

**PUBLIC PROCUREMENT APPEALS AUTHORITY
AT DAR ES SALAAM**

APPEAL CASE NO. 124 OF 2012

BETWEEN

MEKON ARCH CONSULT LTD1ST APPELLANT

PSM ARCHITECTS CO. LTD 2ND APPELLANT

AND

PARASTATAL PENSIONS FUND.....RESPONDENT

ORDER

CORAM:

- | | |
|--------------------------------|---------------|
| 1. Hon. A.G. Bubeshi, J. (rtd) | - Chairperson |
| 2. Mr. K.M Msita | - Member |
| 3. Mr. H.S. Madoffe | - Member |
| 4. Ms. E.J. Manyesha | - Member |
| 5. Ms. B.G. Malambugi | - Secretary |

SECRETARIAT:

- | | |
|----------------------|---------------------------|
| 1. Ms. E.V.A Nyagawa | - Principal Legal Officer |
| 2. Ms. F.R. Mapunda | - Legal Officer |
| 3. Mr. H.O. Tika | - Legal Officer |
| 4. Ms. V.S. Lamilabo | - Legal Officer |

FOR THE APPELLANT:

Absent though on notice

FOR THE RESPONDENT:

1. Mr. Nicander A. Kileo – Legal Services Manager
2. Mr. Issa Sabuni – Head of Procurement Management
Unit

The appeal at hand was lodged by M/s **MEKON ARCH CONSULT LTD** (hereinafter to be referred to as “**the Appellant**”) against **PARASTATAL PENSIONS FUND** commonly known by its acronym **PPF** (hereinafter to be referred to as “**the Respondent**”). After notification of this Appeal to the other bidders who took part in the tender process, one of the tenderers, namely, **M/s PSM ARCHITECTS CO LIMITED** opted to join this Appeal as the **2nd Appellant**.

The said Appeal is in respect of Tender No. PA038/HQ/2010/C/3 for Provision of Consultancy Services for the Proposed Construction of the PPF Ununio Waterfront Project on Plot No.16, 17, and 18 Ununio area Kinondoni Municipality Dar es Salaam (hereinafter to be referred to as “**the tender**”).

According to the documents submitted to the Authority, the facts of the Appeal may be summarized as follows:

The Invitation for Expression of Interest (EOI) was re-advertised in the Guardian newspaper of 5th September,

2011, whereby consultants firms were invited to participate in the pre-qualification process of the above named tender.

The opening of Expressions of Interest took place on 20th September, 2011, whereby seventeen firms expressed interest. After evaluation the following nine firms were pre-qualified and invited to submit proposals:

S/N	Lead Firm	Associated Firms
1.	M/s Tharani Associates Ltd.	<ul style="list-style-type: none"> • Matawana Consulting Group (Quantity Surveyor) • Cowi Consulting (Service Engineers and Structural Engineer)
2.	M/s qD Consultancy (T) Ltd.	<ul style="list-style-type: none"> • UNDI Consulting Group Ltd. (Structural Engineer and Services Engineer) • KIMPHIL Konsult (T) Limited (Services Engineer) • Bangalima & Associates (Quantity Surveyor)
3.	M/s Y & P Architects (T) Ltd.	<ul style="list-style-type: none"> • Norplan (T) Ltd (Services engineer)

		<ul style="list-style-type: none"> • Annova Consult Co. Ltd. (Structural Engineer) • Cost Consult Ltd. (Quantity Surveyor)
4.	M/s Mekon Arch Consult Ltd.	<ul style="list-style-type: none"> • Symbion International. (Architect) • AQE Associates Ltd. (Quantity Surveyor) • Mekon Consulting Engineers. (Structural Engineer) • Services Consult Ltd. (Services Engineer)
5.	M/s Hab Consult Ltd	<ul style="list-style-type: none"> • Costeq Consult Ltd. (Quantity Surveyor) • S&F Consultancy Ltd. (Structural Engineer) • Electriplan (T)Ltd. (Services Engineer)
6.	M/s A+P Consultants Ltd Architects and Planners	<ul style="list-style-type: none"> • Q.S Consultants Ltd. (Quantity Surveyor) • FBNE Ltd. (Services Engineer) • Lomo Consult Ltd.

		(Structural Engineer
7.	M/s Sky Architects Consultants	<ul style="list-style-type: none"> • B.J. Amuli- Architects Ltd. (Architect) • MaS-Q Associates Ltd. (Quantity Surveyor) • RH Engineering Consultant Ltd. (Structural Engineer) • Sprint Engineering Consultant Ltd. (Services Engineer)
8.	M/s Digital Space Consultancy	<ul style="list-style-type: none"> • Envirolink Architects Ltd. (Architect) • Metroconsult (Structural Engineer) • Nimeta Consult (T) Ltd. (Services Engineer) • JB Costcare Consultant Ltd (Quantity Surveyor)
9.	M/s PSM Architects Company Ltd.	<ul style="list-style-type: none"> • Howard Humphrey (T) Ltd. • Bish (T) Ltd. (Quantity Surveyor)

Upon review of the Request For Proposal Document (hereinafter referred to as "RFP") issued to tenderers, the Procurement Management Unit (PMU) noted some anomalies in the said document, hence, suggested to the Tender Board during its meeting held on 7th February, 2012, that;

- It should rescind its previous approval of the RFP which inadvertently contained the QCBS method for evaluation of proposals.
- Approve QBS to be used in the tendering process as proposed by the user department.
- Approve the revised RFP Document and Proposal Data Sheet to the effect that the selection method to be read as **Quality Based Selection (QBS)** and such amendment to be communicated to all Consultants.
- Approve extension of Bid submission date for two weeks to give time to tenderers to reflect those amendments in their Proposals.

At the same meeting the Tender Board approved the changes to be made in the RFP and approved the extension of Bid submission deadline.

On 7th February, 2012, the Respondent notified all the tenderers that, the deadline for submission of proposals had been extended from 15th February, 2012 to 29th February, 2012, due to changes made in the Request for Proposals. They also informed the consultants that the changes effected were in relation to the change in method of selection of consultants from **Quality and Cost Based Selection (QCBS)** as indicated in Clause 1.1 of the Proposal Data Sheet to **Quality Based Selection (QBS)**. As a result of this change, the formula for determining the financial scores and weights given to Technical and Financial proposals was no longer applicable.

On 8th February, 2012, the Appellant wrote a letter referenced PPF/CD/186/01/VOL.1/101 to the Respondent disputing the changes made in the RFP and claimed that it contravened the requirements of the law.

On 24th February, 2012 the Respondent replied to the Appellant's queries vide letter referenced PPF/CD/186/o1.Vol 1/20 informing them that the change of the selection method was not a major modification of the RFP and the same was done in accordance with the law.

The opening of Proposals took place on 29th February, 2012, whereby all the shortlisted firms submitted proposals.

On 8th May, 2012, the 1st Appellant wrote to the Respondent vide letter referenced MAC/PPFTND/3 seeking for administrative review in relation to the changes made in the selection procedures indicating that they were not satisfied with the Respondent's reply of 24th February, 2012.

On 25th May, 2012, the Respondent vide letter referenced PPF/EA/C/22/39 informed the 1st Appellant that their application for review had been filed out of time, and therefore could not be entertained since it was filed outside of the twenty eight days set by the law They

were further informed that the law prohibits review to be preferred on matters related to choice of a procurement method, hence, their application for review was rejected.

The Appellant was dissatisfied with the Respondent's decision, and therefore filed an application for administrative review to Public Procurement Regulatory Authority (hereinafter to be referred to as "**PPRA**") vide letter referenced MAC/PPFTND/4 dated 1st June, 2012.

On 29th June, 2012, PPRA delivered its decision, whereby the 1st Appellant complaint was found to have some merit but was dismissed.

Being dissatisfied with PPRA's decision, on 09th July, 2012, the 1st Appellant filed an Appeal to the Public Procurement Appeals Authority (hereinafter to be referred to as "**the Authority**").

On filing the Appeal to this Authority, other consultants were notified and allowed to join in the appeal pursuant to Section 83(1). One of the consultants,

namely, PSM Architects who had earlier submitted an appeal opted to join in the appeal as the 2nd Appellant. The appeal submitted earlier was not heard on merit by this Authority for being submitted pre-maturely, without exhausting the lower levels of the Review Mechanism.

On 2nd August, 2012 the 1st Appellant decided to withdraw their appeal voluntarily and filed a notice of withdrawal pursuant to Rule 12 of the Public Procurement Appeal Rules, GN No. 205/2005. The Authority accepted the 1st Appellant's decision to withdraw their appeal.

However, considering that, PSM Architects had joined the appeal as the 2nd Appellant after being notified of the Appeal submitted by the 1st Appellant, the Authority decided to proceed with determination of the Appeal submitted by the 2nd Appellant on merit.

SUBMISSIONS BY THE 2ND APPELLANT

The 2nd Appellant's arguments may be summarized as follows:

That, the 2nd Appellant was among the invited consultants who submitted their proposals for the tender under Appeal.

That, on 4th January, 2012 the Respondent provided them with the RFP after being pre-qualified and being invited to submit technical and financial proposals.

That, on 24th January, 2012, they submitted a request to the Respondent so that they could be allowed to associate with Iain Pattie Associate Ltd, a firm which was not among the shortlisted consultants.

That, on 25th January, 2012 they submitted the profile and CV's of Iain Pattie Associates Ltd, to the Respondent for consideration.

On 7th February, 2012 they received a letter from the Respondent informing them of extension of the deadline for submission of proposals due to changes in the method of procurement from Quality and Cost Based Selection (QCBS) indicated in the Clause 1.1 of the Proposal Data

Sheet (PDS) to Quality Based Selection (QBS) and also that due to the changes Clause 38.3 and 40.1 of the PDS would not be applicable.

That, on 24th February, 2012 the Respondent responded to the 2nd Appellant's request to associate with Iain Pattie Associate refusing the request because it was not among the shortlisted consultancy firms.

That, on 27th February, 2012, they challenged the Respondent's decision on the basis of Clause 17.2 of the RFP with regard to association of the consultants not among the shortlisted firm.

That, on 29th February, 2012 they submitted their Technical Proposal in association with Iain Pattie.

That, on 30th May, 2012 the 2nd Appellant received a letter from the Respondent informing them that their Proposal was not successful as they scored 69.17% below the qualifying points of 75%.

That, on the 25th July 2012 the 2nd Appellant received a notification letter from PPAA informing them to join the appeal as they were among the consultants who participated in the tender process and might be affected by the review proceedings as per Section 83(1) (2) of the Act read together with Rule 9(1) of the Appeals Rules.

That, the Respondent's failure to observe the evaluation mechanism for the selection procedures based on the Quality Based Selection Method contravened the requirements of Regulation 37 of GN No 98/2005. Non observance of the procedures led the 2nd Appellant's bid were rejected prematurely.

Finally, the 2nd Appellant, prayed for the following orders;

- That the tender process be nullified
- The Respondent be ordered to start the tender process afresh in accordance with the law.

RESPONDENT'S REPLIES

The Respondent's arguments were preceded by two points of Preliminary Objection, namely;

- a) That the Appeal is bad in law for being *res judicata***
- b) That the appeal contravenes Section 79(2) of the Public Procurement Act of 2004.**

Without prejudice to the above objections, the Respondent's replies to the 2nd Appellant's submissions may be summarized as follows:

That, the 2nd Appellant submitted the profile and CV'S of Iain Pattie Associates Ltd to the Respondent not to obtain approval as claimed, but for consideration pursuant to the procurement laws and Regulations.

That, on 27th February, 2012 the 2nd Appellant wrote a letter to the Respondent referenced PSM/RFP/PPF/07/2012 informing them that Clause 17.2

of the Information for Consultants issued by the latter allows additional of sub-consultants.

That the 2nd Appellant submitted their Proposals with inclusion of Iain Pattie Associates Ltd. The said proposals were evaluated accordingly without exclusion of the Iain Pattie Associates Ltd.

That, on 30th May, 2012, the 2nd Appellant was notified that its tender was not successful.

That, the Respondent's acts of notifying the 2nd Appellant about the results of the technical evaluation was legally correct and made pursuant to Regulation 59(1) of GN.No.98/2005.

That, the applicability of Section 83(1) of the Act read together with Rule 9(1) of the Appeals Rules does not warrant the 2nd Appellant any justification to bring the matter to the Appeals Authority as the matter is *res judicata*.

Finally, the Respondent prayed for the following orders;

- Dismissal of the Appeal
- Costs
- Any other relief this Authority may deem fit to grant.

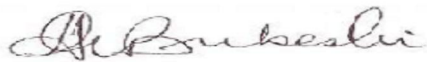
On the date set for hearing only the Respondent appeared before this Authority and there was no information submitted in relation to the absence of the 2nd Appellant.

According to Rule 17 of the Public Procurement Appeals Rules GN No. 205/2012, the Authority has been vested with powers of dismissing an Appeal in a situation where only the Respondent appears and the Appellant does not appear without notice. The said rule states as follows;

“Where the respondent appears and the Appellant does not appear when the Appeal is called for hearing the Public Procurement Appeals Authority shall make an order dismissing the appeal”.(Emphasis supplied)


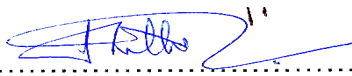
Based on the above quoted provision, the Authority dismissed the Appeal for non appearance of the Appellant with no order as to costs.

This Order is made this 7th day of August, 2012.



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JUDGE (rtd) A. BUBESHI
CHAIRPERSON

MEMBERS:

1. MR. H.S MADOFFE 
2. MR. K.M. MSITA 
3. MS. E. J. MANYESHA 