

**IN THE PUBLIC PROCUREMENT APPEALS AUTHORITY**

**APPEAL CASE NO. 22 OF 2023-24**

**BETWEEN**

**M/S OURMAST GROUP KINGSHURST**

**CONSULTANTS JV.....APPELLANT**

**AND**

**TANZANIA PETROLEUM DEVELOPMENT**

**CORPORATION .....RESPONDENT**

**RULING**

**CORAM**

- |                        |                   |
|------------------------|-------------------|
| 1. Adv. Rosan Mbwambo  | - Ag. Chairperson |
| 2. Mr. Pius Mponzi     | - Member          |
| 3. Dr. William Kazungu | - 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. Dennis Malamba   | - Advocates, Edward & Associates |
| 2. Ms. Veronica Kulanga | - Project Manager                |



## **FOR THE RESPONDENT**

1. Mr. Barnabas Mwashambwa - Legal Officer
2. Ms. Elizabeth Luwanda - Procurement Officer
3. Ms. Tumaini Daniel - Engineer
4. Ms. Rabia Mohamed - Senior Engineer
5. Mr. Donald Aponde - Principal Procurement Officer

**M/S Ourmast Group - Kingshurst Consultants JV** (hereinafter referred to as "**the Appellant**") has preferred this Appeal against the **Tanzania Petroleum Development Corporation** commonly known by its acronym as "**TPDC**" (hereinafter referred to as "**the Respondent**"). The Appeal is in respect of the request for Expression of Interest (EoI) No. ISP-DRM-NRG/TZ/AfDB/CS15/QCBS/2023 for Consultancy Services in Preparing Liquefied Petroleum Gas (LPG) and Compressed Natural Gas Promotion Plan and Development Strategy (hereinafter referred to as "**EoI**")

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

The EoI was conducted in accordance with the procedure provided under the African Development Bank Procurement Policy for Bank Group Funded Operations, 2015 (hereinafter referred to as the "**the Bank's Procurement Policy of 2015**").

On 14<sup>th</sup> June 2023, the Respondent through its website, the African Development Bank's Website, the Daily News Newspaper and on 15<sup>th</sup> June 2023 through the United Nations Development Business (UNDB) Website invited eligible consulting firms to submit their EoI. The deadline for submission of EoI was set on 5<sup>th</sup> July 2023 at 11.00 hours. On the deadline, the Respondent received EoI from thirteen firms.

The received EoI were subjected to evaluation. After completion of the evaluation process, the Evaluation Committee recommended a shortlist of five consulting firms which were found to have complied with the requirements of the EoI and the Bank's Procurement Policy of 2015. The recommended firms were: - M/S Disney International Consultancy, M/S Sunmaker Development & Consulting (Tanzania) Ltd, M/S Saga Global Consultants, M/S Quality Energy Development Consulting of UK and M/S Global LPG Partnership. The Tender Board approved the five firms that were proposed to be shortlisted through a Circular Resolution dated 25<sup>th</sup> August 2023.

The approved results of the EoI were communicated to all firms through a letter dated 11<sup>th</sup> September 2023. The said letter was received by the Appellant on 18<sup>th</sup> September 2023. The letter informed the Appellant that its EoI was not successful as it did not perform any assignment in Africa and performed only one assignment similar to the intended project.

Dissatisfied with its disqualification, on 19<sup>th</sup> September 2023 the Appellant applied for administrative review to the Respondent.

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The Respondent through a letter dated 27<sup>th</sup> September 2023, issued its decision on the Appellant's Application for administrative review. The decision was received by the Appellant on 28<sup>th</sup> September 2023. On 2<sup>nd</sup> October 2023, the Appellant submitted the Notice of Intention to Appeal to the Respondent. On 18<sup>th</sup> October 2023, the Appellant filed this Appeal to the Appeals Authority.

The Respondent in response to the Statement of Appeal raised a Preliminary Objection on the point of law to wit; "*the Appeal is time barred and should be rejected by the Appeals Authority*".

When the matter was called on for hearing and during framing up of issues, the Appeals Authority informed the parties that from the record of Appeal there is a point of law to be determined. This was on the jurisdiction of the Appeals Authority to determine this Appeal. The Appeals Authority observed that the Tender was conducted as per the procedures provided under the Bank's Procurement Policy of 2015. Based on that observation, the following issues were framed: -

- 1.0 Whether the Appeals Authority has jurisdiction to entertain the Appeal;**
- 2.0 Whether the Appeal is time barred;**
- 3.0 Whether the Disqualification of the Appellant's Expression of Interest was justified;**
- 4.0 What reliefs, if any, are the parties entitled to?**



After framing the issues the parties were asked to address the Appeals Authority on the first issue before embarking on the remaining issues.

The Respondent took the floor first and Mr. Barnabas Mwashambwa, its Legal Officer submitted that Section 6.01(a) and (b) of the Loan Agreement between the United Republic of Tanzania and the African Development Fund (Hereinafter referred to as the "**the Loan Agreement**") provides threshold for determination of the procurement procedures that would be applicable during tendering process. Section 6.01 (a) and (b) of the Loan Agreement reads as follows: -

*"Section 6.01 Procurement. Procurement of goods (including non- consultancy services), and acquisition of consulting services financed by the proceeds of the Loan will be carried out in accordance with the Procurement Policy and Methodology for Bank Group Funded Operations, October 2015, as may be amended from time to time, and the Project Procurement Plan approved by the Fund, and as further set out below.*

*(a) Borrower Procurement System (BPS)*

*BPS shall apply to Tanzania Mainland only.  
**Procurement for Zanzibar, and procurement for Tanzania mainland involving contracts***



***whose value exceeds the threshold specified below, will follow Bank procurement Method and Procedures.***

*Procurement of Goods and Non-Consulting Services involving contracts with a value of UA 300,000 or less, and acquisition of Consultancy Services involving contracts with a value of UA 200,000 or less for firms, and UA 50,000 or less for individual consultants, will be carried out following BPS Procurement Methods and Procedures, using the available Borrower's Model Bidding Documents – National Standard Bidding Documents (NSBD).*

***(b) Bank Procurement Method and Procedures: - Procurement of Goods and Non- Consulting Services involving contracts whose value exceeds UA 300,000, and acquisition of Consultancy Services involving contracts whose value exceeds UA 200,000 for firms, and UA 50,000 for individual consultants, will be carried out following Bank Procurement Method and Procedures, using the relevant Bank Standard Solicitation Documents (SBD)."***

[Emphasis Added]



He submitted further that the EoI was conducted using procedures specified under the Bank's Procurement Policy of 2015 since the threshold of the project fell under Section 6.01 (b) of the Loan Agreement. The Respondent stated further that the procedure of lodging complaint was provided under Item 11 of the African Development Bank Rules and Procedures for the Use of Consultants, May 2008 Edition, Revised 2012 (hereinafter referred to as "**the African Development Bank Rules of 2012**"). Item 11 of the African Development Bank Rules of 2012 reads as follows:

*"11. If consultants wish to raise issues or questions about the selection process, they may send the Bank copies of their communications with the Borrower, or they may write to the Bank directly when the Borrower does not respond promptly or when communication is a complaint against the Borrower. All such communications should be addressed to the Sector Director for the project, the Director of the Procurement and Financial Services Department (ORFP). Name of the Sector Director is available in the PAR."*

The Respondent elaborated that the above quoted provision indicates clearly that a dissatisfied consultant may submit complaint to the borrower or to the Bank depending on the circumstances



elaborated under Item 11. The Respondent was of the further view that Item 11 use the word "may" which suggests that consultants may either choose to submit complaint to the borrower or may submit complaint to the Appeals Authority. Therefore, the Respondent was of the view that based on that requirement the Appeals Authority has jurisdiction to determine the Appeal submitted before it.

The Appellant on its part stated that the EoI was conducted as per the Bank's Procurement Policy of 2015. However, since it is not conversant with Bank's Procurement Policy of 2015, the Appellant left the matter to be determined by the Appeals Authority as to whether or not it has jurisdiction to entertain the Appeal.

## **ANALYSIS BY THE APPEALS AUTHORITY ON THE POINT OF LAW**

### **1.0 Whether the Appeals Authority has jurisdiction to entertain the Appeal**

The Appeals Authority reviewed Item 5 of the EoI Document. It observed that the provision indicates that EoI shall be conducted as per the Bank's Procurement Policy of 2015. Item 5 of the EoI reads as follows: -

5. *Eligibility criteria, establishment of short-list and the selection procedure shall be in accordance with the African Development Bank's Procurement Policy for Bank*





*Group Funded Operations, October 2015, which is available on the Bank's website at <http://www.afdb.org>.*

According to Section 6.01 (b) of the Loan Agreement as quoted hereinabove as well as the Respondent's submissions, it is undisputed that the EoI relates to a tender with the value that exceeds the threshold for borrowers' procurement procedures to apply.

The Appeals Authority reviewed Item 11 of the African Development Bank Rules of 2012. It observed that item 11 allows a dissatisfied consulting firm to submit its complaint to the borrower and send copies of its communications to the Bank or if the complaint is against the borrower, the consulting firm may submit complaint directly to the Bank.

In this Appeal, the Appellant is a consulting firm. It is challenging the decision of the Respondent, the borrower. In view of Section 6.01 (b) of the Loan Agreement and Item 11 of the African Development Bank Rules of 2012, the Appeals Authority is of the firm view that the Appellant should have submitted its complaint direct to the Bank. To the contrary, the Appellant filed this Appeal before the Appeals Authority.

Under the circumstances, the Appeals Authority finds that it has no jurisdiction to entertain the Appeal. In view of this finding, the Appeals Authority would not delve into the remaining issues. The Appeals Authority hereby dismiss the Appeal for want of



jurisdiction. Since the point of jurisdiction was raised by the Appeals Authority *suo motu*, 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 Appellant and in the absence of the Respondent though duly notified this 23<sup>rd</sup> day of November 2023.

**ADVOCATE ROSAN MBWAMBO**



**Ag. CHAIRPERSON**

**MEMBERS: -**

**1. MR. PIUS MPONZI**.....

**2. DR. WILLIAM KAZUNGU**.....