

IN THE  
PUBLIC PROCUREMENT APPEALS AUTHORITY  
AT DAR ES SALAAM  
APPEAL CASE NO. 18 OF 2018-19

BETWEEN

M/S MEKON ARCH CONSULT LTD.....APPELLANT

AND

ARUSHA INTERNATIONAL CONFERENCE CENTER  
(AICC).....RESPONDENT

DECISION

CORAM

- |                                     |               |
|-------------------------------------|---------------|
| 1. Hon. Justice (rtd) Souda Mjasiri | - Chairperson |
| 2. Dr. Leonada Mwangi               | - Member      |
| 3. CPA. Fredrick Rumanyika          | - Member      |
| 4. Eng. Stephen P. Makigo           | - Member      |
| 5. Adv. Rosan Mbwambo               | - Member      |
| 6. Mr. Rhoben P. Nkori              | - Member      |
| 7. Mr. Ole-Mbille Kissioki          | - Secretary   |

SECRETARIAT

- |                           |       |
|---------------------------|-------|
| 1. Ms. Florida R. Mapunda | - DST |
|---------------------------|-------|

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

#### FOR THE APPELLANT

1. Arch. Dr. Moses E. Mkony - Managing Director
2. Arch. Berno Batinamani - Director

#### FOR THE RESPONDENT

1. Mr. Eliakim Samwel - Head, PMU
2. Mr. Teotimo Costantine - Advocate

This Appeal was lodged by M/s Mekon Arch Consult Ltd (hereinafter referred to as "the Appellant") against Arusha International Conference Center commonly known by its acronyms as AICC (hereinafter referred to as "the Respondent"). The Appeal is in respect of Tender No. PA075/HQ/2018/19/C/02 for Architectural Design and Supervision for the Proposed Construction of Out Patients Department (OPD) Building- Plot No. 43, Old Moshi Road-Arusha (hereinafter referred to as "the Tender"). The Tender was conducted using Quality and Cost Based Selection Method specified in the Public Procurement Act of 2011 as amended (hereinafter referred to as "the Act") and the Public Procurement Regulations, Government Notice No.446 of 2013 as amended (hereinafter referred to as "GN. No.446 of 2013").

After going through the documents and oral submissions of the parties to the Public Procurement Appeals Authority (hereinafter referred to as “the Appeals Authority”), the facts of the Appeal may be summarized as follows:

On 24<sup>th</sup> July 2018, the Respondent issued a Request For Proposal (hereinafter referred to as “RFP”) to ten short listed consultants’ firms. On 16<sup>th</sup> August 2018, eight firms submitted their Technical and Financial proposals.

The Technical Proposals were subjected to evaluation which was conducted into one stage namely; detailed technical proposal evaluation. All firms were found to be in compliance of the RFP as they scored above the minimum points of 75. Therefore, they were invited for opening of the Financial Proposals which took place on 31<sup>st</sup> August 2018.

The Financial Proposals were evaluated and after combining the Technical and Financial scores, the proposal by M/s JT Architects scored the highest marks and they were recommended for award of the Tender. The Tender Board meeting held on 5<sup>th</sup> September 2018 approved the award as recommended by the Evaluation Committee.

On 11<sup>th</sup> September 2018, the Respondent informed the Appellant and other tenderers of its intention to award the Tender to M/s JT Architects after being ranked the first with a total score of 88.16%. The Appellant was further informed that, his proposal was ranked second with a total score of 81.99%.

Dissatisfied with the decision, the Appellant applied for administrative review on 13<sup>th</sup> September 2018. On 18<sup>th</sup> September 2018, the Respondent issued a decision by dismissing the Appellant's complaints.

Aggrieved further by the Respondent's decision, the Appellant filed this appeal on 25<sup>th</sup> September 2018.

Upon receipt of notification of the Appeal, the Respondent raised a preliminary objection that the Appeal is time barred. In that regard, the Appeals Authority was obliged to resolve the Preliminary Objection raised first before addressing the substantive appeal.

#### RESPONDENT'S SUBMISSIONS ON THE PRELIMINARY OBJECTION (PO)

The Respondent submitted that his PO is in line with Section 96(4) of the Act. According to the said provision a complaint has to be lodged within seven working days from the date when the tenderer became aware of the circumstances giving rise to the complaint or disputes. He submitted that the Appellant became aware of the circumstances during the opening of the financial proposals since the scores for the Technical Proposal of each firm were readout pursuant to Regulation 302(2) of the GN. No.446 of 2013. However, the Appellant did not raise any complaint until 13<sup>th</sup> September 2018 after being served with the Notice of Intention to award the Tender.

Apart from that, the Appellant bought the RFP document on 31<sup>st</sup> July 2018, thus, he was aware of the clauses of the RFP. Therefore, if he was dissatisfied he ought to have lodged a complaint. However, he waited until 13<sup>th</sup> September 2018. The delay by the Appellant contravened Section 96(4) of the Act. Supporting his argument the Respondent made reference to this Appeals Authority's decision in Appeal Case No. 33 of 2017/18 between Nice Catering Services Company Limited and Medical Stores Department and Appeal Case No. 35 of 2017/18 between National Social Security Fund and the Ministry of Finance and Planning. In concluding his argument, counsel for the Respondent stated that, the Appellant's failure to lodge his application for review within time, automatically invalidated this Appeal, since there is no valid decision to be appealed against. Thus, he prayed for the dismissal of the Appeal with costs.

#### REPLY BY THE APPELLANT ON THE PRELIMINARY OBJECTION

According to the Appellant the Appeal is properly before the Authority since the Appellant has complied with Clauses 50-51 of the RFP which empowers aggrieved bidders to appeal. He did so and upon his application for review being unsuccessful, he lodged his appeal with the Appeals Authority within time.

#### ANALYSIS BY THE APPEALS AUTHORITY ON THE PRELIMINARY OBJECTION

In order to determine whether or not the appeal is time barred, the Appeals Authority needs to ascertain facts as to when the Appellant

became aware of the circumstances giving rise to the complaints or disputes for him to lodge an application for administrative review in respect of the Respondent's decision. A preliminary objection should only consist of a point of law. In *Mukisa Biscuit Manufacturing Company Ltd v. West End Distributors Ltd.* (1969) EA 696, it was held that:

*"A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained."*

From the above decided case the Appeals Authority is of the firm view that, the PO raised does not fall within the ambit of the PO. Thus, the same is hereby dismissed and we proceed to determine the merits of the Appeal.

#### SUBMISSIONS BY THE APPELLANT ON THE MERITS

The Appellant's arguments in support of the appeal may be summarized as follows:-

1. That, the Respondent erred in law and conduct for his failure to apply Clause 36.2 (i)- (iv) of the Proposal Data Sheet (PDS) during evaluation process contrary to the requirement of Clause 36 of the Information To Consultants (IFC) and GN. No. 446 of 2013.
2. That, the Respondent erred in law for failure to take into account tenderer's general experience, reputation and experience in similar assignments which was a core criteria for competitive bidding.

3. That, the Respondent awarded the tender to a firm that lacks requisite experience in health care facilities, design and supervision contrary to the requirement.
4. That, the Respondent did not conduct the Expression Of Interest (EOI) in a transparent manner that would allow tenderers to know the pass mark scored. He wondered as to what criteria the Respondent used to prequalify the Appellant.
5. That, Clause 18(b) of the RFP requires bidders to provide information including experience of the firm under form 5A. Thus, if the Respondent wanted to omit such a requirement he ought to have informed the bidders, to the contrary, he did not do so.
6. That, in this Tender the Respondent had not complied with the requirements under the law.

The Appellant prayed for the following orders:-

- i. To review the marks in accordance with the requirement under Clauses 36.2 (iii) (A) (a)- (f) and 36.2 (iii) (B) (a) of the Proposal Data Sheet;
- ii. To declare that the Appellant had the highest score, hence the lawful winner of the Tender;
- iii. In the alternative, but without prejudice to (ii) above, nullification of the entire tender process and order for re-tendering;

- iv. The Respondent to treat the Appellant fairly without victimization in this Tender and in future tenders in which the Appellant may participate because of exercising their rights of submitting this appeal;
- v. Compensation for costs incurred in this Tender process amounting to TZS. 5,100,000 as per the following breakdown;
  - a) Costs for the RFP document TZS. 100,000/=
  - b) Costs of preparation and submission of the Tender TZS. 2,500,000/=
  - c) Legal fees and costs of preparation and filing of this Appeal TZS. 2,500,000/=
  - d) General damages
- vi. Any other relief that the Appeals Authority may deem fit and just to grant.

In the course of hearing the Appeal, the Appellant withdrew prayer (ii) and (v).

#### REPLY BY THE RESPONDENT

The Respondent's reply to the grounds of appeal may be summarized as follows:-

That, Clause 36.2 (i)-(iv) of the PDS was not used in the evaluation process since the tender process started with expression of interest (EOI), thus the

referred criteria were marked N/A. Furthermore, Clause 36.5 (1) relied by the Appellant does not exist.

That, the evaluation report for combined Technical and Financial Proposals revealed that, the Appellant scored 81.99% and was ranked the second evaluated bidder.

That, the method for selection was Quality and Cost Based Selection (QCBS), thus after combining Technical and Financial scores the Appellant's proposal was ranked second and he was duly informed of the position together with all other tenderers who participated in this tender.

That, the tender process was open and the Appellant bought the RFP document on 31<sup>st</sup> July 2018 and on 7<sup>th</sup> August 2018, he attended the pre-proposal meeting and did not seek any clarification regarding the RFP document.

That, the Respondent complied with all procurement procedures and the Appellant admitted so during his submission. The Appellant's complaint's that justice was not done had no basis.

That, the Appellant has failed to substantiate the non-compliance by the Respondent that the proposed firm did not comply with experience requirement while he had not seen the documents submitted by the proposed tenderer.

Finally the Respondent prayed for the following orders:-

- i. Dismissal of the Appeal;

- ii. The Respondent to proceed with the award decision;
- iii. The Appellant to compensate the Respondent the sum of TZS. 2,120,000/= which includes; air tickets, accommodations and other incidentals in Dar es Salaam;
- iv. Damages of TZS. 30,000,000, and
- v. Any other relief as this honorable Appeals Authority may deem fit and just to grant.

#### ANALYSIS BY THE APPEALS AUTHORITY ON MERITS

The Appeals Authority having gone through the various documents submitted by both parties and oral submissions during the hearing is of the view that, the parties are in agreement that the Appeal is centred on three main issues namely:-

- 1.0 Whether the exclusion of Clause 36.2 (i)-(iv) of the RFP was proper in law;
- 2.0 Whether the Respondent complied with the procurement procedures as per the law; and
- 3.0 What reliefs, if any, are the parties entitled to.

Having identified the issues in disputes, the Appeals Authority proceeded to determine them as hereunder

- 1.0 Whether the exclusion of Clause 36.2(i)-(iv) of the RFP was proper in law

In considering the Appellant's contention in this issue, the Appeals Authority revisited Clause 36.2 (i)-(iv) of the RFP and observed that the said clause dealt with the number of points to be given under each of the

evaluation criterion. Specifically, (i) firms general experience, reputation and experience in previous similar assignment, (ii) understanding of the terms of reference, methodology and the overall quality of the proposal, (iii) qualification of key personnel and (iv) local firms participation. However, all the above requirements were marked N/A meaning that such criteria would not be applicable in the evaluation process. During the hearing, the Appellant was asked by Members of the Appeals Authority what was the significance of said clause in the RFP. The Appellant replied that the tender is all about technical works thus bidders needed to be evaluated using these criteria to establish their experience and expertise in similar assignment. He argued further that, the Respondent's act of omitting and modifying such important criterion would not only result in having an incompetent contractor but it entailed a deliberate move by the Respondent to ensure that the award is made to the tenderer of his favour, who indeed, has no experience and expertise in similar assignment.

When further asked at what stage of the tender did he realize these shortcomings of the evaluation criteria omitted and/or modified by the Respondent. The Appellant responded that, it was realized earlier but he did not see it in that context he sees now. But he insisted that it was not proper for the Respondent to omit experience requirements.

Furthermore, the Appeals Authority observed that the Appellant was represented by Arch. Berno Batinamani at the pre-proposal meeting which was conducted on 7<sup>th</sup> August 2018. Thus, he had a chance to seek for

clarification with regard to the RFP if he thought that the same was not clear. The Appeals Authority rejects the Appellant's argument that the RFP was received on the same day that was set for pre- proposal meeting. This is because the purchase receipt indicates that the Appellant purchased the RFP on 31<sup>st</sup> July 2018. Therefore, there was sufficient time to review and seek for clarification if any, during the pre- proposal meeting or before the deadline for submission of the proposal which took place on 16<sup>th</sup> August 2018. The appellant did not do so.

The Appeals Authority further considered the Appellant's argument that the Expression of Interest was not transparent. The Appeals Authority is of the considered view that the Appellant ought to have complained earlier to the Respondent if he felt that he was dissatisfied with the way the Respondent conducted the EOI at the initial stage instead of waiting until after issuance of the letter of Intention to award.

In the circumstances, the Appeals Authority is of the considered view that, since the law provide for an opportunity to the tenderer either to ask for clarifications or lodge complaints on any matter that may lead the Tender process to be unfair. The Appellant ought to have sought for clarification from the Respondent within 14 days prior to the deadline for submission pursuant to Clause 9.1 of the ITC read together with Regulations 291(2) and (3) of GN. No. 446 of 2013 as amended which provides as follows;

(2)" The consultant shall critically review the documents to determine whether or not there is any ambiguity,

omission or internal contradiction, or any feature of the terms of reference or other conditions which are unclear or appear discriminatory or restrictive.

(3) The consultant shall, where the consultant determines any ambiguity or omission, request the procuring entity, in writing and within the time period specified in the request for proposals documents, to clarify the ambiguity or contradiction."

Consequently, the Appeals Authority finds issue No. 1 in the affirmative that is, exclusion of Clause 36.2(i)- (iv) of the RFP was proper in law.

## 2.0 Whether the Respondent complied with the procurement procedures as per the law

In resolving this issue the Appeals Authority considered the Appellant's contention that the Respondent complied with the procurement procedures but justice has not been done. However, the Appellant failed to substantiate how justice was denied, given that the procedures provided by the law were duly observed by the Respondent. The Appeals Authority revisited the Technical Proposal and observed that, Clause 36.2(i)-(iv) of the RFP was not used in the evaluation process. Furthermore, the Appeals Authority observed that the Respondent's Technical Evaluation Report complied with the requirements of Regulation 299(1) and (2) of the GN. No. 446 of 2013 as amended, which provides as follows;

(1)"The evaluation of technical proposals shall be carried out on the basis of the 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.”

Given the above provisions, the Appeals Authority is of the firm view that there was no injustice caused to any bidder, since the evaluation process was conducted in compliance with the criteria stated in the Tender Document.

The Appeals Authority concludes the second issue in the affirmative that, the Respondent complied with the procurement procedures.

3.0 What reliefs, if any, are the parties entitled to

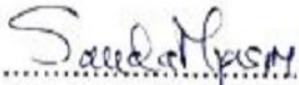
Having answered both issues in the favour of the Respondent, the Appeals Authority hereby dismiss the Appeal for lack of merits. Each party to bear its own costs.

It is so ordered.

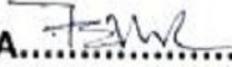
This Decision is binding on the Parties and may be executed in terms of Section 97 (8) of the Act.

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

The Decision is delivered in the presence of the Respondent and his advocate and in the absence of the Appellant, this 8<sup>th</sup> day of November 2018

  
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**HON. JUSTICE (rtd) SAUDA MJASIRI**  
**CHAIRPERSON**

**MEMBERS:**

- 1. DR. LEONADA MWAGIKE ..... 
- 2. ENG. STEPHEN MAKIGO ..... 
- 3. CPA FREDRICK RUMANYIKA..... 
- 4. ADV. ROSAN MBWAMBO..... 
- 5. MR. RHEUBEN NKORI..... 