

**IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY
AT DAR-ES-SALAAM**

APPEAL CASE NO. 64 OF 2010

BETWEEN

ERNST & YOUNGAPPELLANT

AND

**DAR ES SALAAM STOCK
EXCHANGERESPONDENT**

DECISION

CORAM:

- | | |
|--------------------------------|---------------|
| 1. Hon. A.G. Bubeshi, J. (rtd) | - Chairperson |
| 2. Hon. V.K. Mwambalasa (MP) | - Member |
| 3. Mr. K.M. Msita | - Member |
| 4. Mrs. N.S.N. Inyangete | - Member |
| 5. Ms B.G. Malambuigi | - Secretary |

SECRETARIAT:

- | | |
|-----------------------|--------------------------|
| 1. Ms. E.V.A. Nyagawa | -Principal Legal Officer |
| 2. Ms. F. Mapunda | - Legal Officer |

FOR THE APPELLANT:

FOR THE RESPONDENT

This decision was scheduled for delivery today 23rd March, 2010, and we proceed to deliver it.

The Appeal at hand was lodged by **M/s ERNST & YOUNG** (hereinafter to be referred to as "**the Appellant**") against the **DAR ES SALAAM STOCK EXCHANGE** commonly known by its acronym **DSE** (hereinafter to be referred to as "**the Respondent**").

The said Appeal is in respect of Tender No. DSE/2009/10/C/01 for Provision of Consultancy Services for the Preparation of the DSE's Five Year Corporate Plan (2009-2014) (hereinafter to be referred to as "**the Tender**").

According to the documents submitted to the Authority as well as oral submissions by parties, the facts of the Appeal may be summarized as follows:

On 8th September, 2009, the Respondent invited seven short listed firms to submit proposals for the preparation of a five year Corporate Plan for DSE.

In order to guide the related procurement process including preparation and submission of Technical and Financial Proposals, the Respondent issued Request for Proposal document to all consultants.

The deadline for submission of proposals and the opening of Technical Proposals was 9th October, 2009, whereby two proposals were received from the following consultants:

- (a) Ernst & Young
- (b) Delloitte Consulting Limited

After evaluation of the Technical Proposals, the proposals submitted by both consultants were determined to be in compliance with the requirements of the Request for Proposal and the Tender Board at its meeting held on 26th October, 2009, approved the recommendations of the Evaluation Committee that both Consultants be invited for Opening of Financial Proposals.

Consultants from the two firms attended the Opening of Financial Proposals which took place on 30th October, 2009, and the read out prices were:

S/No	Name of Consultant	Price Tendered
1.	Ernst & Young	Tshs. 59,790,600 Inclusive of Tax
2.	Delloitte Consulting Ltd	Tshs. 63,176,772 Inclusive of Tax

During evaluation of Financial Proposals the Evaluation Committee noted that, there were inconsistencies in the Appellant's Financial Proposal and the relevant adjustments were made to the price tendered. After the adjustments the tendered price came to Tshs. 4,413,200/= for the Appellant. The said adjustments were communicated to the Appellant *vide* a letter dated 11th November, 2009, with reference No. DSE/0157/TB.

On 12th November, 2009, the Appellant replied to the Respondent's letter disputing the adjustments

indicating that their Proposal did not have any computational errors and provided clarification on how the professional fees were calculated. The Appellant also rejected the Respondent's corrections.

On 18th January, 2010, the Respondent *vide* a letter referenced DSE/0157/TB informed the Appellant that, their Financial Proposal was found to be non responsive and that the contract had been awarded to Delloitte Consulting Limited.

On 21st January, 2010, the Appellant being dissatisfied with the tender results filed an application for review to the Respondent and copied the same to the Public Procurement Regulatory Authority (hereinafter to be referred to as "**PPRA**") disputing the award of the said tender.

On 26th January, 2010, the Respondent replied to the Appellant's complaint *vide* a letter referenced DSE/0157/TB giving the reasons for their disqualification.

Upon receipt of a copy of the complaint letter from the Appellant, PPRA on 27th January 2010, *vide* letter referenced PPRA/PA/013/2, advised the Appellant to lodge an appeal with the Public Procurement Appeals Authority (hereinafter to be referred to as "**the Authority**"), since the contract had already entered into force.

On 5th February, 2010, the Appellant lodged an appeal with this Authority.

SUBMISSIONS BY THE APPELLANT

The Appellant's documentary, oral submissions as well as responses from questions raised by the Members of the Authority during the hearing were as follows:

That, the Appellant's complaint is based on the invalidity of the Respondent's letter of 11th November, 2009, that is, if the said letter had not

been effected they would have been selected as they scored highest in Technical Evaluation and had the lowest financial bid price.

That, the Respondent reported a positive error and insisted on correction while Clause 38.2 of the Request for Proposals (hereinafter to be referred to as "**RFP**") allows only additions of the cost to the offered price and not reductions.

That, the Respondent's argument that the Appellant's failure to accept the correction of errors as the basis for their disqualification contravened Clause 39.2 of the RFP which allows disqualification for non acceptance of correction of arithmetic errors. Clause 39.1 of the RFP classifies arithmetic errors to be:

- a) Multiplication errors
- b) Errors of Addition
- c) Discrepancy between words and figures.

The Appellant was of the view that none of the above classes of errors were in their proposal.

That, if there was any error in the Appellant's Financial Proposal, it was in the presentation of detail and not in value. If the Respondent would have been more realistic in their review they would have seen that their "**correction**" proposed a revised price that was not credible since it reduced the value tendered by 93%.

That, the Appellant's proposal as presented would have been the winning proposal and therefore suitable for selection as the preferred consultant.

The Appellant therefore prays to the Authority to determine whether the Respondent's selection of consultant was proper in the eyes of the law. Further, the Appellant prayed to be compensated a total of Tshs. **21,220,163/-** as per the following breakdown;

ITEM	TSHS
Costs of proposal preparation	2,695,913/=
Loss of Profit on the assignment	16,302,000/=
Costs of pursuit of Claim	2,342,250/=
TOTAL	21,220,163/=

SUBMISSIONS BY THE RESPONDENT

The Respondent's documentary, oral submissions as well as responses from questions raised by the Members of the Authority during the hearing were as follows:

That, the Appellant was among the two consultants who submitted proposals for the preparation of the Respondent's Five Year Corporate Plan.

That, after evaluation of the Technical Proposals both consultants were found to be substantially responsive and qualified for opening of the Financial Proposals.

That, during financial evaluation, the Respondent's Evaluation Committee reviewed the Financial Proposals and noted that, there were inconsistencies in the Appellant's Financial Proposal and adjustments were made and the correction of errors thereof were communicated to the Appellant for acceptance as required by Clause 39.2 of the RFP.

That the major inconsistency found in the Appellant's tender was that, instead of filling Table 5B3 with the staff-month inputs indicated in Table 5A7 they indicated the staff days. This inconsistency was adjusted by filling the appropriate Staff Month inputs as provided in Table 5A7 of the Technical Proposal. Consequently, arithmetic corrections were carried out by multiplying the staff-month rates provided for each key staff with the corresponding correct staff-months. This process resulted into an error amounting to Tshs. 55,377,400/= which was communicated to the Appellant.

That, the Appellant refused to accept the corrected error instead provided clarifications that, the professional fees were calculated on the daily staff rate basis which was not indicated anywhere in their submitted proposals.

That, the Respondent's Evaluation Committee rejected the Appellant's clarification in order to avoid contravening the requirements of Clause 38.1 of the RFP.

That, the source of the inconsistency is the Appellant's assumption that the terms "**staff- days**" and "**staff- months**" are the same. Likewise the Appellant assumed that the staff-month rate indicated under Table 5B3 (page 4 of Financial Proposal) is the same as staff day rate referred to in the letter dated 12th November, 2009. That ` the two assumptions are wrong due to the fact that the terms are different.

That, the term staff-month refers to the provision of one staff member for the duration of one month, while staff-day refers to the provision of one staff member for the duration of one calendar day. Likewise, the term "staff-month rate" refers to the cost of providing one staff member for the duration of one month while "staff-day rate" refers to the cost of providing one staff member for the duration of one calendar day. In this case the staff inputs and duration should be expressed in "number" and "months" respectively.

That, it is unfortunate that the Appellant being an experienced consultant submitted proposals with inconsistencies despite the fact that Clause 18.1(f) of the RFP required the standard Form 5A7 to be filled with estimates of staff inputs in staff month and not in staff days.

That, based on the above detailed explanation the Respondent submitted that;

- The entire process was guided by the procedures outlined in the RFP which were provided to all consultants together with the requirements of the Public Procurement Act No. 21 of 2004 (hereinafter to be referred to as "**the Act**") and Public Procurement (Selection and Employment of Consultants) Regulations, 2005 (hereinafter to be referred to as "**GN. No. 98 of 2005**").

- Clarifications provided by the Appellant in their letter dated 12th November, 2009 were not acceptable based on requirements of Clause 38.1 of the RFP. The same position was clarified by the Respondent in their letter dated 18th December, 2009 with reference No. DSE/0157/TB indicating that the Appellant's letter contravened with the requirements of Clauses 32.1, 34.1 and 34.2 of the RFP which have the implications of rejections of the respective proposal.

That, the processing and adjudication of the disputed tender was properly and adequately undertaken in compliance with the requirements of the Act, GN No. 98 of 2005 and the RFP.

The Respondent prayed for the Appeal to be rejected for lack of merit.

ANALYSIS BY THE AUTHORITY

Having gone through the documents submitted and having heard oral submissions from parties, the Authority is of the view that, the following four main issues need to be resolved:

- **Whether the Evaluation process was conducted in accordance with the law**
- **Whether the Appellant was unfairly disqualified**

- **Whether the award to the Successful consultant was justified**
- **To what reliefs, if any, are the parties entitled to.**

Having framed the main issues, the Authority proceeded to resolve them as hereunder:

1.0 Whether the evaluation was conducted in accordance with the law;

The Authority observes that, the law requires the evaluation process of any tender to be conducted in accordance with the applicable law as well as the RFP. In order to satisfy itself whether the evaluation of the Technical and Financial proposals was in observance of the law, the Authority examined the evaluation process in its entirety by revisiting the applicable law and the RFP *vis-a-vis* the Evaluation Reports as well as oral submissions by parties.

To start with, the Authority reviewed the RFP so as to ascertain whether it contained the evaluation criteria and the methodology thereof as required by the law. In doing so, the Authority noted that the RFP contained the evaluation criteria as the law requires as well as the modality of how the said evaluation would be conducted.

Having established that the RFP complied with the law, the Authority proceeded to examine the Evaluation Reports in order to find out if the evaluation process was conducted in accordance with the criteria stipulated in the RFP and the law. The Authority noted that the evaluation process was carried out in two stages, namely; Technical Evaluation and Financial Evaluation as required by Regulation 57 (1) of GN No. 98 of 2005.

The Authority further noted that, the evaluation of the Technical Proposals was carried out in two stages namely; Preliminary Evaluation and Detailed Evaluation.

During Preliminary Evaluation, the assessment was made to ensure that the submitted Technical Proposals had complied with the requirements provided for in the RFP. In its review the Authority noted that Table No.1 of the Technical Evaluation Report contained the summary results showing that both consultants complied with all the eligibility criteria, save for the issue of Anti-Bribery Policy. The five Evaluators differed on whether the successful consultant had submitted the Anti-Bribery Policy as required by the law. Two evaluators indicated that, the Successful consultant had submitted an Anti-Bribery Policy while the other three indicated that he did not.

The Authority is appalled by the conduct of the Evaluators as it defeats reason as to how they could come up with different results while they had evaluated the same document. During the hearing the Authority raised the same concern and the Respondent who had the Successful consultant's

original Technical Proposal perused it and confirmed that it did not contain an Anti-Bribery Policy. Had the Evaluators been honest in evaluating the Technical Proposals they would have noted the said omission, as it involved attachment of a document which could have been easily verified by all of them. The Authority is concerned that, neither the members of the PMU nor the Tender Board detected the Successful consultant's failure to enclose the Anti-Bribery Policy when reviewing the Evaluation Report for Technical Proposals. The Authority wonders as to how this anomaly could have escaped their eyes while it was documented in the Evaluation Report.

Furthermore, the Authority finds the failure to attach the Anti-Bribery Policy to be in contravention of Item 1 of Section 7 of the RFP read together with Paragraph (1) of the Seventh Schedule to GN. No. 98 of 2005 which provides as follows;

“(1) Each tenderer **must** submit a statement, **as a part of the tender**

documents, with the following text ...”
(Emphasis Supplied)

Based on the above quoted provision the Authority is satisfied that, the Anti-Bribery Policy was among the mandatory documents which was to be included to the consultant’s proposal and failure to do so is tantamount to non compliance with the requirements of the RFP. Moreover, the Authority is concerned with the conduct of the three Evaluators, who despite indicating that the Successful consultant did not attach the Anti-Bribery Policy, either out of ignorance or by design failed to ensure the effect of non compliance is imposed on the Successful consultant in accordance with the law. For purposes of recapitulation, Item 4 of Section 7 of the RFP which is in *pari materia* with Paragraph (4) of the Seventh Schedule to GN. No. 98 of 2005 provides clearly the consequence of non conformity thereof in the following words:

“Proposals which do not conform to these requirements **shall not be considered**”
(Emphasis added)

The Authority therefore concludes that, the Successful consultant’s failure to attach the Anti-Bribery Policy contravened the law thus the proposal should not have been considered further.

The Authority further noted that, despite the Successful consultant’s non compliance as shown above, his Technical Proposal was subjected to detailed evaluation and thereafter he was invited for opening of Financial Proposals followed by their evaluation.

The Authority reviewed the Evaluation Report for Financial Proposals and noted that, during this evaluation there were some inconsistencies noted by the evaluators in the Appellant’s Financial Proposal. The said inconsistencies were caused by the Appellant’s

information provided for in Form No. 5B3. The said Form requires the consultants to fill the estimates of staff inputs in staff months. However, the Appellant filled estimates of staff inputs in staff days instead of staff months which was conceded by him. The Authority further noted that, the Evaluators decided to correct the said inconsistencies and communicated the said corrections to the Appellant who rejected them.

In order to find out if the said corrections were properly done, the Authority revisited the provisions of the RFP and the Act which guide on the procedures for correcting Financial Proposals in a situation where there are inconsistencies. The said guidance is provided under Regulation 62(1) of GN No. 98 of 2005 which states:

“An Evaluation Committee of three members or more shall first review the financial proposal for consistency with the technical proposal and if there are any

inconsistencies they shall make the necessary adjustment.” (Emphasis supplied)

Further the Authority revisited Clause 38.2 of the RFP which provides as hereunder;

“Financial Proposal will be reviewed to ensure these are complete (i.e Whether Consultants have costed all items of the corresponding technical Proposal; if not, the procuring entity will cost them and add their cost to the offered price) **and correct any computational errors.** The Evaluation shall exclude all local taxes, duties and other charges imposed under the Applicable Law”. (Emphasis added)

The Authority is of the view that, according to the above quoted Clause, the Evaluation Committee was mandated to, firstly, review the Financial proposals to check whether they were complete and secondly, correct computational errors thereof. According to

the documentary as well as oral submissions by the Respondent on the correction of arithmetic errors, the Authority observes that, Regulation 62(1) of GN No. 98 of 2005 required the Evaluation Committee to adjust the Financial Proposals to be in line with the Technical Proposals which had already been evaluated and accepted by the Respondent. In other words, the Evaluators were required to evaluate Financial Proposal in line with the Technical Proposal so as to rectify any inconsistencies.

The Authority is of the view that, what was done by the Respondent was not an adjustment of inconsistencies but a purported correction of arithmetic errors. What the Respondent did does not fit within the description of correction of arithmetic errors as per Clause 39.1 of the RFP which states as follows:

“The arithmetic errors in the Financial Proposal shall be corrected on the following basis:

- (a) if there is a discrepancy between the unit price and the total price...
- (b) if there is an error in a total corresponding to the addition or subtraction of subtotals...
- (c) if there is discrepancy between words and figures, the amounts in words shall prevail...
- (d) Prices shall be converted to a single currency using the selling rates of exchange ..." (Emphasis added)

In light of the above observations, the Authority accepts the Appellant's contention that what the Respondent did was not correction of arithmetic errors and therefore they contravened the law.

The Authority further considered the Appellant's argument that, the Respondent's letter dated 11th November, 2009, was invalid as it was meant to reduce the Appellant's price while there was no correction of arithmetic errors made. Further it

contravened the provisions of Regulation 64(1) of GN. No. 98 of 2005 which prohibits communication with consultants during the evaluation process. In reply to the Appellant's argument the Respondent submitted that, the correction of errors which was made to the Appellant's Financial Proposal was due to inconsistencies noted and communication to the Appellant was in accordance with **Clause 39.1** of the RFP which requires the procuring entity to communicate the corrections made to the prospective consultant.

In order to resolve the contentious arguments by parties on this point, the Authority revisited Clause 39.2 of the RFP which permits communication to the consultant where corrections of arithmetic errors have been made. The Authority observes that, Clause 39.2 of the RFP only comes into play upon proper application of Clause 39.1 and not otherwise. As it has been already established that, what the Respondent did was not within the purview of Clause 39.1, it goes without saying therefore that, the

Respondent's communication to the Appellant was erroneous and the subsequent correspondences thereof were equally improper in the eyes of the law.

The Authority also noted that, during the evaluation of the Financial Proposals, the Evaluators had imposed a new criterion for checking arithmetic errors which was not provided for in the RFP. The added criterion found under bullet 4 of Item 6.2.1 of the Financial Evaluation Report is as reproduced hereunder;

“Checking whether there was a discrepancy between staff inputs provided in the Financial Proposal and those provided in the Technical Proposals, where the staff input provided in the technical proposal prevailed.” (Emphasis added)

The Authority finds this to be in contravention with Regulation 52(4)(c)(ii) of GN. No. 98 of 2005 which

requires all criteria to be included in the RFP. The said Regulation provides as hereunder;

“52(4) The information to consultants shall include adequate information, on the following aspects of the assignment:

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

(i) a listing of the technical evaluation criteria and weights given to each criterion;

(ii) **the details of the financial evaluation;**” (Emphasis added)

The Authority is of the view that, the Evaluation Committee erred in adding a new criterion during evaluation process which was not disclosed to prospective consultants prior to submission of proposals.

In view of the above findings, the Authority concludes that the evaluation process was not conducted in accordance with the law.

2.0 Whether the Appellant was unfairly disqualified

In view of the conclusions reached under issue number one above , the Authority concludes that the Appellant was unfairly disqualified.

3.0 Whether the award to the successful consultant was justified

In view of the Authority's findings and conclusion in the first issue, the Authority concludes that, the award of the tender in favour Deloitte Consulting Ltd was not justified as the firm was non compliant with the mandatory requirement of the Item 1 of Section 7 of the RFP read together with Paragraph 1 of the Seventh Schedule to GN. No. 98 of 2005. The Authority observes further that, by awarding the

consultancy in dispute to the said consultant, the Respondent breached Item 4 of Section 7 of the RFP and Paragraph (4) of the Seventh Schedule to GN. No. 98 of 2005.

4.0 To what reliefs, if any, are the parties entitled to.

Having resolved the three issues above, the Authority deems it prudent to review the prayers by parties as follows:

(a) APPELLANT'S PRAYERS

(i) Whether the Respondent's selection of consultant was correct

Having concluded in the three issues above that the selection of consultant in the consultancy under Appeal was not in accordance with the law; the Authority proceeded to consider the prayers by parties as hereunder:

a) Appellant's prayer: Be compensated the sum of Tshs. 21,220,163/=

In regards to this prayer the Authority finds that the Appellant is entitled to compensation as the Appeal is found to have merit and therefore orders the Respondent to compensate the Appellant a sum of **Tshs. 5,158,163/=** for the following costs:

- (a) Proposal preparation Tshs. 2,695,913/=**
- (b) Pursuit of claim Tshs. 2,342,250/=**
- (c) Appeal filing fees Tshs. 120,000/=**

With regard to the Appellant's request for compensation of Tshs. 16,302,000/= for loss of profit on the assignment, the Authority is unable to grant this prayer for lack of jurisdiction.

(b) RESPONDENT'S PRAYER

The Authority considered the Respondent's prayer that the Appeal be dismissed for lack of merit and observes that, the Appeal has merit and therefore the Respondent's prayer is rejected.

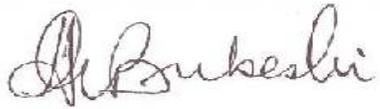
Having considered all facts and evidence, the Authority concludes that, the evaluation process did not comply with the law and therefore the award thereof is a nullity in the eyes of the law.

On the basis of the aforesaid findings, the Authority upholds the Appeal and orders the Respondent to do the following:

- (i) Start the procurement process afresh in observance of the law; and**
- (ii) Compensate the Appellant a sum of Tshs. 5,158,163/= for costs incurred.**

Right of Judicial Review as per section 85 of the Act, explained to parties

Decision delivered in the presence of the Appellant and the Respondent this 23rd day of March, 2010.

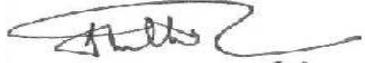


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JUDGE (rtd) A.G. BUBESHI

CHAIRPERSON

MEMBERS:

1. HON. V.K. MWAMBALASWA (MP)

2. MR K. M. MSITA

3. MRS. N.S.N. INYANGETE
