

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

APPEAL CASE NO. 41 OF 2013-14

BETWEEN

M/S HOUSING DEVELOPMENT

CONSULTANTS & PLANNERS.....APPELLANT

AND

GEITA TOWN COUNCIL..... RESPONDENT

DECISION

CORAM

- | | |
|--------------------------------------|----------------|
| 1. Hon. Augusta G. Bubeshi, J. (rtd) | -Chairperson |
| 2. Mrs. Nuru N. Inyangete | -Member |
| 3. Mr. Haruni S. Madoffe | -Member |
| 4. Mr. Francis T. Marmo | - Member |
| 5. Mr Ole-Mbille Kissioki | -Ag. Secretary |

SECRETARIAT

1. Toni S. Mbilinyi - Principal Legal Officer
2. Ms. Violet S. Limilabo - Legal Officer.
3. Mr. Hamisi O. Tika - Legal Officer.

THE APPELLANT.

Robert Zengo - Consultant

FOR THE RESPONDENT.

1. Ms. Irene M. Kasonga - Legal Officer
2. Mr. Ignace Chacha - Head of Procurement
Management Unit
3. Mr. Bennet D. Ninalwo - Board Member
4. Eng. Mangwela, C.J. - Civil Engineer
5. Mr. Samson Lubala - Supplies Officer

FOR THE OBSERVER

1. Eng. Deogratias R. Kaabwera - Chief Engineer-

National Estates and

Designing Consultancy Co.

Ltd

2. Mr. Chilimaaba Chilima - Director

This decision was scheduled for delivery today 23rd June, 2014 and we proceed to deliver it.

The appeal at hand was lodged by **M/S HOUSING DEVELOPMENT CONSULTANTS & PLANNERS** (hereinafter referred to as "**the Appellant**") against the **GEITA TOWN COUNCIL**(hereinafter to be referred to as "**the Respondent**").

The said Appeal is in respect of Tender NO. LGA/160/2013/2014/C/04 for Provision of Consultancy Services for Design, Preparation of Tender Documents and Cost Estimates for Construction of Office Block and Conference Hall (hereinafter referred to as "**the tender**").

According to the documents submitted to the Public Procurement Appeals Authority (hereinafter referred to as "**the Authority**"), as well as oral submissions by parties during the hearing, the facts of the Appeal may be summarized as follows:

On 29th November, 2013, the Respondent invited two short listed firms to submit proposals for the Design, Preparation of Tender Documents and Cost Estimates for Construction of Office Block and Conference Hall. The said tender was to be conducted through Quality and Cost based selection method.

In order to guide the said procurement process including preparation and submission of Technical and Financial Proposals, the Respondent issued a Request for Proposal (hereinafter referred to as "**RFP**") to all consultants.

The deadline for submission of proposals and the opening of Technical Proposals was 30th December, 2013, whereby two proposals were received from the following consultants:

- a) M/S Housing Development Consultants & Planners Ltd.
- b) M/S National Estate and Designing Consultancy Co. Ltd.

The Technical Proposals were subjected to preliminary and detailed evaluation, whereby both consultants were determined to be in compliance with the RFP by scoring the minimum technical score of 75 points. Specifically M/s Housing Development Consultants & Planners Ltd scored of 98% while M/S National Estate and Designing Consultancy Co. Ltd 76.3%.

On the 9th January, 2014, both Consultants were invited for opening of the Financial Proposals vide letters referenced GTC/PMU/2013/2014/22 and GTC/PMU/2013/2014/23 respectively.

The opening of the Financial Proposals took place on the 15th January, 2014, and the read out prices were:

| S/No. | Firm's name | Quoted price in Tshs. |
|--------------|---|------------------------------|
| 1 | M/S Housing Development Consultants & Planners Ltd | 262,561,800.00 |
| 2 | M/S National Estate and Designing Consultancy Co. Ltd | 177,767,000.00 |

The Financial Proposals were subjected to evaluation and both proposals were found to be in compliance with the RFP and their scores were as follows:

| S/No | Firms name | Financial Score | x.0.20 % |
|-------------|---|------------------------|-----------------|
| 1 | M/S Housing Development Consultants & Planners Ltd | 67.7 | 13.5 |
| 2 | M/S National Estate and Designing Consultancy Co. Ltd | 100 | 20.0 |

Thereafter the Evaluation Committee combined the results of the Technical and Financial Proposals of both Consultants whereby the results and ranking were as follows:

| S/N | Firm's Name | Technical Score | Financial Score | Combined Score | Ranking |
|------------|--|------------------------|------------------------|-----------------------|----------------|
| 1 | M/S Housing Development Consultants & Planners Ltd | 78.4 | 13.5 | 91.9 | 1 |
| 2 | M/S National Estate | 61.0 | 20.0 | 81.0 | 2 |

| | | | | | |
|--|--------------------------------------|--|--|--|--|
| | and Designing Consultancy Co. Ltd | | | | |
|--|--------------------------------------|--|--|--|--|

Having ranked the consulting firm's as such, the Evaluation Committee recommended award of the tender to M/S Housing Development Consultants & Planners Ltd at a contract price of Tshs. 262,561,800.00 subject to negotiation on the following matters:

- a) The technical aspect whereby the client were required to propose changes in time of executing the assignment stated in the Terms Of Reference (hereinafter referred to "**as TOR**") since the project was expected to commence immediately and they were behind schedule.
- b) The commercial aspects whereby the parties were required to negotiate on the travel costs proposed by the Consultant in reimbursable expenses so as to reduce the consultancy costs and get value for money.

The Tender Board on its meeting held on 22nd January, 2014, deliberated on the award of the tender to the successful Consultant. Some of the members were concerned that the tender had been awarded to a Consultant whose quotation was higher than the Respondent's estimated budget. However, after a long discussion, it was resolved that the Appellant should be invited for negotiation.

In a subsequent Tender Board meeting, held on 19th February, 2014, the Tender Board received information from the Tender Secretary, that the Town Director had directed that the tender be re- invited because the winning consultant was above the estimated budget of Tshs 250,000,000.00. The Tender Board deliberated again on the tender and reversed the award made to the Appellant on the ground that, their quoted price was above the Respondent's estimated budget. Therefore, the Tender Board resolved that, the tender be awarded to M/S National Estate and Designing Consultancy Co. Ltd at a contract price of Tshs 177,767,000.00 and the Consultant be invited for negotiations.

On 20th February, 2014, the Appellant vide a letter referenced HDC EI/GTC01, lodged their complaint to the Public Procurement Regulatory Authority (hereinafter referred to as "**PPRA**").

On 28th February, 2014, the Respondent invited M/S National Estate and Designing Consultancy Co. Ltd for negotiations which was conducted on 26th March, 2014.

PPRA vide a letter referenced PPRA/LGA/160/11 dated 3rd March, 2014 ordered the Respondent to give clarification to them on the complaints lodged by the Appellant within fourteen days.

On 2nd April, 2014, the Respondent vide a letter referenced C/PMUF/VOL.02/44 communicated the award of the tender to the successful consultant, M/S National Estate and Designing Consultancy Co. Ltd.

On 28th April, 2014, the Respondent vide a letter referenced GTC/PMUF/VOL.02/65 notified the Appellant that their tender was unsuccessful.

Being dissatisfied with award of the tender to the successful consultant, on 9th May, 2014, the Appellant lodged their Appeal before the Authority.

SUBMISSIONS BY THE APPELLANT

The Appellant's arguments as deduced from documents availed to this Authority, as well as oral submissions and responses to questions raised by the Members of the Authority during the hearing, may be summarized as follows;

That, they were notified by the Respondent that their proposal was unsuccessful on the ground that, their quoted price was higher than the one quoted by M/S National Estate and Designing Consultancy Co. Ltd. They dispute that the lowest quoted price was not among the criteria for the award of the tender.

That, the tender selection method was based on Quality and Cost and not cost per se.

That, Regulation 260 of the Public Procurement Regulations GN. No. 446 (hereinafter referred to as "**GN. No. 446/2013**")

provides that, negotiation shall be initiated with the firm which has the highest combined score of technical and financial evaluation.

That, during the opening of the Financial Proposal they were told about the score of the Technical Proposal of each consultant.

That, the quoted price of each consultant were as follows:

a) M/S Housing Development Consultants & Planners Ltd
Tshs 262,561,800.00

b) M/S National Estate and Designing Consultancy Co. Ltd
Tshs 177,767,000.00

That, according to Clause 40.1 of the RFP, Proposals were supposed to be ranked according to their combined Technical and Financial scores.

That, during opening of the Technical Proposal they were told that their tender would be awarded within three months. After the expiry of that period they called one of the Respondent's staff to know the status of the tender. The said staff sent them a message that "nitakupigia kaka mambo sio mazuri".

That, they were supposed to be invited for negotiation since they scored the highest marks than the successful consultant but the Respondent did not do so instead they received a letter notifying them that their proposal was unsuccessful.

The Appellant therefore, prayed for the following orders:

- a) Nullification of award of the tender to the successful tenderer.
- b) An invitation be made to them by the Respondent for negotiation of the tender awarded.

The Appellant prayed for no cost.

REPLIES 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 may be summarized as follows;

That, the procurement process was conducted in compliance with the Law and its Regulations and after completion of the

evaluation process the tender was awarded to M/S National Estate and Designing Consultancy Co. Ltd for Tshs 177,767,000.00.

That, the Appellant was notified about the tender result and the reason of their disqualification.

That, they could not invite the Appellant for negotiations since the law does not allow them to negotiate on price as per Regulations 66 (2) of GN. No. 98/2005. Further they intended to use the savings arising from the lower quotations to other projects.

That the Appellant complained to PPRA before expiry of the bid validity period.

That, the contract was signed on 16th April, 2014 and the execution of the contract is almost completed.

Finally the Respondent conceded that in the award of the tender they did not comply with the law.

ANALYSIS BY THE AUTHORITY

Having gone through the documents submitted and having heard the oral submissions from parties, the Authority deemed necessary to frame the following issues;

1.0 Whether denying award of the tender to the Appellant was justified,

2.0 Whether award of the tender to the successful consultant was proper at law,

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

Having identified the issues in dispute, the Authority proceeded to resolve them as hereunder;

1.0 Whether denying award of the tender to the Appellant was justified,

In ascertaining whether denying award of the tender to the Appellant was justified, the Authority revisited the documents submitted before it, the argument by parties, vis -a- vis the applicable law. In the course of sodoing, the Authority observed

that, Clause 5 of the tender advertisement provided in no uncertain terms that selection will be conducted through **Quality and Cost based** section method. The said Clause reads as hereunder:

Clause 5 "Selection will be conducted through the "**Quality and Cost based**" selection specified in the Public Procurement Regulations".

The Authority further revisited Clause 1.1 of the ITC, which reads as follows;

Clause 1.1 "the Procuring Entity, as indicated in the Proposal Data Sheet (hereinafter referred to as "**PDS**") issues this RFP for the supply of Services as specified in the PDS and described in details in Section 6, TOR in accordance with the method of selection specified **in the PDS**".

The Authority revisited the PDS referred under Clause 1.1 of the ITC above and noted that the said Clause was modified under Clause 1.1 of the PDS which provides that;

Clause 1.1 **“The method of selection is: Quality and Cost Based Selection”**.

Furthermore Clause 40.1 of the ITC provides that:

Clause 40.1 “ In QCBS the Proposal will be ranked according to their **combined technical (St) and financial (Sf) scores** using the weights (T=the weight given to the Technical Proposal;P=the weight given to the Financial Proposal; T+P=1) indicated in the PDS: $S = St \times T\% + Sf \times P\%$. **The firm achieving the highest combined technical and financial score will be invited for negotiation** under ITC Clause 41 to 45”.
(Emphasis added)

Clause 40. 1 of the PDS reads as follows;

Clause 40.1 “ The weight given to the Technical and Financial Proposal are:

T=0.8, and

F=0.2”

Having revisited the requirement of the tender advertisement and the RFP, the Authority proceeded to examine the Evaluation

Report and observed that, the Appellant complied with the above quoted requirement and had the highest combined Technical and Financial score of 91.9 points and was ranked first and M/S National Estate and Designing Consultancy Co. Ltd who scored 81.0 and was ranked second. Consequently the Appellant was recommended by the Evaluation Committee for the award of the tender. The said recommendation was approved by the Tender Board on 22nd January, 2014 which resolved that the Appellant be invited for negotiations.

When asked by Members of the Authority on whether they invited the Appellant for negotiations as directed by the Tender Board, the Respondent replied that, they did not do so because, the Accounting Officer i.e Geita Town Director had directed for retendering on the ground that the Appellant's quotation was higher than the Respondent's estimated budget. However, instead of retendering, the Tender Board decided to award the tender to the second ranked consultant i.e M/S National Estate and Designing Consultancy Co. Ltd presumably because their quotation was within the Respondent's budget.

The Authority further asked the Respondent if cost was the basis for selecting the consultant and if so, why they did not use the method of fixed budget selection which was within their mandate and provide the same in the solicitation document. To the contrary, they indicated that it would not be applicable as per Clause 17.4 of the PDS. The said Clause is reproduced herein under:

Clause 17.4 " In the case of Fixed Budget Selection, the Financial Proposal shall not exceed the available budget of:N/A".

The Respondent replied that, they intended to save the Government money and to use the same in other matters. Further that they could they could not invite the Appellant to negotiate on the price since the law does not allow it. At the end of their submission however they conceded not to have complied with the law.

The Authority hastens to observe that, the Respondent should have complied with their own document and with the law by inviting the Appellant to negotiate. This is because they had the highest combined score of 91.9. In case the negotiations failed they could have invited the second ranked firm as per Regulation

38 (4)(5) and 66 (1) (9) (10) of the Public Procurement (Selection and Employment of Consultant GN. No. 98/2005. In deed, this is consistent with advice given by the Respondent's Procurement Management Unit as reflected in the Tender Board meetings held on 19th February, 2014. The said Regulations read as follow;

Reg. 38 (4) **"The Technical and Financial proposal shall be weighted as specified in the RFP and combined value of the two proposal shall be calculated for each firm.**

(5) Negotiation shall be initiated with the firm with the highest combined score and shall be conducted in accordance with the Regulation".

Reg. 66 (1) "After the appropriate tender board has approved the award recommendation, **the procuring entity shall promptly invite the selected consultant to negotiate,** in order to finalise the terms of the contract based on the model contract on one hand and the

counselor's proposal on the other hand".
(Emphasis added)

Reg. 66(9) " if negotiations fail to result in an acceptable contract, the procuring entity shall terminate the negotiations and **invite the next ranked firm for negotiations in which case the procuring entity shall consult the appropriate tender board prior to taking this step.**

(10) the consultant shall be informed of the reasons for termination of the negotiation and once negotiations are recommenced with the next ranked firm, the procuring entity shall not reopen the earlier negotiations". (Emphasis added)

The Authority is of the considered view that, the Respondent's used an alien criterion to deny award of the tender to the Appellant contrary to the requirements of Regulations 57 (3) and 58 (1) of GN. No. 98/2005 as reproduced herein below:

Reg. 57 (3) “ the financial proposal shall be opened thereafter and the evaluation shall be carried out in full conformity with the provisions of the request for proposal”.

58 (1) “ The evaluation of technical proposal 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 orderof merit on the basis of the highest score”.

In view of the above findings, the Authority agrees that, the Respondent failed to adhere to the requirement of the **RFP** cited above and also they had not complied with the requirement of the law.

Accordingly, the Authority concludes that, denying award of the tender to the Appellant was not justified as observed above and by the Respondent’s own concession that they did not comply with the requirement of the RFP and the law.

2.0 Whether award of the tender to the successful consultant was proper at law.

In resolving this issue the Authority took cognizance of its findings made under issue number one that the Respondent contravened the law by denying award of the tender to the Appellant because they had quoted a price higher than Respondent's estimated budget.

Therefore, the Authority's conclusion with regard to the second issue is that, award of the tender to the successful consultant was not proper at law.

3. 0 To what reliefs, if any, are the parties entitled to.

Having analyzed the contentious issues in dispute, the Authority finds it prudent to consider prayers by parties.

To start with the Authority considered the Appellant's prayer for a declaration that award of the tender to M/S National Estate and Designing Consultancy Co. Ltd was null and void and to order the Respondent to invite them for negotiation. The Authority took cognizance of the anomalies in the Respondent tender process as established under issues one and two above. Since the time for

execution of the contract between the Respondent and the awarded consultant was for two months; and since the contract was signed on 16th April, 2014, and since the execution period **is** almost over, it will be unreasonable and unwise to terminate it since there is virtually nothing to terminate. Had the execution not gone this far, the Authority would have definitely nullified the award.

In the circumstances the best the Authority can do is to grant the Appellant's prayer to declare that the Respondent has not complied with the law as already stated above. The Authority advises the Respondent to abide with the law in all its future tenders.

Right of Judicial Review as per Section 101 of the PPA/2011 explained to parties.

Decision delivered in the presence of the Appellant and the Respondent this 23rd June, 2014.


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JUDGE (rtd) A. G. BUBESHI
CHAIRPERSON

MEMBERS:

1. MRS. N. N. INYANGETE. 
.....

2. MR. H. S. MADOFFE. 
.....

3 MR. F. T. MARMO. 
.....