

**IN THE  
PUBLIC PROCUREMENT APPEALS AUTHORITY**

**AT DAR ES SALAAM**

**APPEAL NO. 43 OF 2018-19**

**BETWEEN**

**M/S TATA CONSULTING ENGINEERS**

**LIMITED (TCE) .....APPELLANT**

**AND**

**MINISTRY OF WATER .....RESPONDENT**

**DECISION**

**CORAM**

- |                                     |   |               |
|-------------------------------------|---|---------------|
| 1. Hon. Justice (rtd) Sauda Mjasiri | - | Chairperson   |
| 2. CPA. Fredrick Rumanyika          | - | Member        |
| 3. Adv. Rosan Mbwambo               | - | Member        |
| 4. Ms. Florida Mapunda              | - | Ag. Secretary |

**SECRETARIAT**

- |                        |   |               |
|------------------------|---|---------------|
| 1. Mr. Hamisi Tika     | - | Legal Officer |
| 2. Ms. Violet Limilabo | - | Legal Officer |

**FOR THE APPELLANT**

- |                             |   |                                    |
|-----------------------------|---|------------------------------------|
| 1. Mr. Alex Balomi          | - | Advocate, Legal Clinic Advocates   |
| 2. Mr. Asdon Rwegasira      | - | Advocate, Law Care Chambers        |
| 3. Mr. Luka Elingaya        | - | Advocate, East Africa Law Chambers |
| 4. Mr. Ajay Pratap Singh    | - | Tata Consulting Head-BD(Africa)    |
| 5. Mr. Atumpelege Mwakyembe | - | Procurement Specialist             |



6. Mr. Bonaventure Masesa - Legal Officer
7. Mr. Jones Bartholomeo - Legal Officer, Law Care Chambers

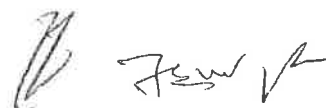
### **FOR THE RESPONDENT**

1. Mr. Simon S. Nkyanyemka - Head of Legal Unit
2. Mr. Hangi Chang'a - Senior State Attorney
3. Mr. Winston Kapina - Ag. Director of Procurement
4. Mr. Adrian L. Muyungi - Procurement Officer
5. Ms. Magreth Milembe - Procurement Officer

The Appeal at hand was lodged by M/s Tata Consulting Engineers Limited (hereinafter referred to as "**the Appellant**") against the Ministry of Water (hereinafter referred to as "**the Respondent**"). The Appeal is in respect of Tender No. ME-011/2018-2019/C/23 which had two Lots; namely, provision of Consultancy Services for Preparation of the Detailed Project Report (DPR) for Construction of Water Supply Schemes of various Towns-Lot 1 and provision of Consultancy Services for Project Management Consultants (PMC) for Construction of Water Supply Schemes of various Towns-Lot 2 (hereinafter referred to as "**the Tender**").

After going through the records submitted by the parties to the Public Procurement Appeals Authority (hereinafter referred to as "**the Appeals Authority**"), the background of the Appeal can be summarized as follows:-

The Tender process commenced with a Pre-qualification process which was conducted by Exim Bank of India (the Exim Bank), the lending bank, on behalf of the Government of India, a donor for this project. After



completion of the Pre-qualification process four firms were shortlisted for Lot 1 and two firms for Lot 2. The names of the shortlisted firms were forwarded to the Respondent who issued to them Request for Proposal (RFP) on 28<sup>th</sup> November 2018. The RFP specified that qualified firms would be selected under Quality Cost Based Selection (QCBS) method. The deadline for submission of proposals was on 14<sup>th</sup> January 2019 whereby four proposals were received with respect to Lot 1 and two proposals for Lot 2.

The received proposals were subjected to Evaluation which was conducted into two stages; namely, evaluation of Technical Proposals and Financial Proposals. Evaluation of the Technical proposals was conducted into two stages namely; Preliminary and Detailed Evaluation. All proposals were found to be responsive on both stages and scored above the minimum set score. Thus, the firms were invited for opening of Financial Proposals which took place on 5<sup>th</sup> February 2019. All the invited firms attended.

The opened Financial Proposals were then subjected to evaluation. After its completion the technical and financial scores were combined and M/s WAPCOS Limited emerged to be the first ranked tenderer in both Lots. It was therefore recommended for award of the Tender for both Lots. The Tender Board through circular resolution No. 127 of 2018-19 approved the award to M/s WAPCOS Limited as recommended by the Evaluation Committee.

On 17<sup>th</sup> April 2019, the Respondent informed all the tenderers of its intention to award the Tender to M/s WAPCOS Limited at a contract price

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of USD 1,462,258.00 for Lot 1 and USD 6,234,604.80 for Lot 2 respectively, exclusive of local indirect Taxes. The said notice also informed the Appellant that it was not recommended for award as it was ranked the second.

Dissatisfied with the Respondent's decision, on 22<sup>nd</sup> April 2019 the Appellant lodged an application for administrative review to the Respondent challenging the proposed award to M/s WAPCOS Limited on the ground that, by the deadline for submission of the proposals the firm had been blacklisted by the Rwanda Public Procurement Authority. Thus, it ought not to have been proposed for award of the Tender. On 7<sup>th</sup> May 2019, the Respondent issued its decision rejecting the complaint. Aggrieved further, on 14<sup>th</sup> May 2019, the Appellant lodged this Appeal.

Both parties confirmed to the Appeals Authority that the contract for this Tender was signed on 14<sup>th</sup> May 2019 after the Respondent had obtained the waiver of the suspension of procurement proceedings from the Public Procurement Regulatory Authority (PPRA) on 14<sup>th</sup> May 2019.

### **SUBMISSIONS BY THE APPELLANT**

The Appellant's grounds of Appeal as well as oral submissions during the hearing of the Appeal may be summarized as follows:-

1. That, the Respondent grossly erred in law and fact for awarding a Tender to an ineligible and unqualified tenderer, who had been blacklisted by Rwanda Public Procurement Authority. The Respondent became aware of the blacklisting status of M/s WAPCOS around mid December 2018 before the deadline for submission of proposals. Thus,

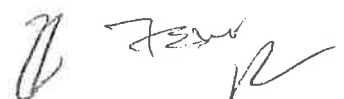


it ought to have disqualified the firm at the earliest stages of evaluation for being ineligible.

Expounding its argument, the Appellant stated that the Respondent's act of awarding the Tender to a debarred firm contravened Clause 4.5(e) of the Instruction to Consultants (hereinafter referred as **ITC**) which requires a debarred firm in terms of Sections 62(2) and 84(7) of the Public Procurement Act of 2011 (hereinafter referred to as "**the Act**") be declared ineligible to participate in the Tender. The Appellant insisted that, as Clause 4.5(e) contained the word "shall" in terms of Section 53(2) of the Interpretation of Laws Act, Cap 1, it was mandatory for such a bidder to be declared ineligible.

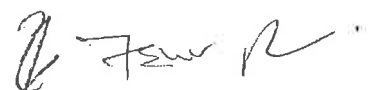
2. That, the Respondent erred in law for failure to justify its decision of awarding the Tender to M/s WAPCOS Limited while it was aware that the firm had been blacklisted. The Appellant submitted that, the Respondent sought guidance from the Exim Bank of India regarding the blacklisting status of M/s WAPCOS Limited. The Respondent should not have sought for guidance from the Exim Bank. According to Clause 3.3 of the ITC verification of fraudulent, collusive or obstructive practices should be obtained from a tenderer/consultant who is alleged to have been involved in such acts.

The Appellant submitted that, the Exim Bank when replying to the guidance sought by the Respondent indicated that the blacklisting of M/s WAPCOS Limited in Rwanda did not affect the firm's eligibility to participate in this Tender as per the Guidelines on Lines of Credit. The Appellant averred that, the Respondent ought not to have relied on the



information provided by the Exim Bank regarding the blacklisting status of M/s WAPCOS Limited. The Appellant submitted that, on 29<sup>th</sup> October 2018 the Exim Bank notified the Respondent three names of the shortlisted consultants for Lots 1 and 2 who were to be invited to participate in the Tender. Sixteen (16) days later, that is on 15<sup>th</sup> November 2018, the Exim Bank submitted to the Respondent the revised list of shortlisted firms by adding on the name of M/s WAPCOS Limited who was not included in the first list and without any justification. The Respondent should have been on alert regarding the Exim Bank's conduct towards M/s WAPCOS Limited. Thus, it should not have sought for guidance from the Exim Bank as the Exim Bank was favoring the firm. The Appellant added that, the Exim Bank was not the representative of M/s WAPCOS Limited; hence, it had no right to speak on behalf of M/s WAPCOS Limited.

3. That, the Respondent erred in law for proceeding with the evaluation process immediately after the opening of the technical proposals without receiving guidance from the Exim Bank on the blacklisting status of M/s WAPCOS Limited. The guidance was sought on 16<sup>th</sup> January 2019, the response by the Exim Bank was issued on 25<sup>th</sup> January 2019 while the evaluation of technical proposals was completed on 21<sup>st</sup> January 2019. In addition to that, the Respondent sought guidance from the Public Procurement Regulatory Authority (PPRA) on 12<sup>th</sup> February 2019 regarding the blacklisting status of M/s WAPCOS Limited while on the same day the Tender Board approved the award of the Tender to the said firm. On 27<sup>th</sup> February 2019 PPRA issued its guidance which required M/s WAPCOS Limited be excluded from the



Tender process as its blacklisting status in Rwanda rendered it to be ineligible to participate in any tender in Tanzania. However, the Respondent proceeded to award the Tender to M/s WAPCOS Limited without abiding to the advice given by PPRA.

4. That, according to Clause 8 of the General Condition of Contract, the laws applicable for this Tender are the laws of Tanzania. Therefore, when conducting this Tender process the Respondent ought to have complied with the requirement of the Act, its Regulations and conditions provided in the RFP. Emphasizing its argument on this point, the Appellant cited the decision of this Appeals Authority in *Appeal case No. 59 of 2009 between Mputa Security Services Guards Co. Ltd and another Vs Institute of Rural Development and Planning* where it was held that "for any procurement process to be properly done, it has to satisfy all requirements provided for under the Act and as specified in the Tender Document issued by a procuring entity". When conducting this Tender process the Respondent ought to have adhered to the requirement of the RFP and the Act, and not the Guidelines on Lines of Credit Extended by the Government of India. Had the Respondent complied with the requirement of the RFP and the Act, M/s WAPCOS Limited would have been declared ineligible.
5. That, the Respondent erred in law for relying on mere pre-qualification list provided by the Exim Bank, since the said list did not automatically qualify M/s WAPCOS Limited for award of the Tender.



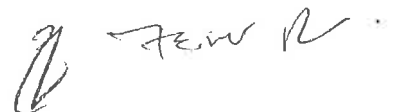
6. That, M/s WAPCOS Limited, concealed its blacklisting status in Rwanda. Its act amounts to fraud, misrepresentation, material deviation to commercial terms and conditions and unfair influence in the public procurement process. This contravened the requirement of Clause 3.4(c) of the ITC.

In expounding his argument counsel for the Appellant cited the case of *Haji Mwikalo Vs Justine Bufure and others, Land Application No.6 of 2013* whereby the decision of Lord Denning in the case of *Lazarus Estates Limited Vs Beasley (1956) All ER 341* was referred, where the court held that:-

*"No court in this land shall allow a person to keep an advantage which has been obtained by fraud. No judgement of a court nor order of a minister can be allowed to stand if it has been obtained by fraud".*

The Appellant contended that, the Respondent after becoming aware of the blacklisting status of M/s WAPCOS Limited ought to have declared the firm ineligible pursuant to Clause 3.2(b) of the ITC. To the contrary, the Respondent closed its eyes on the obvious fact and proceeded to award the Tender to the said firm.

7. That, the Respondent's act of awarding the Tender to M/s WAPCOS Limited contravened Regulation 204(2)(b) of Government Notice. No. 446 of 2013 (hereinafter referred to as GN.No. 446 of 2013) which prohibits award of tenders to a tenderer who failed to comply with eligibility requirement. Further, the Respondent and M/s WAPCOS Limited had failed to observe the highest standard of ethics during the



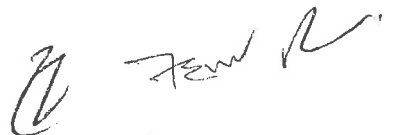


procurement process contrary to the requirement of Clause 3.1 of the ITC.

8. That, the Respondent erred in law by stating that after the decision of the Rwanda Commercial Court which annulled the blacklisting status of M/s WAPCOS Limited, it automatically rendered the firm to be eligible to participate in the tendering process. According to Article 179 of the law governing public procurement in Rwanda, a blacklisted firm remains to be debarred from the date such debarment order is issued until the expiry of the debarred period or when such an order is annulled by a competent court. At the commencement of the Tender process M/s WAPCOS Limited had been debarred. Thus, it was ineligible to participate in the Tender. The court order which annulled the debarment of the Appellant cannot have a retrospective effect.
9. That, Section 4(1)(b) of the Act and Regulation 11(3) of GN. No. 446 of 2013 are not applicable to the scenario at hand since there is no agreement which has been entered by the Government of Tanzania and that of India which warrants applicability of the named provisions.

Finally, the Appellant prayed for the following orders:-

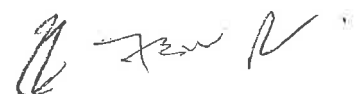
- i. The intention to award the Tender to M/s WAPCOS Limited be quashed;
- ii. A declaration that participation of M/s WAPCOS Limited in the Tender is a nullity;
- iii. The Respondent to pay costs of the Appeal; and
- iv. Any other relief the Appeals Authority may deem necessary to grant.

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## **REPLY BY THE RESPONDENT**

The Respondent's reply to the grounds of Appeal as well as oral submissions during the hearing of the Appeal may be summarized as follows:-

1. That, the Tender involved the loan agreement between the Government of the United Republic of Tanzania and the Government of India. The Government of India provided some of the obligations to the Exim Bank of India which is the lending Bank.
2. That, it was the Exim Bank which shortlisted qualified consultants for the Tender. The said process was conducted using Guidelines on the Lines of Credit (LCO) issued by the Government of India on 7<sup>th</sup> December 2015. After completion of the said process, the list of shortlisted candidates was forwarded to the Respondent to proceed with the Tendering process.
3. That, the Tender process was conducted in accordance with procedures provided under the Act, Regulations, RFP and the requirement of Financing Agreement and the Guidelines on Lines of Credit.
4. That, M/s WAPCOS Limited participated in this Tender after being pre-qualified by the Exim Bank. The Respondent became aware of the blacklisting status of M/s WAPCOS Limited after it received a copy of letter from M/s PROXIMA Ltd an associate of Feedback Infra Private Ltd which was amongst the four shortlisted firms. The Respondent inquired about the blacklisting status of M/s WAPCOS Limited from the Exim



Bank which conducted the pre-qualification process. The Exim Bank clarified that, the blacklisting of M/s WAPCOS Limited by the Rwanda Public Procurement Authority do not apply to the LOC projects in view of the Government of India (GOI) guidelines for lines of Credit of December 2015. Thus, the Respondent was required to proceed with the Tender process as per the pre-qualified list of consultants.

5. That, in proceeding with this Tender process, the Respondent abided by the guidance given by the Exim Bank together with the requirement of Section 4 of the Act and Regulation 11(3) of GN. No. 446 of 2013 which states specifically that if there is a conflict between the position of the donor and that of the beneficiary, then the position of the donor prevails.
6. Regarding the Respondent's act of relying on the pre-qualified list of bidders provided by the Exim Bank, the Respondent submitted that the Appellant has misconceived the procedural requirement as it is mandatory that bidders were to be pre-qualified by the donor. The Respondent is of the considered view that, the Exim Bank is a prudent Bank entrusted by the Government of India to handle such a sensitive Tender; hence it requires strong evidence to argue a case of untrustworthiness against Exim Bank.

Finally, the Respondent prayed for the following orders;

- i) The Appellant's Appeal be dismissed for being frivolous and overtaken by event;
- ii) The Appellant be ordered to compensate the Respondent the cost of this Appeal; and



iii) Any other remedies as the Appeals Authority may deem just and fair for the Respondent.

### **ANALYSIS BY THE APPEALS AUTHORITY**

The Appeals Authority, having gone through the tender proceedings including various documents submitted by the parties and the oral submissions during the hearing, is of the view that the Appeal is centred on two main issues which were agreed upon by the parties. These are as follows:-

- **Whether the award of the Tender to M/s WAPCOS Limited is justified; and**
- **What relief(s), if any, are the parties entitled to**

Having identified the issues, the Appeals Authority proceeded to determine them as hereunder:-

#### **1.0 Whether the award of the Tender to M/s WAPCOS Limited is justified**

In resolving this issue the Appeals Authority took cognizance of the following facts:-

- a) The Tender resulted from the Dollar Credit Line Agreement entered between the Government of the United Republic of Tanzania and the Export-Import Bank of India on 10<sup>th</sup> May 2018.
- b) The pre-qualification process was conducted by the Exim Bank and the names of pre-qualified consultants were submitted to the Respondent for purposes of proceeding with the Tender process.
- c) M/s WAPCOS Limited was not initially included in the shortlist by the Exim Bank, however it was added later.
- d) That at the time of bidding M/s WAPCOS Limited had been blacklisted from participating in public procurement in Rwanda for a period of five years from 18<sup>th</sup> September 2018 to 17<sup>th</sup> September 2023.

- e) That, the Respondent became aware of the blacklisting status of M/s WAPCOS Limited after receiving a copy of a letter addressed to the Exim Bank by M/s PROXIMA Ltd an associate of M/s Feedback Infra Ltd which was amongst the shortlisted firms.

Having reviewed the above facts, the Appeals Authority deemed it prudent to verify if M/s WAPCOS Limited was eligible to participate in this Tender before determining if the award made to it was proper. In the course of so doing the Appeals Authority revisited Annex II to the Guidelines on Lines of Credit Clause C (ii) which was used by the Exim Bank when conducting pre-qualification process for this Tender which reads as follows:-

*"The lending Bank will invite Expression of interest from Indian companies/entities and undertake a pre-qualification exercise for each project at its cost. The list of pre-qualified companies/entities will be provided to the borrowing Government/its agency. Thereafter, the project will be put to bid under a competitive bidding process by a borrowing Government/its agency. For bidding process under LoCs, eligibility of participation is limited to Indian entities registered in India and/or incorporated/established under any law in force in India. **However, such an entity if blacklisted by any multilateral agency or any authority in India or the borrowing country will not be eligible to participate for the period it is blacklisted**". (Emphasis added)*

The above cited provision indicates clearly that a firm would only be deemed ineligible to participate in the pre-qualification process if it has been blacklisted by a multilateral agency, authorities in India or a borrowing country (i.e Tanzania in this case). According to the Exim Bank M/s WAPCOS Limited was deemed eligible and was pre-qualified as its blacklisting in Rwanda did not affect its eligibility as per the Guidelines on Lines of Credit.

The Appeals Authority is of the considered view that, according to the above quoted Guideline read together with Section 4(1) of the Act as well as Regulation 11(3) of the Regulations, the position of the Exim Bank



prevails notwithstanding the requirement of Section 62(2) of the Act. For purposes of clarity the provisions are reproduced hereunder;

S.4(1) *"to the extent that this Act conflicts with an obligation of the United Republic under or arising out of –*

*a) any treaty or other form of agreement to which the Government is a party with one or more other states or political subdivisions of such states; or*

*b) any grant agreement entered into by the Government with an inter-governmental or international financing institution in which the Government is the beneficiary,*

*the requirement of such treaty or agreement shall prevail, but in all other respects, the procurement shall be governed by this Act".*

Reg.11(3) *"To the extent that the clearance or approval of the internal approving authority conflict with the external clearance or approval of an external approving authority arising out of the loan or credit or grant agreement, the clearance or approval of external approving authority shall prevail, but in all other respects the internal clearance or approval shall prevail". (Emphasis supplied)*

From the above analysis, the Appeals Authority hereby declares that the award of the Tender to M/s WAPCOS Limited was justified in terms of the donor's requirement and in view of Section 4(1) and Regulation 11(3) supra. Therefore, our hands are tied.

Therefore, the Appeals Authority's conclusion with regard to the first issue is that, it is answered in the affirmative.

The Appeals Authority would like to mention in passing that may be there is a need to review the provisions of the Act especially on ethical issues such as blacklisting when involving a member state in the East African Community. At least in this matter we are at peace given the fact the blacklisting of M/s WAPCOS Limited had been set aside by the Commercial

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division of the High Court of Rwanda. We have also not been advised of any pending appeal in respect of the said decision. It is however, clear in our minds that the High Court decision did not change anything as it has no retrospective effect.

**2.0 What relief(s), if any, are parties entitled to**

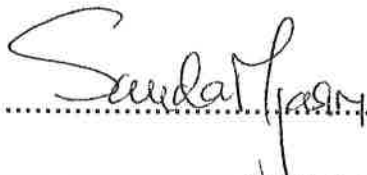
Taking into consideration the findings on the first issue above, the Appeal is hereby dismissed. Each party to bear its own costs.

It is so ordered.

This Decision is binding and can be enforced in accordance with Section 97(8) of the Act.

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

This Decision is delivered in the presence of the Appellant and the Respondent this 18<sup>th</sup> day of June 2019.

  
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**HON. JUSTICE (RTD) SAUDA MJASIRI**

**MEMBERS:**

**1. ADV. ROSAN MBWAMBO**.....

**2. CPA. FREDRICK RUMANYIKA**.....