

IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY
AT DAR ES SALAAM
APPEAL CASE NO. 44 OF 2018-19
BETWEEN
M/S UPIMAC CONSULTANCY SERVICES LIMITED.....APPELLANT
AND
MINISTRY OF WATER.....RESPONDENT

DECISION

CORAM

- | | |
|-------------------------------------|----------------|
| 1. Hon. Justice (rtd) Souda Mjasiri | - Chairperson |
| 2. Dr. Leonada Mwagike | - Member |
| 3. Adv. Rosan Mbwambo | - Member |
| 4. Ms. Florida Mapunda | - Ag.Secretary |

SECRETARIAT

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

FOR THE APPELLANT

- | | |
|--------------------------------|---------------------------|
| 1. Mr. Opolot Majid | - Senior Legal Officer |
| 2. Mr. Nyabongo Steven R.W | - Chief Executive Officer |
| 3. Mr. Andrew Muwanga Sekajugo | - Programmes Manager |

FOR THE RESPONDENT

- | | |
|---------------------------|-------------------------------|
| 1. Mr. Hangi M. Chang'a | - Senior State Attorney |
| 2. Mr. Simon S. Nkanyemka | - Head of Legal Services Unit |
| 3. Ms. Lucy L. Kimaryo | - State Attorney |
| 4. Mr. Winston S. Kapina | - Ag. Director PMU |
| 5. Mr. Adrian L. Muyungi | - Procurement Officer |

This Appeal was lodged by M/s Upimac Consultancy Services 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.TZ-MOW-69883-CS-QCBS for Consulting Services for Verification of Result for the Sustainable Rural Water Supply and Sanitation Program (SRWSSP) (hereinafter referred to as "**the Tender**").

The Tender was conducted using Quality and Cost Based Selection Method specified in the World Bank's Procurement Regulations for IPF Borrower of July 2016 as revised November 2017 and August 2018 (hereinafter referred to as "**the WB Procurement Regulations**"); 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 records of appeal submitted to the Public Procurement Appeals Authority (hereinafter referred to as "**the Appeals Authority**"), the background to the Appeal may be summarized as follows:-

The Respondent through the United Nation Development Business (UNDB) online dated 21st January 2019 and the Daily News newspaper of 23rd January 2019 invited eligible consultants to submit their Expression of Interest (EoI) in relation to the Tender. The deadline for submission of EoI was set for 19th February 2019, whereby nineteen firms submitted their EoI.

The EoI were subjected to evaluation which was conducted into two stages namely, preliminary and detailed evaluation. During preliminary evaluation two firms were disqualified for lack of experience in similar assignments. The remaining seventeen firms were subjected to detailed evaluation in order to ascertain their strength and weaknesses. In that process all firms qualified. However, due to the requirement of Clause 7.17 of the WB Procurement Regulations which requires shortlist to include not fewer than five and not more than eight firms, the Evaluation Committee shortlisted eight firms which had implemented more than thirteen projects of a similar nature. The remaining nine firms were not shortlisted including the Appellant. The Tender Board through a Circular Resolution No. 150 of 2018/2019 dated 11th March 2019 approved the Evaluation Report. On 17th April 2019, the World Bank gave a *no objection* to the recommended shortlisted consultants.

The Respondent through a letter dated 23rd April 2019 informed the Appellant that its proposal for EoI was unsuccessful. The letter was received by the Appellant on 29th April 2019. Dissatisfied with the Respondent's decision, the Appellant on 30th April 2019 applied for



administrative review to the Respondent via email dated 8th May 2019. The Respondent did not respond to the complaint within time. Consequently, on 22nd May 2019, the Appellant lodged this Appeal.

SUBMISSIONS BY THE APPELLANT

The Appellant's grounds of Appeal may be summarised as follows:-

1. That, the Appellant was not availed with reasons for being unsuccessful;
2. That, the Appellant complied with all the requirements provided in the EoI document including the shortlisting criteria published with the request for EoI;
3. That, the Appellant has a vast experience in decentralization and operation of local Governments for over 15 years. Since 2005 it has been involved in various World Bank basket funded projects in Uganda, Tanzania and Southern Sudan;

The Appellant stated further that, its experience in similar assignments has been stated in its EoI from pages 24-70. It was clearly indicated that the firm has undertaken two projects with the Respondent namely; Technical Audit of the Water Sector Development Program under the Ministry of Water of Tanzania in the years 2010-2012 and 2014 - 2018. The two projects were successfully accomplished and exposed the Appellant to WSDP at village level for six years.

Furthermore, the Appellant has undertaken independent verification agent (IVA) for the Urban Local Government Strengthening Programs

(ULGSP) Annual Performance Assessment of 17 municipalities at street and ward level from 2013 to 2014 in Tanzania. The said experience provided more knowledge to the Appellant on water and sanitation projects in Tanzania.

4. That, the Respondent needs to recruit and work with an independent verification agent who needs to be verified by the Internal Auditor General. The Appellant insisted that Annex 3 and 4 of the TOR was clear that the project intended was the IVA and the Appellant had the required experience in Tanzania, Uganda and Southern Sudan where it carried out five assignments.

The Appellant also conducted independent procurement Audit in respect of contracts executed by National Water and Sewerage Corporation in 6 main Municipalities of Uganda for FY.2014/15. The audit focused on planning design, function ability, management, operations and maintenance of facilities for supply of safe clean water and sanitations. Based on the experience shown the Appellant feel that its EoI was unfairly evaluated.

Finally, the Appellant prayed for the order that the EoI be re-evaluated by an independent evaluation team.

REPLY BY THE RESPONDENT

The Respondent's reply to the grounds of Appeal may be summarised as follows:-



1. That, the Appellant's Appeal is based on the ground that the Respondent's letter did not avail reasons for being unsuccessful while it met all the shortlisting criteria published under the invitation for EoI. The Respondent submitted further that all the seventeen firms including the Appellant complied with the requirements of the EoI; however, they differed in terms of similar assignments undertaken by each firm. Taking into consideration the requirement of Clause 7.17 of the WB Procurement Regulations that shortlisted firms shall not be less than five and not more than eight; the firms with more experience were given priority during the shortlisting. Thus, eight shortlisted firms had thirteen years of experience and above in similar assignments in the field of rural water supply and sanitation while the Appellant had experience in only three similar assignments. In addition, Regulations 280(6) and (7) of GN. No. 446 of 2013 provides that, the Respondent is not obliged to short list any firm which has submitted the EoI. The Respondent insisted that the short list of the firms was done fairly and prudently.
2. That, the Appellant filed a complaint to the Respondent in accordance with the law and the Respondent was required to issue a decision within seven working days but did not do so. However, its failure to issue a decision within the prescribed time did not prevent the Appellant from pursuing its legal rights in compliance with the law.

Finally, the Respondent prayed for the following orders:-

- i. Dismissal of the Appeal;



- ii. The Appellant be ordered to compensate the Respondent cost of the Appeal; and
- iii. Any other remedies the Appeals Authority deems fit and just to grant.

ANALYSIS BY THE APPEALS AUTHORITY

The Appeals Authority having gone through the Appeal record, Tender proceedings including various documents and the oral submissions by the parties, is of the view that the Appeal is centred on two main issues:-

1. Whether exclusion of the Appellant in the shortlist of the pre-qualified firms was justified; and

2. What reliefs, if any, are the parties entitled to

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

1. Whether exclusion of the Appellant in the shortlist of the pre-qualified firms was justified

In resolving this issue the Appeals Authority revisited the documents submitted before it and observed that the Appellant passed all stages of evaluation and was ranked the 16th amongst the compliant firms. According to Clause 7.17 of the WB Procurement Regulations, the Respondent was required to shortlist not less than five and not more than eight firms in the process. For purposes of clarity the said clause is reproduced as follows:-

Clause 7.17 The shortlist shall include not fewer than five (5) and not more than eight (8) eligible firms. The

Bank may agree to shortlists comprising a smaller number of firms when not enough qualified firms have expressed interest in the assignment, not enough qualified firms could be identified, or the size of the contract or the nature of the assignment does not justify wider competition."

(Emphasis Added)

Based on the requirement of the above quoted provision; the Respondent shortlisted firms with more experience in similar assignments ranging from thirteen to fifty seven projects. The Appellant had three projects in similar assignments and was ranked 16th in the Evaluation Report. According to the Respondent the ranking was based on experience of firms in similar assignments. The Appeals Authority observed that there were no specific criteria provided in the TOR which guided the ranking of firms. Therefore the Appeals Authority cannot conclude with certainty the criteria used in ranking of the firms.

Furthermore, the Appeals Authority revisited Regulation 280(6) and (7) of GN.No.446 of 2013 which was relied upon by the Respondent and observed that the Respondent was not obliged to include all applicants in the shortlist. Regulation 280(6) and (7) provide as follows:-

"Reg. 280(6) A consultant who wishes to provide the requested services may express his desire in writing to be shortlisted to the procuring entity concerned."

(7) Notwithstanding sub-regulation (6), an expression of interest to participate in the provision of services shall not oblige the procuring entity to include the applicant in the short list."

In view of what is provided in Regulation 280 (7), the Respondent had no obligation to include the Appellant in the short list. Therefore, taking into consideration the surrounding circumstances and the law, the Appeals Authority finds that the exclusion of the Appellant in the list of pre-qualified firms was justified.

Regarding the Appellant's contention that no reasons were given by the Respondent for it being unsuccessful, the Appeals Authority is of the view that, since the Respondent is not obliged to include the Appellant in the shortlist then it is equally not obliged to provide reasons.

Therefore, the Appeals Authority concludes the first issue in the affirmative that is; the exclusion of the Appellant in the shortlist of the pre-qualified firms was justified.

2. What reliefs, if any, are the parties entitled to

Taking cognisance of the findings in the first issue above, the Appeal is hereby dismissed. As parties did not press for costs, we make no order as to costs.

It is so ordered.

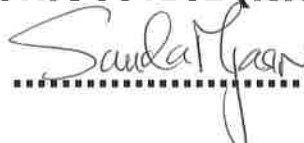
This Decision is binding and can be enforced in accordance with Section 97(8) of the Act.



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 parties today, 28th June 2019.

HON. JUSTICE (RTD) SAUDA MJASIRI


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CHAIRPERSON

MEMBERS:

1. DR. LEONADA MWAGIKE.....

2. ADV. ROSAN MBWAMBO.....