

IN THE PUBLIC PROCUREMENT APPEALS AUTHORITY

APPEAL CASE NO. 47 OF 2022-23

BETWEEN

M/S Y & P ARCHITECTS (T) LTD.....APPELLANT

AND

TANZANIA ELECTRIC SUPPLY COMPANY LTD.....RESPONDENT

DECISION

CORAM

- | | |
|-------------------------------------|---------------|
| 1. Hon. Justice (rtd) Sauda Mjasiri | - Chairperson |
| 2. Adv. Rosan Mbwambo | - Member |
| 3. Eng. Stephen Makigo | - Member |
| 4. Mr. James Sando | - Secretary |

SECRETARIAT

- | | |
|------------------------|------------------------------|
| 1. Ms. Florida Mapunda | - Deputy Executive Secretary |
| 2. Ms. Violet Limilabo | - Senior Legal Officer |

FOR THE APPELLANT

- | | |
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| 1. Mr. Jeremia Mtobesya | - Advocate for the Appellant |
| 2. Mr. Yassin Mringo | - Managing Director |

FOR THE RESPONDENT

- | | |
|-----------------------|-----------------------|
| 1. Mr. Mkumbo Elias | - State Attorney |
| 2. Mr. Mwiga Kasalama | - Procurement Officer |



This Appeal was lodged by **M/S Y & P Architects (T) Ltd** (hereinafter referred to as "**the Appellant**") against **Tanzania Electric Supply Company Ltd** commonly known by its acronym as "**TANESCO**" (hereinafter referred to as "**the Respondent**"). The Appeal is in respect of Tender No. PA/001/2022-23/HQ/C/026 for the Provision of Consultancy Services for Design, Contract Management and Supervision of Implementation of Julius Nyerere Hydropower Project (JNHPP) Corporate Social Responsibility (CSR) Projects (hereinafter referred to as "**the Tender**").

According to the documents submitted to the Public Procurement Appeals Authority (hereinafter referred to as "**the Appeals Authority**") the background of this Appeal may be summarized as follows: -

This Tender was conducted through Restrictive Tendering Method as specified in the Public Procurement Act, No. 7 of 2011 as amended (hereinafter referred to as "**the Act**") and the Public Procurement Regulations, GN. No. 446 of 2013 as amended (hereinafter referred as "**the Regulations**").

On 22nd September 2022, the Respondent through the Tanzania National electronic Procurement System (TANePS) invited tenderers to participate in the Tender. The invited tenderers were issued with the Request For Proposal (RFP). The deadline for submission of the technical and financial proposals was on 27th October 2022. Three tenderers namely; M/S Y & P Architects (T) Ltd, M/S Epitome Architects Ltd and M/S IPA Architects Ltd submitted their technical and financial proposals as required.



The technical proposals were then subjected to evaluation which was conducted into two stages namely; preliminary and detailed technical evaluation. The results of the evaluation process indicated that M/S Epitome Architects Ltd scored 66.79 below the minimum of 75 passing point, whereas M/S Y & P Architects (T) Ltd scored 83.77 and M/S IPA Architects Ltd scored 75.58. The evaluation committee recommended the two firms to be invited for the opening of the financial proposals. The recommendations were then tabled before the Tender Board at its meeting held on 24th November 2022 and were approved accordingly.

On 24th November 2022, the Respondent informed the Appellant and M/S IPA Architects Ltd the results of the evaluation of the technical proposals. The two tenderers were further notified of the date for the opening of the financial proposals. The record of Appeal indicates that the financial proposals were opened on 29th December 2022 and were subjected to evaluation. After completion of the evaluation process, the Evaluation Committee recommended award of the Tender to the Appellant subject to negotiations. The Tender Board at its meeting held on 11th January 2023, approved the recommendations as were tabled.

On 13th January 2023, the Respondent invited the Appellant to attend the negotiation meeting scheduled on 17th January 2023. Negotiations took place on 17th, 26th and 27th January 2023. Minutes of the negotiations indicate that the parties did not reach a consensus on three items namely, payment schedule, reduction of scope of work and overhead costs. The chairperson of the negotiation team informed the parties that the pending



issues would be discussed internally within the Respondent's office and the Appellant would be notified accordingly.

On 27th February 2023, the Respondent requested tenderers to extend the bid validity period from 27th February 2023 to 30th April 2023, to allow it to finalize the remaining part of the procurement process. Furthermore, on 25th April 2023, the Respondent requested another extension of the bid validity period from 30th April 2023 to 20th June 2023. The third extension was requested by a letter dated 20th June 2023, which extended the bid validity period from 20th June 2023 to 31st August 2023.

On 8th March 2023, the Appellant wrote a letter to the Respondent requesting to be given feedback on the pending issues raised during the negotiation meeting. On 13th March 2023, the Respondent informed the Appellant that it was still discussing the issues internally and once they are finalized the Appellant would be invited for further negotiations.

On 29th May 2023, the Appellant applied for administrative review to the Respondent challenging the delay in the finalization of the negotiations. On 9th June 2023, the Respondent informed the Appellant that it was still finalizing internal formalities before inviting it for further negotiations. Aggrieved further, on 16th June 2023, the Appellant filed this Appeal to the Appeals Authority.

When the matter was called on for hearing the following issues were framed: -

1.0 Whether the negotiation process between the parties was conducted in accordance with the law; and



2.0 What reliefs, if any, are the parties entitled to?

SUBMISSIONS BY THE APPELLANT

In this Appeal the Appellant was represented by Mr. Jeremia Mtobesya, learned advocate and Mr. Yassin Mringo, the Managing Director from the Appellant's office. Mr. Jeremia Mtobesya led the Appellant's submissions and started by adopting the grounds of Appeal as contained in the Statement of Appeal.

On the first issue the learned counsel submitted that the Appellant was among the tenderers which participated in this Tender. After completion of the evaluation and other internal processes, its tender was found substantially responsive and was therefore invited for negotiations. Negotiations took place on 17th, 26th and 27th January 2023. According to the Appellant, an agreement was reached on all items in the agenda save for the reduction of the scope of work. The Respondent promised to deliberate on the pending matter internally and to later invite the Appellant for further negotiations.

The learned counsel submitted that, having not received any correspondence from the Respondent, on 8th March 2023 the Appellant wrote a letter to the Respondent inquiring on the status of the pending issues raised during negotiations. On 13th March 2023, the Respondent responded by indicating that it was still working on the matter. Dissatisfied with the Respondent's response as three months had lapsed and the matter was yet to be finalized, on 29th May 2023 the Appellant applied for administrative review to the Respondent pursuant to Sections 95 and 96 of



the Act. On 9th June 2023, the Respondent issued its response with respect to the Appellant's complaint by indicating that it was still working on the pending issue and would invite the Appellant for further negotiations.

The learned counsel contended that, the Respondent's conduct on the negotiation process leaves the Appellant in a dilemma concerning the implementation of the project and its aftermath. This is due to the fact that by the time this Appeal was lodged five months had lapsed with no progress on the pending issues for negotiations. According to the Appellant, the Respondent ought to have made a decision on the raised issues during negotiations as the same were within its mandate. The learned counsel added that, the Respondent was not expected to involve other government institutions on finalizing negotiations since the Tender was floated by it. Thus, it ought to have finalized the matter itself. The Appellant expounded that according to Section 41 of the Act, procurement functions are to be conducted independently without interference. Consequently, the Respondent was not expected to have the negotiations deliberated by inter-ministerial departments.

The learned counsel submitted further that, the Respondent's act of delaying to communicate the decision on the raised issues during negotiations contravenes Section 4A(2) of the Act which requires the procurement processes to be conducted in a manner that would maximize transparency and efficiency.

The learned counsel also submitted that, the Tender under appeal is the Corporate Social Responsibility (CSR) project under the Julius Nyerere Hydropower Project. Therefore, it was expected that since the main project



has a time limit, the CSR project should also have a time limit. However, the Respondent's conduct does not reflect the urgency on the implementation of the CSR project. Furthermore, given the delay, it appears that the negotiation process would be conducted for an unlimited period of time, thus derailing the purpose of the project.

In relation to the reduction of the scope of work, the learned counsel submitted that, during negotiations the Respondent proposed reduction of the scope of work by 90%. The Appellant challenged the said reduction of the scope work by asking to be informed the causes of reduction, who would be executing the remaining works and the legality of the reduction by 90%. According to the Counsel for the Appellant the reduction contravenes the requirements of Regulation 308(4) of the Regulations. The learned counsel elaborated further that Section 76(2) of the Act, Regulations 225(2)(a) and (b) and 308(4) of the Regulations read together with Clause 18.2 of the Negotiations Guidelines, strictly prohibit any negotiations that would alter terms of reference specified in the Tender Document.

The learned counsel submitted further that, despite indicating that the Respondent's act of reducing the scope of work contravenes the law, the Appellant does not expect that the Respondent would change its position on this regard. The Appellant's contentions were based on Item 4.4 of the minutes of negotiations which indicates clearly that the Respondent had already made a decision on the reduction of the scope of work. In addition, the Appellant submitted that since the CSR project depends on the fund from the Julius Nyerere Hydropower Project, the Respondent had not

indicated if the funds earmarked for CSR project had been reduced following the reduction of the scope of work.

The learned counsel contended further that, negotiations are to be conducted in accordance with Regulations 225 and 227 of the Regulations. The referred provisions require the agenda for negotiations to be recommended by the evaluation committee and approved by the Tender Board. However, as per the Respondent's conduct on the disputed negotiation process, the Appellant doubts if reduction of the scope of work was party of the agenda approved by the Tender Board for negotiations. The Appellant urges the Appeals Authority to consider if the negotiated agenda was recommended by the evaluation committee and approved by the Tender Board.

Finally, the Appellant prayed for the following orders:-

- i. The Appeals Authority to warn the Respondent from doing things discretionary, contrary to the requirements of the law;
- ii. The Appeals Authority to order the Respondent to pay costs for the additional costs of security incurred in the event of failure to award the Tender timely;
- iii. Costs of the Appeal as per the following breakdown:-
 - Appeal filing fees TZS 300,000/-
 - Legal fees TZS 6,000,000/-
 - Return transport costs from Dar es Salaam to Dodoma and the associated costs to the tune of TZS 2,000,000/-



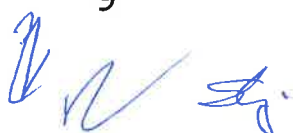
- iv. Any other order the Appeals Authority may deem just and fit to grant.

REPLY BY THE RESPONDENT

The Respondent's submissions were made by Mr. Mkumbo Elias, learned State Attorney from the Respondent's Office. He commenced his submissions by stating that, the Respondent intends to use the funds derived from Julius Nyerere Hydro Power Project to construct four colleges namely; ICT College in Kigoma, Electricity College in Lindi and Health colleges in Dodoma and Tanga Regions.

The learned State Attorney elaborated that, the Respondent through restricted tendering method invited three tenderers, the Appellant inclusive, to submit their tenders. The submitted tenders were subjected to evaluation and the Appellant's tender was found to be substantially responsive. The Appellant was then invited for negotiations which took place on 17th, 26th and 27th January 2023. The Respondent stated that during negotiations some of the issues were not concluded and therefore it was agreed that the pending issues would be discussed internally. Then the Appellant would be invited for further negotiations. Thus, negotiations were not completed as contended by the Appellant.

The learned State Attorney submitted that this Tender is about one of the strategic projects that involve different ministerial bodies (secretariat team of Julius Nyerere Hydro Power Project). The user department and the secretariat team of Julius Nyerere Hydro Power Project were working on the issues raised in relation to this Tender. Thus, once finalized, the



position would be communicated to the negotiation team to finalize the negotiation process.

The learned State Attorney contended that the Respondent never delayed the Tender process as alleged by the Appellant; instead, it was still waiting for the responses from the respective user department for it to finalize the remaining part of the negotiations. Furthermore, the Respondent stated that the Appellant was well informed of the ongoing process through letters dated 13th March 2023 and 9th June 2023 respectively. In addition to that, the Tender is still valid as the tender validity period was extended to 31st August 2023. Thus, there is sufficient time for finalization of the matter.

Regarding the reduction of scope of work, the learned counsel submitted that, there is no conclusive decision on this point. The Respondent is still working on it and therefore it cannot be termed to have been concluded. Thus, the Respondent's position on this point would be provided during finalization of negotiations.

On costs incurred on the tender security resulting from the extension of the tender validity period, the Respondent submitted that since the tender security for this Tender was a Proposal Securing Declaration, there were no costs incurred in that regard. Thus, the Appellant's assertion on this point should be disregarded.

In finalizing his submissions, the learned State Attorney submitted that in conducting this Tender process, the Respondent adhered to the requirements of the Act and its Regulations.

Finally, the Respondent prayed that the Appellant's Appeal be dismissed in its entirety and each party should bear its own costs.

ANALYSIS BY THE APPEALS AUTHORITY

1.0 Whether the negotiation process between the parties was conducted in accordance with the law

In resolving this issue, the Appeals Authority considered the contentious arguments by the parties in that, the Appellant alleged that the Respondent contravened the law for dilly dallying and delaying to finalize the negotiation process. Furthermore, the negotiations included the agenda on the reduction of the scope of work while the same is prohibited under the law. On the other hand, the Respondent denied to have delayed to finalize the negotiation process. The Respondent indicated that following the Appellant's issues raised during negotiations; internal consultations were to be carried out with other government institutions. Once the internal consultations are finalized the negotiation process would be completed. Since the negotiations are yet to be completed, the scope of work has not been reduced as alleged by the Appellant.

In ascertaining the validity of the parties' contentious arguments, the Appeals Authority revisited Regulations 225(1),(4)(a); 226(6) and 227(1) of the Regulations which read as follows: -

"225(1) Negotiations may be undertaken with the lowest evaluated tenderer relating to..."

*225(4) Negotiations with a tenderer **are not permitted until after the tender board has approved the evaluation committee's recommendations-***

(a) of the lowest evaluated tenderer in case of goods, works or services, or highest evaluated tenderer in case of revenue collection, and the need to hold negotiations.

*226(6) **The negotiation team shall prepare a negotiations plan which shall specify the issues to be negotiated as specified in the evaluation report** and the objectives to be achieved and whenever possible, quantify the objectives and set maximum and minimum negotiating parameters.*

*227(1) **The tender board shall approve the negotiations plan prior to any negotiations taking place'**.*

(Emphasis supplied)

The above quoted provisions indicate clearly that negotiations are required to be conducted with the lowest evaluated tenderer after the Tender Board has approved the evaluation committee's recommendations. In addition, the negotiations plan should specify issues to be negotiated as specified in the evaluation report and the same have to be approved by the Tender Board.

According to the record of Appeal, the Appellant was among the tenderers which participated in the tender. After the evaluation process, the

Appellant's tender was found to be substantially responsive and recommended to be invited for negotiations. In addition, the evaluation committee proposed seven issues for negotiations. These were: -

- (a) *"Submission of Anti-bribery Policy/Code of Conduct and compliance programme of his company and sub-consultant;*
- (b) *Confirmation on the availability of proposed qualified Key professional staff;*
- (c) *Confirmation on understanding of Terms of Reference and scope of work;*
- (d) *Consultant's obligations on taxes (direct and indirect and associated taxes);*
- (e) *Confirmation on understanding consultant's methodology;*
- (f) *Discussion on possibilities of removing number of additional staff which have been added by consultant in the technical experts since they were not part of the RFP; and*
- (g) *Discussion on possibilities of reduction of overheads costs submitted by the consultant".*

The Appeals Authority revisited the record of Appeal and observed that the evaluation committee's recommendations for award of the Tender to the Appellant and agenda for negotiations were approved by the Tender Board at its meeting held on 11th January 2023. The matter was tabled before the Tender Board through Paper No. SMP/MPP/PMU/23/31/007 dated 10th January 2023.

The Appeals Authority observed that on 13th January 2023 the Respondent invited the Appellant to attend negotiations meeting scheduled to take

place on 17th January 2023. The said invitation letter contained eight agenda items for negotiations. Having reviewed the agenda items the Appeals Authority observed that there was one new item relating to "*reduction of the scope of work for the consultancy assignment*" that was added which was not among the negotiations issues proposed by the evaluation committee and approved by the Tender Board. The Appeals Authority noted further that the eight agenda items were also included in Item 3.0 of the Minutes of negotiations. The Minutes indicates further that the agenda item on the reduction of the scope of work was deliberated under Item 4.4 of the said minutes; however, the same was not concluded as further consultation on the matter was to be done.

Having related the above quoted provisions to the facts of this Appeal, the Appeals Authority is of the view that since the Appellant was found to be substantially responsive to the Tender, it was proper for it to be invited for negotiations after approval by the Tender Board. The Appeals Authority is of the further view that, since the approved issues for negotiations by the Tender Board were those recommended by the evaluation committee, we find the Respondent to have complied with the law at this stage.

The Appeals Authority observed further that the Respondent when issuing an invitation for negotiations to the Appellant, it included a new agenda item that was neither recommended by the evaluation committee nor approved by the Tender Board. The record of Appeal indicates that the new agenda item was deliberated during negotiations. However, there was no conclusion reached. During the hearing the Respondent submitted that in view of the Appellant's concern on the legality of the new agenda item



(reduction of the scope work), the present position is, the consultations on this agenda item are still ongoing and no conclusion has been reached. Having observed that negotiations were not concluded on the new agenda item, the Appeals Authority is unable at this juncture to conclude that negotiations was based on agenda item that was not approved by the Tender Board.

The Appeals Authority is also unable to ascertain the validity of the Appellant's contention that the Respondent has reduced the scope of work by 90% since negotiations on this point are yet to be finalized.

The Appeals Authority further considered the Appellant's contention that the Respondent erred in law for failure to finalize the negotiations process and observed that the Act and Regulations are silent on the time limit for completion of the negotiation process. Thus, the Respondent cannot be faulted for having conducted negotiations for an allegedly long period. Neither the Procurement Act nor its Regulations provide a limitation period for the negotiation process. The Appeals Authority is of the considered view that there is a lacuna in the law which could result in everlasting negotiations, hence delaying the implementation of the project. There is a need for a review of the Act and its Regulations to address this anomaly in the law.

Given the above observations, the Appeals Authority finds that the Appeal has been brought pre-maturely prior to the conclusion of the negotiations.

2.0 What reliefs, if any, are the parties entitled to?

Taking cognizance of the above findings that the negotiations between the parties were not concluded, the Appeals Authority is not in a position to grant any relief prayed by the Appellant. Therefore, the Appeal is hereby dismissed.

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 this 20th day of July 2023.

HON. JUSTICE (rtd) SAUDA MJASIRI



.....
CHAIRPERSON

MEMBERS: -

1. ADV. ROSAN MBWAMBO.....



2. ENG. STEPHEN MAKIGO.....

