. According to the cited provisions, a tenderer who is dissatisfied with the Notice of Intention to award is required to submit a complaint to the Borrower. The Borrower is required to consider the complaint and provide a decision thereof. If a tenderer would be dissatisfied with the issued decision, it is required to seek a debriefing with the World Bank's country office.

From the record of this Appeal, it is clear that the Tender was governed by the World Bank Procurement Regulations. In addition, Clause 47.1 of the BDS provides clearly that all disputes arising out of the Tender would be resolved as per the World Bank Procurement Regulations.

The Appeals Authority reviewed the record of this Appeal and observed that the Notice of Intention to award was issued to all tenderers through a letter dated 26th July 2023. Dissatisfied, with the reason given for its disqualification, the Appellant filed a complaint to the Respondent on 31st July 2023. On 4th August 2023, the Respondent issued its decision which was served to the Appellant on 7th August 2023. Aggrieved further, on 17th August 2023, the Appellant filed this Appeal.



According to the World Bank's Procurement Regulations, the Appellant upon being dissatisfied with the Respondent's decision ought to have sought a debriefing with the World Bank's country office. To the contrary, the Appellant filed this Appeal before the Appeals Authority.

The Appeals Authority considered the Appellant's argument that it has jurisdiction to entertain this Appeal, since Regulation 5.96 of the World Bank Procurement Regulations relied upon by the Respondent is not applicable in the circumstances of the disputed Tender. The Appellant asserted that such a provision could only be invoked if a contract award notice has been published. In the Tender under Appeal, the contract award notice was yet to be published. Thus, the only remedy available for the Appellant is to file an Appeal before this Appeals Authority.

The Appeals Authority having reviewed Regulation 5.96 of the World Bank Procurement Regulations observed that complaints that could be submitted to the World Bank's country office are not limited to only those that would arise after publication of contract award notice. The complaints which are referred under Regulation 5.96 of the World Bank Procurement Regulations include complaints which might arise as a result of the tenderers' dissatisfaction with the Borrower's decision from a complaint filed following a tenderer's dissatisfaction with the notice of intention to award. In this regard, the Appeals Authority is of the firm view that the Appellant upon being dissatisfied with the Respondent's decision ought to have filed its complaint to the World Bank's country office as per Regulation 5.96 of the World Bank Procurement Regulations.



The Appeals Authority is of the considered view that since the project in respect of this Tender is financed by the loan granted by IDA which the Respondent is the beneficiary, the governing rules for the Tender are the World Bank Procurement Regulations. This position is supported under Section 4(1) (b) of the Act. Section 4(1)(b) of the Act reads as follows:-

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

(a)

(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."

Given the above findings and the requirements provided under the World Bank Procurement Regulations, the Appeals Authority is of the considered view that, it has no jurisdiction to entertain the Appeal. Therefore, the Appeals Authority upholds the Preliminary objection.

In view of our findings hereinabove, the Appeals Authority would not delve into the remaining issues. The Appeals Authority hereby dismiss the Appeal for want of jurisdiction. We make no order as to costs.

It is so ordered.



This Ruling is binding and can be enforced in accordance with Section 97(8) of the Act.

The Right of Judicial Review is as provided under Section 101 of the Act.

This Ruling is delivered in the presence of the parties this 15th day of September 2023.

HON. JUSTICE (rtd) SAUDA MJASIRI



.....
CHAIRPERSON

MEMBERS: -

1. MR. RHOBEN NKORI



2. MR. PIUS MPONZI

