

IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY
AT DAR ES SALAAM

APPEAL NO 121 OF 2012

BETWEEN

M/S PSM ARCHITECTS CO. LTD.....1ST APPELLANT

M/S MEKON ARCH CONSULT LTD2ND APPELLANT

AND

PARASTATAL PENSIONS FUND.....RESPONDENT

RULING

CORAM:

- | | |
|--------------------------------|---------------|
| 1. Hon. A.G. Bubeshi, J. (rtd) | - Chairperson |
| 2. Mr. H.S. Madoffe | - Member |
| 3. Mr. K.M. Msita | - Member |
| 4. Ms. E.J. Manyesha | - Member |
| 5. Ms. B.G. Malambugi | - Secretary |

SECRETARIAT:

- | | |
|-----------------------|---------------------------|
| 1. Ms. E.V.A. Nyagawa | - Principal Legal Officer |
| 2. Ms. F.R. Mapunda | - Legal Officer |
| 3. Ms. V. Simeon | - Legal Officer |
| 4. Mr. H.O. Tika | - Legal Officer |

FOR THE 1st APPELLANT:

1. Mr. Peter S. Matinde – Managing Director (PSM)
2. Mr. Deo Mugishangwe – Architect (PSM)
3. Mr. John Kelly – Managing Director (Iain Pattie Associates)

FOR THE 2nd APPELLANT:

1. Dr. Moses Mkony – Managing Director
2. Arch. Chesco Sapula- Architect
3. Arch. Martinos Mkony - Architect

FOR THE RESPONDENT

1. Mr. Nicander A. Kileo – Legal Services Manager.
2. Mr. Issa Sabuni – Head of the Procurement Management Unit

This Ruling was scheduled for delivery today 05th July, 2012 and we proceed to deliver it.

The appeal at hand was lodged by M/s PSM ARCHITECTS CO. LIMITED (hereinafter to be referred to as “the 1st Appellant”) against PARASTATAL PENSIONS FUND commonly known by its acronym PPF (hereinafter to be referred to as “the Respondent”). After notification of this Appeal to the other bidders who participated in the tender process, one of the tenderers, namely, M/s MEKON ARCH CONSULT LTD opted to join this Appeal as the 2nd Appellant.

The said Appeal is in respect of Tender No. PA038/HQ/2010/C/3 for Provision of Consultancy Services for the Proposed Construction of the PPF Ununio Waterfront Project on Plots Nos. 16, 17 and 18 Ununio area in Kinondoni Municipality, Dar es Salaam (hereinafter to be referred to as “the tender”).

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

The Invitation for Expression of Interest (EOI) was re-advertised in the Guardian newspaper of 5th September, 2011, inviting consultancy firms to participate in the pre-qualification process of the above named tender.

The opening of EOI documents took place on 20th September, 2011 whereby seventeen firms expressed interest. After evaluation the following nine firms were pre-qualified and invited to submit proposals:

S/N	Lead Firm	Associated Firms
1.	M/s Tharani Associates Ltd.	<ul style="list-style-type: none"> • Matawana Consulting Group (Quantity Surveyor) • Cowi Consulting (Service Engineers and Structural Engineer)
2.	M/s qD Consultancy (T) Ltd.	<ul style="list-style-type: none"> • UNDI Consulting Group Ltd. (Structural Engineer and Services Engineer) • KIMPHIL Konsult (T) Limited (Services Engineer) • Bangalima & Associates (Quantity Surveyor)

3.	M/s Y & P Architects (T) Ltd.	<ul style="list-style-type: none"> • Norplan (T) Ltd (Services engineer) • Annova Consult Co. Ltd. (Structural Engineer) • Cost Consult Ltd. (Quantity Surveyor)
4.	M/s Mekon Arch Consult Ltd.	<ul style="list-style-type: none"> • Symbion International. (Architect) • AQE Associates Ltd.(Quantity Surveyor) • Mekon Consulting Engineers.(Structural Engineer) • Services Consult Ltd.(Services Engineer)
5.	M/s Hab Consult Ltd	<ul style="list-style-type: none"> • Costeq Consult Ltd.(Quantity Surveyor) • S&F Consultancy Ltd.(Structural Engineer) • Electriplan (T)Ltd. (Services Engineer)
6.	M/s A+P Consultants Ltd Architects and Planners	<ul style="list-style-type: none"> • Q.S Consultants Ltd. (Quantity Surveyor) • FBNE Ltd. (Services

		<p>Engineer)</p> <ul style="list-style-type: none"> • Lomo Consult Ltd. (Structural Engineer
7.	M/s Sky Architects Consultants	<ul style="list-style-type: none"> • B.J. Amuli- Architects Ltd. (Architect) • MaS-Q Associates Ltd. (Quantity Surveyor) • RH Engineering Consultant Ltd. (Structural Engineer) • Sprint Engineering Consultant Ltd. (Services Engineer)
8.	M/s Digital Space Consultancy	<ul style="list-style-type: none"> • Envirolink Architects Ltd. (Architect) • Metroconsult (Structural Engineer) • Nimeta Consult (T) Ltd. (Services Engineer • JB Costcare Consultant Ltd (Quantity Surveyor)
9.	M/s PSM Architects Company Ltd.	<ul style="list-style-type: none"> • Howard Humphrey (T) Ltd. • Bish (T) Ltd. (Quantity Surveyor)

The deadline for submission of the proposals was set for 15th February, 2012. However, the said deadline was extended to 29th February, 2012, due to changes made by the Respondent in the Request for Proposals (hereinafter to be referred to as "RFP"). The changes were in relation to the method of selection from Quality and Cost Based Selection (QCBS) as indicated in Clause 1.1 of the Proposal Data Sheet to Quality Based Selection (QBS). As a result of this change the formula for determining the financial scores and weight given to Technical and Financial proposals was no longer applicable.

The opening of the proposals took place on 29th February, 2012, whereby all the shortlisted firms submitted their proposals.

On 20th March, 2012, the Respondent appointed an Evaluation Committee comprising of different experts to evaluate the submitted proposals. The Evaluation Committee recommended that M/s qD Consultancy (T)

Limited in association with UNDI Consulting Group Ltd, KIMPHIL Konsult (T) Limited and Bangalima & Associates be invited for contract negotiation after scoring 85% which was the highest.

On 30th May, 2012, the Respondent *vide* their letter referenced PPF/DHRA/32/30/2/279 informed the Appellant that, they were unsuccessful as they scored 69.17% which was below the minimum score of 75%. The said letter was received by the 1st Appellant on 5th June, 2012.

Upon being dissatisfied with the said tender results the 1st Appellant, on 14th June, 2012, filed an Appeal to the Public Procurement Appeals Authority (hereinafter to be referred to as "the Authority").

Having notified the Respondent on the presence of the Appeal and required them to submit their written replies, the Respondent raised a Preliminary Objection. As a matter of procedure, the Authority is obliged to resolve the Preliminary Objection raised before addressing the merits of the Appeal.

THE RESPONDENT'S SUBMISSIONS ON THE PRELIMINARY OBJECTION

The Respondent raised a Preliminary Objection on a point of law to the effect that;

The Appeal before this Authority has been submitted prematurely for failure to observe the review mechanism procedures under Sections 79, 80, 81 and 82 of Public Procurement Act No 21 of 2004 (hereinafter to be referred to as "the Act") read together with Regulation 106 of GN No. 98/2005 and Rules 4 and 8 of the Public Procurement Appeals Rules of 2005 (hereinafter to be referred to as "Appeals Rules")

Elaborating on the Preliminary Objection, the Respondent stated as follows;

That, the objection is in respect of the 1st Appellant only, although it would affect the 2nd Appellant as well.

That, the right to review is provided under Section 79 of the Act, and procedures to be followed by an aggrieved supplier, contractor or consultant are provided for under Sections 80, 81, and 82 of the Act.

That, the procedures of appeal as mentioned above are mandatory and bound to be complied with by the parties to a dispute as they ultimately give the appeal its legitimacy. Hence, if these procedures are not followed the appeal should be rejected in accordance with Rule 13(1) of the Appeal Rules.

That, the 1st Appellant by-passed the mandatory procedures provided for in the Act and filed their complaint directly to this Authority. According to Section 79 of the Act, the aggrieved supplier, contractor or consultant must first, submit the complaint to the Procuring Entity. If the dispute is not amicably settled by the Accounting Officer or is not reviewed within the prescribed time, the same has to be referred to the Public Procurement Regulatory Authority (hereinafter to be referred to as "PPRA") in accordance with Section 81 of the Act.

That, Section 82 of the Act provides for the right of appeal to this Authority if the consultant remains aggrieved by the decision of PPRA.

That, the Appeal by the 1st Appellant has been brought to this Authority prematurely in total disregard of Sections 79, 80 and 81 of the Act which provide for the review levels to be exhausted before filing a complaint to this Authority.

That, Section 82(6) of the Act clearly states that the decision by this Authority is final, hence, if this matter is to be heard on merit, despite the glaring omission, that would constitute gross injustice to the aggrieved party.

That, Rule 4 of the Appeals Rules provides that, the Appeal to this Authority can be lodged only where a person is dissatisfied with the decision of the Minister responsible for Local Government or PPRA, but in the Appeal at hand there is no decision which gave rise to this Appeal. Also the Appeal by the 1st Appellant's did not

comply with the requirements of Rule 8(2) of the Appeals Rules.

That, the letter of award is yet to be issued to the successful tenderer as the whole process was stopped after the 2nd Appellant had filed a complaint to PPRA who ordered the Respondent to suspend the tender process.

Thus, the Respondent prayed for dismissal of the Appeal for being improperly before the Authority.

THE 1ST APPELLANT'S REPLIES ON THE PRELIMINARY OBJECTION

The 1st Appellant's oral replies on the Preliminary Objection may be summarized as follows;

That, the 1st Appellant did not follow the review procedures provided for in the Act, due to the fact that the Respondent had already shown a negative attitude towards them by not responding to their concerns. Thus, they felt that justice could not be done in such a situation.

That, failure to comply with procedures should not be a reason for rejecting this Appeal as there are a lot of issues in this tender that need to be determined. Hence, the same should not be rejected.

ANALYSIS BY THE AUTHORITY

Having gone through the documents submitted and having heard the oral arguments by parties in relation to the Preliminary Objection, the Authority wishes to resolve the following issue, namely, whether the Appeal is properly before it.

To start with, the Authority revisited the Respondent's Preliminary Objection, to wit;

The Appeal before this Authority is bad in law for contravening Sections 79, 80, 81 and 82 of the Act, read together with Regulation 106 of GN No. 98/2005 and Rule 4 and 8 of the Appeals Rules.

Having considered submissions by parties on this point, the Authority reviewed them in the light of the applicable law so as to ascertain whether the Appeal is properly before it or not. In so doing, the Authority revisited Section 79(1) of the Act which was relied upon by the Respondent which is reproduced herein below;

“S. 79(1) any supplier, contractor or consultant who claimed to have suffered or that may suffer any loss as a result of a breach of duty imposed on a procuring entity or approving authority by this Act may seek a review in accordance with Sections 81 and 82 of this Act, provided that, the application for review is received by the procuring entity or approving authority within twenty-eight days of the supplier, contractor or consultant becoming aware of the circumstances giving rise to the complaint or when the supplier, contractor or consultant should have become aware of those circumstances” (Emphasis supplied)

The Authority observes that, the above provision accords the right to seek review to any supplier, contractor or consultant. In so far as this Appeal is concerned the consultant has the right to seek review in accordance with Sections 81 and 82 of the Act.

The Authority observes that, Section 79 provides generally for a tenderer's right to review, while Sections 80, 81 and 82 provide specifically for the two avenues which have to be followed when a supplier, contractor, or consultant wants to seek a review of a procurement process.

a) The First Avenue:

Under this avenue a tenderer who seeks review of a procurement process is obliged to start the process by first, invoking the provisions of Section 80(1) and (2) of the Act, which stipulates that all complaints or disputes arising during procurement process have to be submitted to the Accounting Officer within twenty eight days from the date when a tenderer became aware or ought to have

become aware of the circumstances giving rise to the complaint. Additionally, Section 80(4) of the Act requires the Accounting Officer to issue a written decision within thirty days from the date the complaint was filed. The provisions cited hereinabove are reproduced as follows;

"S. 80(1) Complaints or disputes between procuring entities and suppliers, contractors or consultants which arise in respect of procurement proceedings and awards of contracts and which cannot be resolved by mutual agreement shall be reviewed and decided upon a written decision by the Accounting Officer, Chief Executive of a Procuring Entity, unless the procurement has been reviewed and approved by an approving authority, in which case that approving authority shall review and decide on the dispute and give reasons for its decision in writing.

(2) The head of the procuring entity or of the approving authority shall not entertain a complaint or dispute unless it is submitted within twenty eight days from the date the

supplier, contractor or consultant submitting it became of the circumstances giving rise to the complaint or dispute or when that supplier, contractor or consultant should have become aware of those circumstances, whichever is earlier.

(4) Unless the complaint or dispute is resolved by mutual agreement of the supplier, contractor or consultant that submitted it, the head of the procuring entity or of the Approving Authority shall, within thirty days after the submission of the complaint or dispute deliver a written decision which shall: -

- a) state the reasons for the decisions;
and
- b) if the complaint or dispute is upheld in whole or in part indicate the corrective measures to be taken." (Emphasis added)

If a tenderer is dissatisfied with the decision of the Accounting Officer or if the Accounting Officer fails to issue a decision within thirty days, a tenderer has the right to apply for review to PPRA as per Section 81 of the Act. The Authority reproduces Section 81(1), (2) and (3) of the Act.

“S. 81(1) A supplier, contractor or consultant who is aggrieved by the decision of the procuring entity or an approving authority may refer the matter to the Authority for review and administrative decision

(2) where: -

- a) the accounting officer does not make a decision within the period specified in section 80(4) of the Act;
- b) the tenderer is not satisfied with the decision of the accounting officer;

the tenderer may make a complaint to the Authority within fourteen working days from the date of communication of the decision by the accounting officer

(3) The Authority shall within thirty days after the submission of a complaint or dispute deliver a written decision ...”

It should be noted that the word “Authority” in the above quoted provisions refers to PPRA.

Upon being dissatisfied with the decision of PPRA, a tenderer has the right to appeal to this Authority as per Section 82(1) of the Act which states as follows;

“Complaints or disputes not amicably settled by the Authority shall be referred to the Public Procurement Appeals Authority”

Furthermore, Section 82(6) of the Act provides that, the decision of this Authority is final unless the matter is submitted to the High Court for Judicial Review under Section 85 of the Act.

It should be noted that this avenue is only applicable where a procurement contract has not entered into force pursuant to Section 55(7) of the Act.

b) The Second Avenue

Section 82(2) of the Act provides for circumstances under which an appeal can be filed directly to this Authority without exhausting other review levels as it has been elaborated under the first avenue. The said Section 82(2) provides as follows: -

S. 82(2) A supplier, contractor or consultant entitled under section 79 to seek review may submit a complaint or dispute to the Public Procurement Appeals Authority;

a) if the complaint or dispute cannot be entertained under section 80 or 81 because of entry into force of the procurement contract and provided that the complaint or dispute is submitted within fourteen days from the date when supplier, contractor or consultant submitting it

became aware of the circumstances giving rise to the complaint or dispute or the time when supplier, contractor or consultant should have become aware of those circumstances.” (Emphasis added)

The second avenue is applicable where a procurement contract has already entered into force pursuant to Section 55(7) of the Act which stipulates as to when a procurement contract enters into force. The said subsection provides as follows:

“S. 55(7) The procurement contract shall enter into force when a written acceptance of a tender has been communicated to the successful supplier, contractor or consultant”
(Emphasis supplied)

The above quoted provision entails that, an appeal can be filed directly to this Authority once the notification of award has been communicated to the successful tenderer, whereby the procurement contract is

considered to have entered in force. In such a situation, this Authority has sole original jurisdiction on complaints where a procurement contract is already in force.

According to the facts of this Appeal, the 1st Appellant filed his Appeal directly to this Authority after being notified that their Technical Proposal had scored 69.17% which was below the minimum cut-off score of 75% set by the Respondent.

The Authority further observes that, although the 1st Appellant was informed that their Proposal was unsuccessful, it was evident during the hearing that, the communication of award to the successful tenderer was yet to be done as the Respondent was ordered to stop the process following an application for review filed by the 2nd Appellant to PPRA.

The Authority is of the view that, given that the communication of award to the successful tenderer was yet to be done; thus, the procurement contract has not entered into force. This means therefore that, the 1st Appellant erred in filing their Appeal directly to this

Authority. The 1st Appellant ought to have followed the review channel as described in the first avenue. That is, to seek review by invoking Sections 80, 81 and 82 of the Act.

The Authority therefore concurs with the Respondent that, the 1st Appellant did not follow the requisite review procedures as enshrined in the Act.

Based on the above facts and evidence, the Authority is of the settled view that, the Appeal was not filed in accordance with the procedures stipulated in the Act.

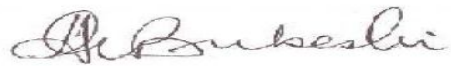
Accordingly, the Authority's conclusion in respect of this issue is that, the Appeal is not properly before it.

Consequently, the Appeal is hereby rejected and each party ordered to bear their own costs.

In respect of the 2nd Appellant, during the hearing it became clear that they had lodged their complaint to the Accounting Officer of the Respondent and later to PPRA. PPRA had deliberated on the matter and delivered their decision on 29th June, 2012, a copy of which was availed to this Authority by the 2nd Appellant. Considering PPRA's decision, this Authority hastens to say that, the 2nd Appellant may appeal against the said decision, if they so wish, within fourteen days from the date of receiving PPRA's decision.

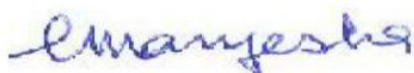

Right of Judicial Review as per Section 85 of the PPA/2004 explained to parties.

Ruling is delivered in the presence of the 1st Appellant, 2nd Appellant and the Respondent this 5th day of July, 2012.



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JUDGE (rtd) A. BUBESHI
CHAIRPERSON

MEMBERS:

1. MS. E. J. MANYESHA..... 
2. MR. H. S. MADOFFE..... 
3. MR. K.M MSITA 