

IN THE PUBLIC PROCUREMENT APPEALS AUTHORITY

APPEAL CASE NO. 42 OF 2023 - 2024

BETWEEN

M/S MOON ENGINEERING CO. LTD.....APPELLANT

AND

NATIONAL IDENTIFICATION AUTHORITY.....RESPONDENT

RULING

CORAM

- | | |
|-------------------------------------|---------------|
| 1. Hon. Justice (Rtd) Sauda Mjasiri | - Chairperson |
| 2. Mr. Rhoben Nkori | - Member |
| 3. Mr. Pius Mponzi | - Member |
| 4. Mr. James Sando | - Secretary |

SECRETARIAT

- | | |
|-------------------------|------------------------------|
| 1. Ms. Florida Mapunda | - Deputy Executive Secretary |
| 2. Ms. Agnes Sayi | - Senior Legal Officer |
| 3. Ms. Violet Limilabo | - Senior Legal Officer |
| 4. Mr. Venance Mkonongo | - Legal Officer |

FOR THE APPELLANT

- | | |
|-----------------------|----------------------------|
| 1. Mr. Sosten Mbedule | - Advocate, HESL Attorneys |
| 2. Mr. Shin Tae Hyun | - Executive Director |



FOR THE RESPONDENT

1. Mr. Ayoub Sanga - State Attorney, Office of the Solicitor General
2. Mr. Boaz Msofe - State Attorney, Office of the Solicitor General
3. Mr. Stephen Kimaro - State Attorney, Office of the Solicitor General
4. Mr. Melamari Nagai - Ag: Director of Legal Services
5. Ms. Judith Komba - Manager Litigation
6. Ms. Jacqueline Mosha - Senior Legal Officer
7. Mr. Abdalla Omar - Director, Zanzibar Coordination Office
8. Mr. Edson Nguyai - Director of Identity Management
9. Dr. Geofrey Mbatta - Chairman – 1st Evaluation Committee
10. Mr. Sharrif Fadhili - Chief Procurement Officer
11. Ms. Irene Ndesanjo - Procurement Officer
12. Ms. Witness Temu - Procurement Officer
13. Mr. Herman Mhambo - Estate Officer

This Appeal was lodged by **M/S Moon Engineering Co. Ltd** (hereinafter referred to as "**the Appellant**") against **National Identification Authority**, commonly known by its acronym as "**NIDA**" (hereinafter referred to as "**the Respondent**"). The Appeal is in respect of the RFP No. AE/061/2022-2023/HQ/C/04 for Consulting Services for National ID System Expansion Project (Phase II) in Tanzania (Design and Supervision of Construction of NIDA HQ, Warehousing and 31 NIDA District Offices) (hereinafter referred to as "**the Tender**").

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



The Tender was conducted through Restricted Competitive Tendering method as specified in the Guidelines for the Employment of Consultants under the EDCF Loan.

This Tender process was preceded with a pre-qualification process which shortlisted three consultants as follows: -

- (i) The Appellant in a Joint Venture with M/S Heerim Architects and planners Co. Ltd and M/S Sangji Environment and Architecture Inc;
- (ii) M/S Daeyeong Ubitec Co. Limited in a Joint Venture with M/S Sunjin Engineering and Architecture Co. Ltd and M/S ITM Corporation Co. Ltd; and
- (iii) M/S Korea Information Systems Consulting in a Joint Venture with M/S Yooil Engineering and Architects Co. Ltd.

On 29th May 2023, the Respondent invited the shortlisted firms to participate in the Tender by issuing them with a Request For Proposal (RFP) document. The deadline for submission of proposals was on 3rd July 2023. Prior to the deadline for submission of proposals, the Appellant requested the approval of the Respondent to associate with M/S CUBOX Co. Ltd (CUBOX) which was not among the Appellant's JV partners in the pre-qualification process. The Appellant's request was granted by the Respondent through a letter dated 28th June 2023.

By the deadline for submission of proposals, all the three invited firms responded to the invitation by submitting their proposals. The Appellant submitted its proposal in a Joint Venture (JV) with three firms including CUBOX. The received proposals were then subjected to evaluation. After completion of the evaluation process and all internal approvals, the



Respondent issued the Notice of Intention to award the Tender on 6th May 2024. The Notice stated that the Respondent intends to award the Tender to M/S Daeyeong Ubitec Co. Limited JV (the successful tenderer) for having scored 97.9% in the overall technical scores. The Notice also informed the Appellant that its proposal was disqualified for its JV partner, CUBOX recording a financial deficit for three consecutive years contrary to the requirement of Clause 12.1(a) of the Instruction to Consultants and Data Sheet (hereinafter referred to as "**the ITC**").

On 8th May 2024, the Appellant submitted the request for debriefing to the Respondent. In the said request for debriefing, the Appellant challenged the award proposed to the successful tenderer due to the fact that its proposed Project Manager and Application Expert lacked the requisite qualification for this Tender. On 15th May 2024, the Respondent issued its decision which maintained its earlier position. Aggrieved by the Respondent's decision, the Appellant filed this Appeal before the Appeals Authority on 23rd May 2024.

The Appellant's Appeal centered on the ground that it was unfairly disqualified from the Tender process as its JV partner, CUBOX, had a record of financial deficit for three consecutive years. The Appellant contended that much as it concedes that CUBOX had a record of financial deficit for three consecutive years, it argued that the Respondent ought to have requested the Appellant to submit credit rating certificates as required by Clause 12.1(a) of the ITC. The referred clause provides for an additional qualification criterion for a tenderer who had a financial deficit for consecutive three years. The Appellant also challenged the award proposed to the successful tenderer on the basis that its proposed Project



Manager and the Application Expert lacked the requisite experience. The Appellant alleged that the proposed successful tenderer submitted false information during the Tender process and therefore, its proposal ought to have been disqualified.

Upon receipt of this Appeal, the Appeals Authority notified the Respondent about its existence and required it to submit a Statement of Reply. The Respondent submitted the Statement of Reply as required. It later filed a notice of Preliminary Objection (PO) on a point of law to wit; *"This Appeal is untenable in law as this Honorable Appeals Authority has no jurisdiction to entertain the matter"*.

When the Appeals Authority called on the matter for hearing and during the framing up of issues, parties were informed that the Respondent raised a point of law that requires determination. This point of law was about the jurisdiction of the Appeals Authority to determine this Appeal. Based on this observation, the following issues were framed: -

- 1.0 Whether the Appeals Authority has jurisdiction to entertain the Appeal;**
- 2.0 Whether the disqualification of the Appellant's tender is justified; and**
- 3.0 What reliefs, if any, are the parties entitled to?**

Having framed the issues, the Appeals Authority required the parties to address the first issue on the jurisdiction of the Appeals Authority to determine this Appeal before embarking on the substantive grounds of Appeal.

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SUBMISSIONS BY THE RESPONDENT ON THE PO

The Respondent's submissions were made by Mr. Ayoub Sanga, the learned State Attorney from the Office of the Solicitor General. He commenced by stating that every quasi-judicial body obtains its powers and mandate from the law which establishes its existence. The Appeals Authority is established by the Public Procurement Act, No. 7 of 2011 as amended (hereinafter referred to as "**the Act**"). As per the establishing law, the Appeals Authority is mandated to determine disputes arising out of public procurement processes. Specifically, Sections 96 and 97 of the Act require the Appeals Authority to determine Appeals arising out of the decisions issued by the accounting officers.

The learned State Attorney contended that, as per the record of this Appeal, the Respondent issued a decision with respect to the Appellant's request for debriefing on 15th May 2024. However, the issued decision did not fall within the ambit of Section 96 of the Act. Therefore, it was incapable of being challenged by way of an Appeal before the Appeals Authority. The learned State Attorney asserted that the tender under Appeal was conducted in accordance with the Guidelines for Employment of Consultants under the EDCF Loan. According to him, the referred guidelines were applied in this Tender because of the Loan Agreement that was entered between the Government of the United Republic of Tanzania and the Export-Import Bank of Korea on behalf of the Government of the Republic of Korea.

The learned State Attorney submitted that Article IV of the Loan Agreement specified clearly that all procurements arising out of the proceeds of the loan should be conducted in accordance with schedule 5



(procurement of goods) and Schedule 6 (employment of consultants) attached to the Loan Agreement. He contended further that since the Tender under Appeal relates to procurement of consultancy services, the applicable guidelines were those for Employment of Consultants under the EDCF Loan. The learned State Attorney contended that the applicability of the referred guidelines to this Tender was clearly specified under Paragraph 2 – Letter of Invitation in the RFP Document.

The learned State Attorney emphasized that the applicability of the Guidelines for Employment of Consultants under the EDCF Loan in this Tender was also specified under Paragraphs 2 and 4 of Schedule 6 to the Loan Agreement. He added further that Paragraph 3 of the said Schedule 6 specified that consultants who were eligible to participate in this Tender were from the Republic of Korea or juridical person incorporated or registered therein.

The learned State Attorney contended that Section 3.08 of the Guidelines for Employment of Consultants under the EDCF Loan provides guidance on the debriefing procedures to be followed by a tenderer who was dissatisfied with the way the tender process was conducted. In addition, Clauses 29 and 30 of the ITC also clarify the procedures to be followed by a tenderer who is dissatisfied with the notification of intention to award issued in this Tender.

The learned counsel submitted that it is clear from the submissions made that the applicable guidelines for this Tender are the Guidelines for Employment of Consultants under the EDCF Loan.

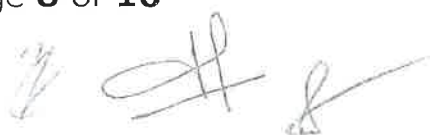
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Section 4 of the Act requires that if there is a specific requirement on the applicability of the financier's guidelines in the procurement arising out of the loan or grants proceeds, the requirements of the financier's should prevail over the Act. Thus, this is the case in this Tender, the learned State Attorney contended.

The learned State Attorney stated that after receipt of the notification of intention to award, the Appellant timely sought for debriefing to the Respondent in line with Clause 29 of the ITC. He asserted that the Appellant's act of seeking debriefing to the Respondent and not filing an application for administrative review implied that the Appellant was aware that the applicable guidelines for this Tender were the Guidelines for Employment of Consultants under the EDCF Loan and not the Act and its Regulations. The learned State Attorney elaborated further that, since the Appellant timely submitted the request for debriefing, the Respondent issued its decision as required by Clauses 29 and 30 of the ITC. Therefore, the Appellant should not to have filed this Appeal.

In support of his argument, the learned State Attorney cited PPAA Appeal Case No. 22 of 2023-24 between ***M/S Ourmust Group Kingshurst Consultants JV versus Tanzania Petroleum Development Corporation***. In the referred Appeal, this Appeals Authority dismissed the Appeal for want of jurisdiction as the disputed tender was conducted under the World Bank's Procurement Policy of 2015.

The learned State Attorney also cited PPAA Appeal Case No. 10 of 2023-24 between ***M/S Sec More Investment Limited versus Dar es salaam***



Institute of Technology, Appeal Case No. 4 of 2021 -2022 between ***M/S Mekon Arch Consult Ltd versus Dar es Salaam Institute of Technology*** and Appeal Case No. 6 of 2023-24 between ***M/S China Electric Power Equipment and Technology Company Ltd versus Tanzania Electric Supply Company Ltd.*** The learned State Attorney stated that in all the above cited cases the Appeals Authority dismissed the appeals for lack of jurisdiction as the disputed tenders were conducted under the financiers' guidelines and not the Act and its regulations. Therefore, the Appeals Authority's jurisdiction was ousted by the applicability of the financiers' guidelines.

Based on the above submissions, the learned State Attorney prayed for the dismissal of the Appeal with costs.

REPLY BY THE APPELLANT ON THE PO

The Appellant's submissions were made by Mr. Sosten Mbedule, learned advocate. He commenced by stating that this Appeal emanated from the decision issued by the Respondent on 15th May 2024 to the Appellant's request for debriefing. The learned counsel stated that upon being aggrieved with its disqualification from the tender process and award proposed to the successful tenderer, the Appellant requested for debriefing to the Respondent in accordance with the RFP document. After receipt of the Appellant's request for debriefing, the Respondent issued its decision thereof as required.

The learned counsel contended that the RFP document was silent on procedures to be followed by a tenderer who is dissatisfied with the Respondent's decision on the debriefing. Thus, since the beneficiary of the



proceeds of the loan is the Government, the Appellant decided to invoke Section 88 of the Act which vests this Appeals Authority with jurisdiction to determine Appeals arising out of public procurement processes.

The learned counsel submitted further that the Appellant is aware of the requirements of Section 4 of the Act that once there is a financing agreement which requires its guidelines to be applied during the procurement process, the applicability of the Act and its Regulations ceases. However, since the RFP document was silent on the procedures to be followed after the debriefing, the Appellant filed this Appeal.

The learned counsel further distinguished all the cases cited by the Respondent in support of its submissions on the basis that the circumstances of the referred cases differ significantly with the facts of this Appeal. Therefore, the Appellant prayed that the PO be rejected and the Appeals Authority proceeds to determine the Appeal as it has jurisdiction to do so.

REJOINDER BY THE RESPONDENT

On its brief rejoinder, the learned State Attorney submitted that the Appellant has conceded that the RFP document provides guidance on procedures to be followed to resolve the dispute arising out of this Tender process. The learned State Attorney stated further that after the Appellant had observed that the RFP document was silent on procedures to be followed after the debriefing, it was required to seek guidance from the Respondent or financier on the required procedures. On the contrary, the Appellant directly filed this Appeal to the Appeals Authority which lacks jurisdiction to entertain the same, the learned State Attorney contended.

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Thus, the learned State Attorney reiterated his prayer that the Appeal be dismissed for want of jurisdiction of the Appeals Authority.

ANALYSIS BY THE APPEALS AUTHORITY

1.0 Whether the Appeals Authority has jurisdiction to entertain the Appeal

In resolving the contentious arguments by the parties on this issue, the Appeals Authority reviewed the RFP document. It observed that paragraph 1 of Section 1-Letter of Invitation states that the Government of the United Republic of Tanzania had received a loan from the resources of the Economic Development Cooperation Fund (EDCF) of the Republic of Korea in the amount of United State Dollars Seventy Million (US\$70,000,000.00) through the Export-Import Bank of Korea towards the cost of National ID System Expansion Project (Phase II).

The Appeals Authority reviewed the record of Appeal and observed that the Loan Agreement referred to hereinabove was one of the documents submitted by the Respondent in response to this Appeal. The said document verifies the contents of paragraph 1, Section 1 – Letter of Invitation in the RFP Document. The Appeals Authority noted further that Article I, Section 1.02 of the Loan Agreement recognizes the Respondent as the project executing agency for the loan. In addition, the Appeals Authority observed that Article IV of the Loan Agreement requires the procurement of goods and services that would be financed out of the proceeds of the loan to be conducted in accordance with schedule 5 (procurement of goods) and Schedule 6 (employment of consultants) attached to the Loan Agreement.



As the Tender under Appeal relates to employment of consultants, the Appeals Authority examined paragraph 2 of Schedule 6 – Employment of Consultants which reads as follows: -

"The selection and employment of consultants shall be subject to the provision of this schedule and the Bank's Guidelines for the Employment of Consultants under the EDCF Loan (hereinafter called the "Consultant Guidelines"), as amended from time to time, which have been furnished to the Borrower"

Emphasis supplied

The above quoted provision states firmly that the process of Selection and Employment of Consultants under the Loan Agreement must be conducted in accordance with the Bank's Guidelines for the Employment of Consultants under the EDCF Loan.

The Appeals Authority reviewed the Guidelines for Employment of Consultants under the EDCF Loan. It observed that Section 3.08 provides guidance on procedures to be followed by a tenderer who is dissatisfied with the Tender process conducted under these guidelines. Section 3.08 of the Guidelines for Employment of Consultants under the EDCF Loan reads as follows: -

"In the notification referred to in Section 3.07, the Borrower shall inform the shortlisted consultant that any consultant who wishes to ascertain the grounds on which its proposal was not selected, shall request an explanation from the Borrower. The Borrower shall promptly provide explanation as to why such proposal was not selected, either in writing

and/or in a debriefing meeting at the option of the consultant. The requesting consultant should bear all the costs of attending such a debriefing”.

(Emphasis supplied)

The record of this Appeal indicates that the Respondent adhered to Article IV of the Loan Agreement as it specified clearly under Paragraph 2 of Section 1, Letter of Invitation in the RFP document that the Tender under Appeal would be conducted in accordance with the Guidelines for the Employment of Consultant under the EDCF Loan. Paragraph 2 of Section 1-Letter of Invitation reads as follows: -

“The terms and conditions of the contract and payments by the Bank, therefore, shall be subject in all aspects to the terms and conditions of the Loan Agreement, including the Guidelines for the Employment of Consultants under the EDCF Loan (the Guidelines). Except as the Bank may especially otherwise agree, no party other than the Borrower shall derive any rights from the Loan Agreement or have any claim to the loan proceeds”.

(Emphasis supplied)

Furthermore, Clauses 29 and 30 of the ITC (RFP Document) provide guidance on how a tenderer who is dissatisfied with the way the Tender process was conducted could challenge the same. Clause 29.1 reads as follows: -

“If the Standstill period is applied, upon receipt of the client’s Notification of intention to Award referred to in ITC

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26.1, an unsuccessful Consultant has three (3) Business Days to make a written request to the Client for debriefing. The Client shall provide a debriefing to all unsuccessful consultants whose request is submitted in compliance with procedures set forth in the Data sheet as is received within this deadline".

(Emphasis supplied)

In view of the above observations, the Appeals Authority is of the settled view that complaints arising out of this Tender process were to be resolved as provided in the RFP Document and the Guidelines for Employment of Consultants under the EDCF Loan which governed this Tender.

The Appeals Authority considered the Appellant's contention that since the RFP document was silent on procedures which follow after the debriefing, the Appellant decided to file this Appeal as the Tender was advertised by a government entity and therefore the country's procurement laws were applicable. The Appeals Authority would like to enlighten the Appellant that Section 4(1)(b) of the Act requires that if there is a financing/loan agreement that has been entered by the Government of the United Republic Tanzania and the International Financing Institution, the financier's requirement would prevail over the applicability of the country's procurement law. Section 4(1)(b) of the Act reads as follows: -

"4(1) To the extent that this Act conflicts with an obligation of the United Republic under or arising out of-

(a)

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

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

(Emphasis added)

In view of the requirement of Article IV of the Loan Agreement and Section 4(1)(b) of the Act, the Appeals Authority is of the considered view that disputes arising under the disputed Tender were to be handled as per the guidance provided in the RFP Document read together with the Guidelines for Employment of Consultants under the EDCF Loan.

Under the circumstances the Appeals Authority concludes the first issue in the affirmative that the Appeals Authority has no jurisdiction to entertain the Appeal.

In view of our findings hereinabove, the Appeals Authority would not delve into the remaining issues. The Appeals Authority hereby dismiss the Appeal for want of jurisdiction. We make no order as to costs.

It is so ordered.

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

The Right of Judicial Review is as provided under Section 101 of the Act.

This Ruling is delivered in the presence of the parties this 27th day of June 2024.

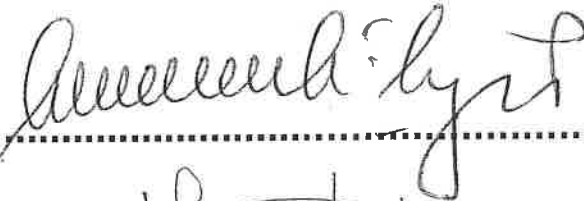
HON. JUSTICE (rtd) SAUDA MJASIRI



.....
CHAIRPERSON

MEMBERS: -

1. MR. RHOBEN NKORI.



2. MR. PIUS MPONZI

