

**IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY
APPEAL CASE NO. 97 OF 2011**

BETWEEN

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

AND

NATIONAL SOCIAL

SECURITY FUND.....RESPONDENT

DECISION

CORAM:

- | | | |
|----|-----------------------------|---------------|
| 1. | Hon. A.G. Bubeshi, J. (rtd) | - Chairperson |
| 2. | Mr. F.T. Marmo | - Member |
| 3. | Mr. H.S. Madoffe | - Member |
| 4. | Mr. K.M. Msita | - Member |
| 5. | Mrs. R.A. Lulabuka | - Member |
| 6. | Mrs. N.S.N. Inyangete | - Member |
| 7. | Ms. E.J. Manyesha | - Member |
| 8. | Ms. B.G. Malambugi | - Secretary |

SECRETARIAT:

- | | | |
|----|---------------------|---------------------------|
| 1. | Ms. E. V.A. Nyagawa | - Principal Legal Officer |
| 2. | Mr. R. Chisumo | - Legal Officer |

FOR THE APPELLANT:

1. Mr. Frank Mwalongo – Advocate from Apex Attorneys Advocates
2. Mr. Frank N. Modestus – Advocate from Apex Attorneys Advocates
3. Mr. Vitalis E.M. Salimu – Legal Officer
4. Dr. Moses Mkony – Managing Director
5. Mr. Beno Batinamani – Technical Director

FOR THE RESPONDENT

1. Mr. Celestin Ntagara – Legal Officer
2. Eng. John K. Msemo – Projects Manager
3. Eng. Karim Mattaka – Principal Estates Officer
4. Hashim Nyendage - Supplies Officer

This decision was scheduled for delivery today 18th May, 2011 and we proceed to deliver it.

The Appeal at hand was lodged by **M/S MEKON ARCH CONSULT LTD** (hereinafter to be referred to as "**the Appellant**") against **NATIONAL SOCIAL SECURITY FUND** commonly known by its acronym **NSSF** (hereinafter to be referred to as "**the Respondent**").

The said Appeal is in respect of Tender No. PA/005/2010-2011/HQ/W/15 for Provision of Consultancy Services for the Proposed Construction of NSSF Tourist Hotel in Mwanza (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:

On 19th April, 2010, the Respondent invited Consultants interested in providing consultancy services to submit Expressions of Interest (hereinafter to be referred to as "**EOI**") vide Habari Leo newspaper.

The deadline for submission of the EOI was 21st May, 2010. Twelve **applications** were received and subjected

to evaluation after which the following eight firms were shortlisted namely:

- M/s Cons Africa Ltd;
- M/s MD Consultancy Ltd;
- M/s Mekon Arch Consult Ltd;
- M/s qD Consult (T) Ltd;
- M/s Digital Space Consultancy Ltd;
- M/s Y & P Architect (T) Ltd;
- M/s Claus Bremer Associates Ltd; and
- M/s HabConsult Ltd.

The deadline for submission of Technical and Financial Proposals was set at 20th August, 2010, whereby the shortlisted firms submitted their proposals, except for M/s Claus Bremer Associates Ltd.

The Technical Proposals were subjected to Preliminary Evaluation and the tender submitted by M/s MD Consultancy Ltd was disqualified at that stage for failure to submit Audited Financial Statements for the past three years. The other six firms were subjected to Detailed

Evaluation where total scores scored by each firm were as follows:

S/ No.	NAME OF THE TENDERER	TOTAL SCORE%
1	M/s Mekon Arch Consult Ltd	81
2	M/s HabConsult Ltd	90
3	M/s Digital Space Consultancy Ltd	76
4	M/s Y & P Architect (T) Ltd	85
5	M/s Cons Africa Ltd	86
6	M/s qD Consult (T) Ltd	82

At this stage one tenderer M/s Digital Space Consultancy Ltd was disqualified for failing to score the minimum mark of 80%. The Evaluation Committee recommended the remaining five tenderers to be invited for the opening of Financial Proposals and the same was approved by the Tender Board.

The opening of the Financial Proposals took place on 13th October, 2010, whereby the readout prices quoted by the tenderers were as follows:

NAME OF THE TENDERER	Fees Reimbursable Amount (Tshs)	Plus Local Taxes (Tshs)
M/s Mekon Arch Consult Ltd	275,035,250/=	49,506,345/=
M/s HabConsult Ltd	974,700,000/=	135,045,000/=
M/s Y & P Architect (T) Ltd	855,596,112/=	131,975,300.16
M/s Cons Africa Ltd	721,390,400/=	144,220,000/=
M/s qD Consult (T) Ltd	575,390,400/=	103,570,272/=

After opening of Financial Proposals, the Evaluators went on to calculate the combined scores for Technical and Financial Proposals and ranking was done as indicated in the Table below :

Name of the Tenderer	Combined scores	Ranking
M/s Mekon Arch Consult Ltd	84.8%	1
M/s HabConsult Ltd	77.64%	2
M/s Y & P Architect (T) Ltd	74.43	5
M/s Cons Africa Ltd	76.43%	3

M/s qD Consult (T) Ltd	75.16%	4
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Having ranked the consultants, the Evaluators went on to do a detailed analysis of the Financial Proposals whereby it was found that the proposal with the highest combined scores had some deficiencies, in that, there were inconsistencies between the Technical and Financial proposals in that some items appearing in the Technical Proposal were under priced e.g. the cost of the Resident Engineer and some mandatory items such as the cost of the Environmental Engineer were completely omitted leading to under-pricing of reimbursable costs of the project.

On 4th January 2011 the Respondent notified the Appellant vide letter referenced NSSF/HQ/N.12/146/009 that their tender was not successful.

On 11th January 2011, the Appellant being dissatisfied with the tender results, applied for administrative review to the Public Procurement Regulatory Authority

(hereinafter to be referred to as **PPRA**) vide a letter No.MAC/NSSF/10/SF3

On 17th January 2011, PPRA replied to the Appellant's complaint vide a letter referenced PPRA/PA/004/146 informing them that PPRA had no jurisdiction to entertain the matter and advised them to lodge their appeal to the Public Procurement Appeals Authority (hereinafter to be referred to as "**the Authority**").

On 12th February, 2011, the Appellant lodged an appeal with this Authority.

SUBMISSIONS BY THE APPELLANT

The Appellant'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 Appellant did not under price the reimbursable expenses. The claim made by the Respondent is baseless

and vague as they have not provided a yardstick to substantiate their claim. The Appellant filled all reimbursable expenses as required including all the elements of reimbursable expenses indicated under Clause 19.1(d) of the Instructions to Bidders (hereinafter to be referred to as "**ITT**"), that includes cost of communications, cost of printing, costs of travelling and accommodation were not specifically stated. The Appellant further stated that Table 5B4 which provides the breakdown of reimbursable expenses with a footnote that bidders could omit pricing for or delete the items that were not applicable.

That, there was no indication in the RFP, that laboratory testing and subcontracting were part of the requirements. The Appellant did not price for laboratory testing and subcontractor works because these items fall under the category of design and build contracts and the Appellants are not design and build contractors. Furthermore, these issues did not form part of Terms of Reference and methodology.

That, the Appellant strongly disputes the claim that the Resident Engineer in the project was allocated unrealistic time. This assertion is baseless since the Appellant established the costs on the basis of efficiency and experience of its consultant in adhering to the program and time frame in the methodology. It was their view that the time provided for Resident Engineer was in accordance with estimated time for the project delivery during post contract period.

That, though the Appellant conceded to the failure to include the Environmental Engineer and costs thereof, considering that this was a minor omission it would only entitle them to lose 6 marks in the Technical Proposal Evaluation, but could not justify their disqualification.

That, the Appellant did not underestimate the total professional staff months required by the project. According to page 24 of the Proposal Data Sheet, the estimated number of staff months is twelve. Thus, it was the Respondent who under estimated the professional staff months. Also according to the submitted Form 5A7

staffing schedules which were appended the total staff months shown in the Technical Proposal were 12 and this was the basis of the pricing.

That, their disqualification was perhaps due to failure to include the client's remuneration and commission which did not form part of the Proposal Data Sheet. The Appellant further argued that, under Section 7 of the RFP, the consultants were required to sign and provide an Anti Bribery Policy and thus it was illegal for them to provide and conceal client's staff remuneration and the Respondent should have understood this.

That, the Respondent is a public institution and it is investing members' contributions, for profit and value for money and the reason put forward by the Respondent for disqualifying them was meant to deny the Appellant his right to compete.

That, the Respondent entered into contract with the successful consultant before attending to the Appellant's

request for administrative review which was submitted on 30th November 2010. This raises red flags and it contravenes, Section 84 of the Public Procurement Act, Cap. 410 (hereinafter to be referred to as "**the Act**").

That, the Respondent contravened the law deliberately for failing to suspend the process as he was aware that the cost of compensating the aggrieved consultant was negligible compared to the advantages of the favored consultant.

That said, the Appellant therefore requested the Authority to:

- (a) Review the matter and order the Respondent to nullify the contract award to M/s HabConsult Limited.
- (b) Order the Respondent to award the contract to the Appellant.
- (c) Order the Respondent to pay the Appellant for costs incurred in pursuit of the Appeal to the tune of Tshs 10,000,000/-, of which Tshs. 8,000,000/-

is for professional fees and Tshs. 2,000,0000 as attendance fees.

REPLIES BY THE RESPONDENT

The Respondent's replies deduced from the documents submitted to the Authority as well as the oral submissions and responses from questions raised by Members of the Authority during the hearing may be summarized as hereunder:

That, the Appellant was disqualified due to under pricing of reimbursable expenses including travel expenses. The following reasons justify the above contention:

Firstly because the Appellant's offices are in Dar- Es-Salaam and the Project in question is in Mwanza which means that the Consultant would be required to travel from Dar Es Salaam to Mwanza to attend to project issues and thereafter to travel back to Dar es Salaam. The core team of Consultants comprised of five distinct

professions namely Architecture , Structural Engineering , Civil Engineering , Mechanical Engineering , Electrical Engineering and Quantity Surveying .

That, the Appellant's work program proposal had indicated that there would be 30 scheduled visits from the design stage to completion of defects liability. These 30 visits were spread out as follows: 3 visits during design and tendering stage, 24 visits during project execution that is; attending site meetings every month and 3 visits during defects liability period. These visits must be made by the core team of five consultants.

That, the Appellant's consultants would have to make 30 trips (go and return) between Dar and Mwanza. The prevailing air fare (return) at the time of tender submission was Tshs. 400,000/=. Therefore, the costs for travel tickets for one consultant for the 30 trips would be $Tsh\ 400,000/= \times 30\ Trips = Tshs\ 12,000,000/=$; for 5 consultants the cost would be $Tshs\ 12,000,000/= \times 5 = Tshs.\ 60,000,000/=$.

That, the Appellant had indicated Tshs. 24,000,000/= for travelling costs for the entire project which would only be able to cover 12 trips.

That, **The Appellant provided Tshs. 200,000/= for Per Diems** for 120 days. This implied that each of the 5 consultants was allocated 24 days.

That, the Appellant's Technical Proposal had indicated a minimum number of 30 days per diem instead of 60 days (that is two days per trip) for each of the five consultants. Using the same rate that was provided by Appellant, the total per diem cost should have been 5 consultants x Tshs.200,000/= x 60 days = Tshs. 60,000,000/=. The Appellant has provided only Tshs. 24,000,000/= which would cover the said expenses for 12 days only.

That, the Appellant did not include the travelling and Per Diem costs for 18 trips valued at Tshs. 72,000,000/=.

That, under **FORM 5B4 of the RFP** the Appellant was allowed to delete or not to price the items which were not applicable. **FORM 5B4** was meant to cater for items that were considered to be irrelevant to the consultant. For example, the cost of travelling from Dar es Salaam to Mwanza and back to Dar es Salaam was 'not applicable' to a consultant based in Mwanza.

That, the Respondent required bidders to come up with Technical Proposals that had all the necessary technical tasks required by the consultant to fulfill the requirements of designing a Tourist Hotel.

That, the Appellant's Technical Proposal included the following tasks:

- Topographical Survey and
- Soil/Geotechnical Survey.

These tasks are done by specialized experts or subcontractors that collect data from site and process the

data in the laboratories or computers and then interpret the results of their findings

That, the Appellant included these tasks in their Technical Proposal, but did not include them in the Financial Proposal. If the tender was to be awarded to the Appellant, the Respondent would have to prepare separate sub-tenders for the project.

That, the Appellant had opportunity to ask the Respondent for clarification on the costs of laboratory and subcontract works.

That, the Respondent expected the cost of Resident Engineer to cover 24 months as included in the Appellant's Technical Proposal. However, the Appellant had indicated that the time to be spent by the Resident Engineer on site would be 0.2 man months.

That, the Respondent failed to see how someone who was required to work full time on site for 24 months can condense his work time on site to 0.2 months.

That, the Appellant had underestimated the total man months required for the project. The Respondent is of the view that, the Appellant otherwise did not understand what the terms 'Resident Engineer and the project execution time' meant. The Respondent reiterated that 12 staff months are not adequate for the project which would take 24 months.

That, the Appellant's claims before the Authority that, the Respondent had favoured the Successful Consultant in the award of contract are unfounded. The Appellant's Technical Proposal had some mistakes and omissions that would have warranted disqualification during evaluation of the Technical Proposals.

That, the Respondent's had observed and considered value for money in the process as opposed to the assertion put by the Appellant.

That, Regulation 62 of The Public Procurement (Selection and Employment of Consultants) Regulations, 2005, Government Notice No. 98 of 2005 (hereinafter to be

referred to as “**GN. No. 98/2005**”) guides on evaluation of financial proposals and require that they be reviewed for consistency with the technical proposals.

That, Section 67 of the Act requires procuring entities to evaluate on common basis the tenders that have not been rejected. It further states that, the lowest submitted price may not necessarily be the basis for selection for award of the contract. The Act forbids any procedure under which tenders above or below pre – determined assessment of tender are automatically disqualified.

The Respondent finally prayed that the Authority dismiss the Appeal in its entirety.

ANALYSIS BY THE AUTHORITY

Having gone through the documents submitted and having heard the oral submissions from parties, the Authority is of the view that, this Appeal is centred on the following issues;

- **Whether the Appellant was unfairly disqualified**
- **Whether the award to the Successful Tenderer was proper at law**
- **To what reliefs, if any, are the parties entitled to.**

Having identified the issues in dispute, the Authority proceeded to resolve them as follows:

1.0 Whether the Appellant was unfairly disqualified

In its endeavour to resolve this issue the Authority deemed it necessary to review the evaluation process as it is the centre of the controversy. The Appellant disputes the reasons for their disqualification and also contends that the Successful Consultant did not qualify for award as their price was too high compared to the Appellant's price as well as the other tenderers who took part in the

tender. In the course of analyzing the issues in dispute, the Authority reviewed the evaluation of the Technical Proposals and later the evaluation of Financial Proposals whereby the Respondent's reasons for disqualifying the Appellant will also be addressed.

To start with, the Authority reviewed the evaluation of the Technical Proposals so as to ascertain if it was conducted in accordance with the RFP and the applicable law. The Authority noted that, the evaluation of Technical Proposals was conducted in two stages, namely, Preliminary Evaluation and Detailed Evaluation.

The Authority revisited Regulation 58(9) of GN. No. 98/2005 read together with Clause 36.1 of the RFP which guides the manner in which the evaluation of Technical Proposals would be made in the following words:

“Reg. 58(9) The evaluation committee shall evaluate each proposal on the basis of criteria stipulated in the request for proposal.”

“36.1 The Procuring Entity shall evaluate and rank the Technical Proposals on the basis of their responsiveness to the Terms of Reference, applying the evaluation criteria, sub-criteria, and points system specified in ITC Sub-Clause 36.2.” (Emphasis added)

During Preliminary Evaluation the tenders were checked for compliance with the requirements of Section 2 of the RFP. The Authority noted that, at that stage the Evaluators checked, amongst other things, CV's of key personnel whereby the Evaluators indicated that the Appellant had complied with this requirement.

The Authority noted that the Appellant did not provide for the Environmental Engineer. This was also confirmed, in the Appellant's Rejoinder to the Respondent's written replies and oral submissions during the hearing, whereby the Appellant conceded that their Technical Proposal did not provide for the Environmental Engineer. The Appellant argued that, according to the Proposal Data

Sheet appearing on page 25 of RFP, having an Environmental Engineer was optional as various disciplines were indicated whereby the tenderers were at liberty to choose which of them to include as they deemed fit. For purposes of clarity, the respective paragraph is reproduced hereunder:

“PROJECT STRUCTURAL / ELECTRICAL & ICT/MECHANICAL & AC / ENVIRONMENTAL ENGINEERS Must possess a degree in Structure/Civil, or Electrical, or Mechanical or Environmental Engineering or equivalent qualifications plus at least ten(10) years appropriate building sector experience. The Project Engineer must be a registered Professional Structural/Civil, or Mechanical, or Environmental Engineer.”

The Authority considered the oral submissions of Dr. Mosses Mkony, the Managing Director of the Appellant, who stated that he has qualifications in environmental engineering. Thus the services in respect of environmental engineering would have been carried out

by him. However, his CV attached to the Technical Proposal does not indicate such qualifications. The Authority further observes that, the Title of his Ph.D. Thesis indicates that it was on **“A Conceptual Model for Promoting a Healing Health Care Environment in Tanzania”**, which cannot be equated to having Environmental Engineering qualifications. Moreover, his CV does not indicate registration with the Engineers Registration Board as an Environmental Engineer as required by law .

Much as the Authority shares the Appellant’s concern that the above quoted paragraph is not explicit enough, the Proposal Data Sheet on page 27 of the RFP provides a list of experts required as well as the number of points to be given for each expert during evaluation. The said list is reproduced herein below:

“(iii) Qualifications of experts and experience in the field of assignment

Project Manager	25%
Project Architect	15%
Project Quantity Surveyor	13%
Project Civil/Structure Engineer	13%
Project Electrical & ICT Engineer	9%
Project Mechanical & Air Conditioning Engineer	9%

Project Environmental Engineer	6%
Resident Engineer/Architect	4%
Civil Technician	4%
Other (Economist, Estate expert, Interior Designer	2%
"Total Points: 100"	

The Authority does not accept the Appellant's contention that consultants were given options, as the above quotation indicates clearly that it was mandatory to provide for the experts listed therein as the apportioned points made a total of 100 points. Furthermore, Clause 36.1 of the RFP provides guidance on the manner, in which the criteria and points system are to be employed in the evaluation of Technical Proposals and the said point system is provided for in the Proposal Data Sheet (page 27 of the RFP as quoted).

The Appellant's misinterpretation of the requirement (on page 25), of the RFP (as quoted above) should have been cured by the requirements provided on page 27 of the RFP. The Authority observes that, the Appellant should have sought for clarification had they found the requirement on page 25 of the RFP to be imprecise. Indeed a wholistic reading of the tender document leaves

no doubt that each and every one of the experts indicated in the RFP was required in the project.

Furthermore, the Authority does not comprehend how the Appellant's Technical Proposal scored 81% considering the following deficiencies detected therein:

- Lack of provision for the Environmental Engineer.
- Inconsistencies in the Appellant's Technical Proposal with regard to the construction period which is shown as 24 months under Section 4.2 SUMMARY OF ACTIVITIES" but it is 8 months (32 weeks) under the "ACTIVITY (WORK) SCHEDULE".
- Inconsistencies with respect to the "Time Schedule for Professional Personnel" which shows a total of staff month inputs of 1.01; 0.20 for field work out of which 0.07 staff month inputs for post-contract services from month 13 to month 36, which includes 24 months for the construction period.

- Inclusion of unrelated matters in the Technical Proposal as rightly submitted by the Respondent in their additional written Replies during the hearing under paragraph 6.2 Table 1 as reproduced herein below:

	TASK	EXPLANATION
1	Task 1: Mobilization and Inception	- It is crucial that the project objectives be clearly tied to the overall mission of the TIA in its purpose to design a (sic) administration building.
	TASK 3	<ul style="list-style-type: none"> • Bullet 2: environmental sustainability with minimal degradation of existing building • Bullet 6: structural integrity of the building to be renovated or extended.
	Page 13 task 3	In this page M/s Mekon is explaining about scheme design of a warehouse and proposal for technical specification of a warehouse. This is repeated on page 14.
	Page 15 task 5	M/s Mekon is explaining that an evaluation team will be formed comprising of members from TIA Tender Board.

Based on the above analysis, the Authority is of the considered view that, the failure by the Appellant to provide for the Environmental Engineer and for very limited time provision for the services of the Resident Engineer meant that the Technical Proposal submitted by the Appellant did not comply with this particular requirement and should have been rejected at the preliminary stage for failure to respond to important aspects of the RFP pursuant to Clause 36.2 of the RFP which states as follows:

“Technical Proposals shall be evaluated and ranked on the basis of their responsiveness to the Terms of Reference, applying the evaluation criteria, and point system specified in the PDS. Each responsive Technical Proposal will be given a technical score (St). **A Technical Proposal shall be rejected if it does not respond to important aspects of the RFP, and particularly the Terms of Reference** or if it fails to achieve the minimum technical score indicated in the PDS. ” (Emphasis supplied)

In view of the foregoing, the Authority is of the settled opinion that, had the evaluation of Technical Proposals been properly done, the Appellant would have been disqualified for being non-responsive to the RFP.

During the hearing, Members of the Authority questioned the Respondent on the reasons for not disqualifying the Appellant at the preliminary stage of the evaluation of Technical Proposals for being non compliant to the RFP. In reply thereto, the Respondent conceded carrying the Appellant to the next evaluation stage without the requisite qualifications. However, he stated that it was done bona fide in consideration of the need to promote local consultants. The Authority believes that this is a misconception of the Local Preference Policy since such preference cannot be used to reward unqualified consultants or those who fail to submit responsive tenders. It is the view of this Authority that had the Respondent intended to do so within the confines of the law, they should have clearly provided for National

preference in the RFP pursuant to Section 49(2) of the Act which states as follows:

“The procuring entity shall, when procuring goods, works or services by means of international or national tendering, or when evaluating and comparing tenders, grant a margin of preference for the benefit of tenders for certain goods manufactured, mined, extracted or services provided by Tanzania consultants, **provided that this is clearly stated in the tender documents** subject to the provisions prescribed in the Regulations.”
(Emphasis added)

The Authority observes that, the Evaluators’ failure , to disqualify the said tenderer at the preliminary stage, contravened Clause 36.2 of the RFP as quoted above. The Authority is concerned that, such conduct casts doubt on the competence, motive and diligence of the Evaluators.

The Authority observes that, the Evaluation Report for Technical Proposals should have pointed out, inter alia, strengths and weaknesses of the Technical Proposals evaluated which was not done in the tender under Appeal. Regulation 58(11) of GN. No. 98/2005 provides guidance on this matter in the following words:

“At the end of the process, the evaluation committee shall prepare an evaluation report of the “technical quality” of the proposals which shall substantiate the results of the evaluation and describe the relative strengths and weaknesses of the proposals and all records relating to the evaluation, such as individual mark sheets, shall be retained until completion of the project and its audit.”

Having reviewed the evaluation of Technical Proposals, the Authority proceeded to analyse the evaluation of Financial Proposals to see if it was conducted in accordance with the RFP as well as the applicable law. As it has already been pointed out, the Appellant should not have qualified for the opening of Financial Proposals. The

Respondent therefore erred in subjecting them to evaluation of Financial Proposals.

The Authority revisited Sub-regulations (1) and (2) of Regulation 62 of GN. No. 98/2005 which guide on how the evaluation of Financial Proposals was to be done. The said provisions are reproduced herein below:

“Reg. 62(1) An evaluation committee of three members or more shall first review the financial proposal for consistency with the technical proposal and if there are any inconsistencies they shall make the necessary adjustment.

(2) An evaluation shall review the financial proposals and if there are any arithmetical errors, they shall be corrected. For purpose of comparing proposals, the costs shall be converted to a common currency selected by the procuring entity as stated in the request for proposals.” (Emphasis added)

Based on the above quoted provisions, the Authority observes that, the Evaluators of the Financial Proposals were supposed to review the Financial Proposals vis-a-vis the Technical Proposals to check if there were any inconsistencies therein and to correct arithmetical errors. The Authority revisited the Evaluation Report for Financial Proposals to ascertain whether the requirements of the RFP and the applicable law were complied. In the course of doing so, the Authority noted that, the first stage involved computation of financial scores whereby the following formula was employed:

$$\text{Score} = \frac{\text{Lowest price (corrected)} \times (0.20 \times 100)}{\text{Bidder's price (corrected)}}$$

The Authority observes that, the Evaluators erred by starting with the computation of financial scores before checking for consistency between the Technical and Financial Proposals and correction of arithmetical errors in line with Regulations 62(1) and (2) of GN. No. 98/2005.

The Authority also noted that, having done the said computation, the Evaluators combined the Technical scores with Financial scores and ranked the tenderers as follows:

Firm	Technical Scores	Financial Scores	Total	Rank
M/s Mekon Arch Consult Ltd	64.8%	20%	84.8%	1
M/s HabConsult Ltd	72%	5.64%	77.64%	2
M/s Y & P Architect (T) Ltd	68%	6.43%	74.43%	5
M/s Cons Africa Ltd	68.8%	7.63%	76.43%	3
M/s qD Consult Ltd	65.6%	9.56%	75.16%	4

The above Table indicates that, the Appellant's Financial Proposal had scored 100 points equivalent to 20% and was therefore the lowest evaluated Financial Proposal.

The Authority further noted that, the apportionment of the financial scores was not done properly as the lowest evaluated financial proposal was at that time, unknown

because financial evaluation was incomplete. Hence, the ranking was equally faulty.

The Authority noted further that, after combining the Financial and Technical scores, the Evaluators proceeded to compare the Technical and the Financial Proposal. The Authority observes that, this step should have been the done first in the evaluation of Financial Proposals. It was during this stage of evaluation that the shortfalls of the proposals submitted by the Appellant and three other Consultants, save for the Successful Tenderer, were detected. The Authority deemed it necessary to analyse the reasons for the disqualification of the Appellant despite the fact that the firm should not have qualified for financial evaluation anyway.

The Authority proceeded to analyse each of the reasons which led to the disqualification of the Appellant as follows:

(i) Under-pricing of the reimbursable expenses in fundamental items like travel expenses for supervision works:

In analysing this point, the Authority revisited the Respondent's submissions thereof as well as the Appellant's replies. The Respondent's arguments on this particular point are as summarized hereunder:

- The Appellant allocated a total of Tshs. 48,000,000/=, out of which Tshs. 24,000,000/= is for travelling expenses while Tshs. 24,000,000/= is for subsistence allowance.
- The project is located in Mwanza while the Appellant is based in Dar es salaam. The Consultant's team will be expected to make at least 30 supervision trips to Mwanza during the 36 months of the execution of the project.
- A normal site meeting will require at least five members from the consultant's team, namely, an

Architect, Quantity Surveyor, Mechanical Engineer, Electrical Engineer and a Civil/Structural Engineer, who will have to travel to Mwanza where they will spend about two days.

- Further assuming 30 trips are made to Mwanza by the aforementioned five experts during the duration of the execution of the contract, the Tshs. 48,000,000/= allocated by the Appellant would not suffice as a single trip thereof will cost Tshs. 1,600,000/=. This means, each of the five consultants will spend Tshs. 320,000/= for return air tickets, accommodation and meals which is definitely on the low side.
- The Appellant's Financial Proposal indicated that the per diem rate is Tshs. 200,000/= per day for 120 days, which means each of the five consultants was allocated 24 days only , that is, two days per trip. However, the Appellant's Technical Proposal indicated that 30 trips would be made. Therefore they should have allocated 60 days, that is, two days per trip for each of the five consultants. Given the Appellant's rate of Tshs, 200,000/= , 5 consultants and 60 days

The total amount of per diems is Tshs. 60,000,000/= . Thus the amount of Tshs. 24,000,000/= allocated for this activity by the Appellant is inadequate as it caters for only 12 trips and was therefore underpriced by Tshs. 36,000,000/= .

- With regard to transport expenses, the Appellant's Proposal indicated that air transport was to be used for which they had allocated a total of Tshs. 24,000,000/= . However, if five Consultants were expected to make 30 trips, the cost translates to Tshs. 60,000,000/= .
- The Appellant's quoted price did not include transport and per diem costs for 18 trips for the five Consultants which is Tshs. 72,000,000/= . This could adversely affect proper supervision of the project.

Having summarized the Respondent's submissions on this point, the Authority revisited the Appellant's responses thereof, which are as summarized herein below:

- The sum allocated for both transport as well as per diem for five consultants to Mwanza is sufficient as they have roadworthy motor vehicles to cater for such trips as one car (Pajero) can accommodate all five Consultants. As for the per diem, despite quoting for Tshs. 200,000/=, the payable rate as per the Appellant's policy is Tshs. 50,000/= per day.
- Their reimbursable expenses are fair as they are based on experience in similar ongoing projects of the Prevention and Combating of Corruption Bureau (PCCB) and Tanzania Ports Authority (TPA) in Mwanza and Bukoba using similar rates.
- The rates quoted by the Successful Consultant are on the high side as there is a trend of quoting astronomical rates in Government tenders which is not the case where tenders are invited by private entities. The rates quoted by the Appellant are realistic as they have considered national interest as well as the state of the economy and are not intended to make super profits.

The Authority analysed the validity of the submissions by parties on this point and observes that, a project of such magnitude and complexity requires adequate supervision by the Consultant.

The Authority detected some contradictory information in the Appellant's oral submissions vis-a-vis what is contained in their tender. For instance, while their tender indicated the mode of transport will be by air at Tshs. 200,000/= per trip, their oral submissions thereof indicated use of road transport. Moreover, the quoted rate of per diem is Tshs. 200,000/= per day while they actually pay Tshs. 50,000/= per day. Furthermore, upon being asked which was the actual rate they had intended to pay their consultants if they had been awarded the tender, they did not provide a specific answer.

The Authority is concerned that the Appellant was not being truthful, in that, reimbursable expenses are meant to allow the consultants to recover actual expenses incurred. In their Financial Proposal the Appellant indicated that they would pay a per diem of Tshs.

200,000/= per person however, in their oral submissions they said they would pay a per diem of Tshs. 50,000/=.

The Authority is of the view that, this is cheating, in the sense that, they charge a higher amount of Tshs. 200,000/= to the client while they pay a lesser amount of Tshs. 50,000/= to their staff.

The Authority had expected the Appellant to address the contentious issue of under-pricing of travel expenses and Per Diem by trying to substantiate how their quoted amount of Tshs. 48,000,000/= would be sufficient to execute the contract without jeopardizing the quality of the works. However, the Appellant failed to demonstrate that they did not under-price and therefore in the absence of any additional evidence to the contrary, the Authority accepts the Respondent's contention that the Appellant had under-priced on this particular item.

The Authority's conclusion on this point is that, the Appellant had under-priced on travelling expenses and per diem.

(ii) Failure to price costs associated with laboratory tests and subcontract work:

In their submissions the Respondent stated that, the consultants were required to include costs associated with laboratory tests and subcontracting which could be obtained through soliciting quotations from experts or including costs of doing such works. Further that, the Appellant's Technical Proposal contained tasks which fall under this category, to wit, Topographical Survey and Soil/Geotechnical Survey but did not include them in their Financial Proposal. Such an omission meant had they won the tender, costs relating to such tasks would have to be borne by the Respondent. The Respondent submitted that, had the Appellant faced problems in understanding the RFP they should have sought for clarification prior to the expiry of the tender submission deadline.

In reply thereof, the Appellant conceded that they did not cost for laboratory tests and subcontracts because such a

requirement was not stated anywhere in the RFP. They further submitted that, they did not do so as laboratory tests and subcontracting fall under the category of **“design and build contracts”** which the disputed tender is not.

Having summarised the submissions by parties on this particular point, the Authority agrees with the Respondent that, this was a requirement under FORM 5B4 titled “Breakdown of Reimbursable Expenses”. It goes without saying therefore that, the Appellant did not comply with this requirement.

(iii) Providing unrealistic time for engagement of Resident Engineer in the project:

In its endeavour to ascertain the validity of this particular reason for disqualifying the Appellant, the Authority revisited the Respondent’s submissions thereof which are as summarized herein below:

- The nature of the work on site is expected to take between 18 and 24 months, which means, a Resident Engineer should be on site on a daily basis during the entire construction period. The number of key staff input in the project should have been not less than 18 man months.

- The Appellant allocated only 13.25 man months for the entire work, including 1.19 man months for the Resident Engineer.

- The fact that the Consultant's team estimated that the project execution would take 24 months, and knowing that they had to provide a full time Resident Engineer for the entire duration of the project execution suffices to show that the 12 staff months for all staff are not adequate. Furthermore, the 0.2 man months allocated by the Appellant to the Resident Engineer, is not by any standard realistic.

In reply thereof, the Appellant submitted that the time provided for the Resident Engineer was in accordance with estimated time for the project delivery during post

contract period. This is evidenced by the fact that, their methodology scored high, to wit, 81%.

In ascertaining the validity of the arguments by parties on this point, the Authority revisited the Respondent's oral submission during the hearing and observes that, the estimated number of staff months of 12 appearing on page 24 of the RFP is quite misleading. However, the Authority observes that, page 24 of the RFP indicates that the completion period is 36 months and therefore the Appellant should have sought for clarification had they detected the said contradiction. Furthermore, the Authority has already observed the inconsistencies pertaining to the man months allocated to the Resident Engineer.

(iv) Failure to price for the provision of Environmental Engineer:

With regard to this point, the Appellant conceded that their tender did not provide for the Environmental Engineer because it was optional. Since this inclusion of

the said staff has already been discussed, the Authority agrees with the Respondent that it was a serious omission. However, the Authority considered that Appellant's reasoning that, the Evaluators should have priced for the said staff in accordance with Clause 38.2.as quoted herein below:

“Financial Proposals will be reviewed to ensure these are complete (i.e. whether Consultants have costed all items of the corresponding Technical Proposal; if not, the Procuring Entity will cost them and add their cost to the offered price) and correct any computational errors. The evaluation shall exclude all local taxes, duties and other charges imposed under the Applicable Law. (Emphasis added)”

The Authority does not accept the Appellant's argument as the said clause does not have a backing in the Act. The Authority is of the considered view that had the law intended omissions relating to rates for reimbursable expenses to be curable; it would have been expressly

provided for. The Authority observes that, such omissions are not curable as Regulation 66(8) of GN. No. 98/2005 prohibits negotiation on such matters in the following words:

“Proposed unit rate for staff-months and reimbursable shall not be negotiated since these have already been a factor of selection in the cost of the proposal, unless there are exceptional reasons.” (Emphasis added)

(v) Under-estimating total man months provided for the project:

The Respondent’s submissions on this point were that, the Appellant had allocated only 13.25 man months for the entire work which is unrealistic. Further, this anomaly coupled with the deficit of Tshs. 54.1 million for reimbursable expenses, will cause a lot of operational problems during contract execution as the consultant will not be able to meet the minimum input requirements of

the project. Hence, the quality of the project could be compromised.

The Appellant's replies on this point were that, they did not underestimate the total man months provided for the project as Clause 15.1 of the RFP as modified in the Proposal Data Sheet indicates the estimated number of staff months to be 12 which was duly observed by the Appellant. The Appellant further stated that, being experienced architects, they are capable of executing the project within the proposed professional staff months indicated in their tender. In addition they stated that, if 12 months is an underestimation then the basis for the said underestimation is the Proposal Data Sheet and not the Appellant.

The Authority observes that, on the one hand the Appellant states that the staff months allocated in their tender is sufficient while on the other they attributes their under estimation to the Proposal Data Sheet. The Authority is of the view that, the Appellant's replies should have proved the Respondent wrong by showing how the

allocated man months were adequate to execute the contract. The Technical Proposal especially under SECTION 4.2 on Summary of Activities indicates a total duration of 302 man days for Pre-contract activities and 31.5 months for Post-contract activities; 24 months being for operations at site, that is, activities related to construction of the works. Furthermore, the Activity Work Schedule clearly indicates that design work will take 12 months. This means that, in spite of the Appellant's contention that the Respondent had underestimated the professional staff months, the Appellant clearly understood what was actually required.

Furthermore, since the issue of the estimated number of staff months has already been analysed under item (iii) above, the Authority reiterates that the Appellant should have sought for clarification from the Respondent prior to submitting their tender.

In view of the foregoing, the Authority also considered the disqualification by the Respondent of the other three consultants, namely, M/s Y & P Architect (T) Ltd, M/s qD

Consult (T) Ltd and M/s Cons Africa Ltd and observes as follows:

- M/s Cons Africa Ltd did not qualify for the opening of Financial Proposals as their Technical Proposal did not respond to the requirements of the RFP, as they did not price for laboratory tests, subcontracts and some key staff, e.g. Environmental Engineer, Interior Designer and Resident Engineer which were major and incurable omissions.
- M/s qD Consult (T) Ltd was properly disqualified for failure to price for the Resident Engineer and the Interior Designer.
- M/s Y & P Architect (T) Ltd was equally disqualified for under-pricing for reimbursable expenses as they allocated Tshs. 18,000,000/= for per diems (which was much lower than the Appellants Tshs. 24,000,000/=) and Tshs. 37,200,000/= for travelling expenses.

In view of the foregoing, the Authority is of the considered opinion that, the disqualification of the four consultants, the Appellant inclusive, was justified.

The Authority observes that, despite the shortfalls pointed out in the evaluation of the Financial Proposals, the proposal submitted by the Successful Consultant was the only one which met the requirements of the RFP hence qualified for award.

The Authority's conclusion in respect of the first issue is that, the Appellant was fairly disqualified.

2.0 Whether the award to the Successful Consultant was proper at law

In view of the findings and conclusion made on the first issue, the Authority's conclusion on the second issue is that, the award of the tender to the Successful Consultant, namely, M/s HabConsult Ltd was proper at law.

3.0 To what reliefs, if any, is the Appellant entitled to

In resolving this issue, the Authority took cognizance of its conclusion on the first issue that the Appellant was fairly disqualified and accordingly rejects in their totality the Appellant's prayers.

Other matters that caught the Authority's attention

In the course of handling this Appeal the Authority discovered the following matters which are worth mentioning:

- a) The Evaluators did not treat the tenderers fairly during the evaluation process. This is evidenced in the manner in which scores were awarded to the tenderers. For example in awarding scores on the Item "**Qualifications of experts**" - M/s Cons Africa Ltd who did not include in their proposal three mandatory experts scored 29 points while M/s Mekon Consult who did not include only one expert scored 28 points. This

was a breach of Section 43 of the Act which requires that procuring entities to give equal opportunity to all tenderers and, treating them fairly.

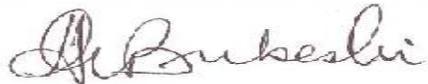
- b) The Personal Covenants filled by the members of the evaluation Team did not indicate the names of the tenderers to be evaluated and instead indicated the title of the Tender. Hence the Authority could not establish how the members of the evaluation team ascertained that they did not have conflict of interest with the tenderers.

Having considered all facts and evidence, the Authority concludes that, the Appellant was fairly disqualified and the award of the tender to M/s HabConsult Ltd was proper at law.

On the basis of the aforesaid findings, the Authority rejects the Appeal and orders the Respondent to compensate the Appellant a sum of Tshs. 500,000/= being costs for the adjournment of the hearing without notice on 6th May, 2011, on the request of the Respondent.

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

Decision delivered in the presence of the Appellant and the Respondent this 18th day of May, 2011.

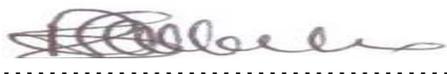


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JUDGE (rtd) A. BUBESHI
CHAIRPERSON

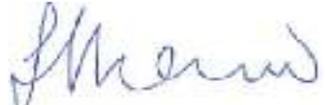
MEMBERS:

1. ENG. K.M. MSITA.....

2. MRS. N.S.N. INYANGETE.....

3. MRS. R.A. LULABUKA.....

4. MS. E. J. MANYESHA.....

5. ENG. F. T. MARMO.....

6. MR. H. S. MADOFFE.....