

IN THE PUBLIC PROCUREMENT APPEALS AUTHORITY

APPEAL CASE NO. 36 OF 2022-23

BETWEEN

M/S MAC CONTRACTORS CO. LTD.....APPELLANT

AND

TANZANIA NATIONAL PARKS.....RESPONDENT

RULING

CORAM

- | | |
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| 1. Hon. Justice (rtd) Sauda Mjasiri | - Chairperson |
| 2. Eng. Stephen Makigo | - Member |
| 3. Ms. Ndeonika Mwaikambo | - 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. Alvin Nkiggi | - Quantity Surveyor |
| 2. Mr. Nelson Anatoli | - Assistant Chief Engineer |



FOR THE RESPONDENT

- | | |
|---------------------------|----------------------------|
| 1. Mr. Theophil Alexander | - Principal State Attorney |
| 2. Mr. George Dalali | - Senior State Attorney |
| 3. Mr. Michael Tarimo | - Civil Engineer |
| 4. Mr. John Kafuku | - Project Advisor |
| 5. Ms. Asha Mvungi | - Procurement Officer |

This Appeal was lodged by M/S Mac Contractors Co. Ltd (hereinafter referred to as "**the Appellant**") against Tanzania National Parks, commonly known by its acronym as "**TANAPA**" (hereinafter referred to as "**the Respondent**"). The Appeal is in respect of Tender No. TZ-TANAPA - 316214-CW-RFB-LOT 1: Mikumi National Park, for Construction of Building(s) Infrastructure for Staff and Tourist Amenities for Ruaha, Mikumi, Udzungwa Mountains and Nyerere National Parks (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:-

The Tender was conducted through the International Competitive Bidding Procedures as specified in the World Bank's Guidelines: Procurement of Goods, Works and Non-consulting Services under IBRD Loans and IDA Credits and Grants by the World Bank Borrowers dated January 2011 (revised July 2014) (hereinafter referred to as the "**World Bank Procurement Guidelines**").



The Respondent advertised publicly the Tender through the Dg-Market UNDB online and TANAPA website on 10th November 2022. Furthermore, the Tender was also advertised in the Daily News newspaper of 11th November 2022 and the East African newspaper of 12th November 2022. The deadline for submission of tenders was set for 23rd December 2022. On the deadline the Respondent received seven tenders including that of the Appellant.

The received tenders were subjected to evaluation and after the completion of that process, the Evaluation Committee recommended award of the Tender to M/S UNIK Construction Engineering (Pty) Ltd. After the finalization of all the internal approval processes, on 7th March 2023, the Respondent issued the Notice of Intention to award the contract to the Appellant. The Notice indicated that the Respondent intended to award the contract to M/S UNIK Construction Engineering (Pty) Ltd for a sum of Tanzanian Shillings Fifteen Billion Five Hundred Sixty One Million Eight Hundred Nineteen Thousand Six Hundred and Three and cents Ninety Four only (TZS 15,561,819,603.94) VAT inclusive.

The Notice also informed the Appellant that its tender was disqualified for submitting a bid security (Bank Guarantee from Akiba Commercial Bank) addressed to the Appellant's managing director instead of the Respondent as required by the Tender Document. In addition, the Appellant's bid security was found not to have a validity of twenty eight (28) days beyond the stipulated bid validity period.

Dissatisfied with reasons given for its disqualification, on 11th March 2023 the Appellant filed an application for administrative review to the Respondent. On 20th March 2023 the Respondent issued its decision which rejected the Appellant's application for administrative review. Aggrieved with the Respondent's decision, the Appellant lodged this Appeal on 29th March 2023.

GROUND OFS OF APPEAL

The Appellant's grounds of Appeal as stated in the Statement of Appeal may be summarized as follows:-

1. That, the Appellant's bid security complied with the requirements of the Tender Document as it was properly addressed to the Respondent. Thus, the Respondent's assertion that the Appellant's bid security was not addressed to it is unfounded.
2. That, the Appellant complied with the requirements of the Tender Document by submitting a bid security addressed to the Respondent and a line of credit addressed to its managing director. The Respondent confused the line of credit and bid security submitted by the Appellant while the same were submitted in compliance with the requirements of the Tender Document.
3. That, the award proposed to M/S UNIK Construction Engineering (PTY) Ltd is not proper as the firm quoted a higher price compared to the price quoted by the Appellant. M/S UNIK Construction Engineering (PTY) Ltd's price was TZS 15,561,819,603.94 while the Appellant's price was TZS 13,581,492,491.78. The price of M/S UNIK

Construction Engineering (PTY) Ltd was higher by TZS 1,980,327,112.16. Therefore, M/S UNIK Construction Engineering (PTY) Ltd ought not to have been proposed for award of the Tender, instead the Tender ought to be awarded to the Appellant.

4. Finally, the Appellant prayed for a declaration that the Tender process was not conducted in accordance with the law.

RESPONDENT'S REPLY

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

1. That, the evaluation process was carried out in accordance with the requirements of the Tender Document and the World Bank's Procurement Guidelines. In the course of doing so, the Appellant's tender was found to be substantially non-responsive at the preliminary evaluation stage. Therefore, it did not qualify for detailed evaluation where price comparison was carried out.
2. That, the Appellant's tender was disqualified for submitting a bid security that was not addressed to the Respondent. The bid security was addressed to the managing director of the Appellant's company contrary to the requirements of the Tender Document. The bid security No. 1866/22 issued by Akiba Commercial Bank attached to the Appellant's Statement of Appeal, as Appendix 1, was not attached to the Appellant's tender submitted to the Respondent on the deadline for submissions of tenders. The Appellant's tender received by the deadline for submission of tenders has a bid security



addressed to its managing director and was in the Form of Bank Guarantee with a value of TZS 215,000,000.00.

3. That, the Appellant's bid security had reference No. ACB/CB/HQ/011/2022 dated 8th December 2022 from Akiba Commercial Bank. The indicated expiry date was 4th May 2023. The bid security did not cover the twenty eight (28) days beyond the bid validity period. Clause 19.1 of the Instructions to Bidders (ITB) requires a bid security to be valid for twenty eight (28) days beyond the stipulated bid validity period. The specified bid validity period was one hundred and twenty (120) days and therefore the bid security was to be valid for one hundred and forty eight (148) days.
4. That, the referred Appellant's line of credit was submitted as a bid security and there is no contradiction as the Appellant alleged. Based on Form FIN-3.3 the Appellant submitted a line of credit from Akiba Commercial Bank amounting to TZS 1,200,000,000.00 and USD 150,000.00. The Respondent stated that as much as the Appellant claimed to have attached the line of credit, the same was addressed to ICT Commission with credit amounting to TZS 250,000,000.00. According to Form FIN 3.1 tenderers were required to demonstrate the access of line of credit of USD 1 Million. Therefore, the line of credit of TZS 215,000,000.00 was neither a condition nor a requirement of the Tender.
5. Regarding the Appellant having the lowest price, the Respondent indicated that the Appellant's tender was disqualified at the



preliminary evaluation stage and therefore it did not reach the price comparison stage. Thus, its price could not have been compared with other tenderers who reached that stage. Hence, it could not have been proposed for award of the Tender.

6. Finally, the Respondent prayed for dismissal of the Appeal.

When the matter was called on for hearing and at the time of framing up the issues, the Appeals Authority informed the parties that, having reviewed the record of Appeal it was observed that there is a point of law relating to the jurisdiction of the Appeals Authority that needs to be determined prior to determination of the substantive Appeal. This came about after the Appeals Authority observed that the Tender was conducted under the World Bank's Procurement Guidelines. Given the circumstances, the following issues were framed:-

- 1.0 Whether the Appeals Authority has jurisdiction to entertain the Appeal;**
- 2.0 Whether the Appellant's disqualification was 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 which relates to the point of law raised *suo motu* before embarking on the substantive Appeal.

Mr. Nelson Anatoli, Assistant Chief Engineer who represented the Appellant took the floor first and stated that the Tender was conducted in accordance



with the World Bank's Procurement Guidelines. According to the said guidelines disputes arising out of the Tender process are to be first lodged to the Respondent (Borrower) and then to the Regional Procurement Manager of the World Bank's respective country office.

The Appellant contended that having been dissatisfied with the reasons for its disqualification as contained in the Notice of Intention to award, it lodged a complaint to the Respondent on 11th March 2023. The Respondent issued its decision thereof through a letter dated 20th March 2023. After receipt of the Respondent's decision and being aggrieved with the same, the Appellant lodged its Appeal to this Appeals Authority instead of submitting its appeal to the Regional Procurement Manager of the World Bank's respective country office.

The Appellant conceded to have skipped the procedures for submitting the complaint as provided by the World Bank's Procurement Guidelines. Following such an admission the Appellant stated that the Appeal is not properly before the Appeals Authority as it was filed prematurely.

On his part, Mr. Theophil Alexander, Principal State Attorney from the Respondent's office submitted that as correctly pointed out by the Appellant that this Tender was conducted under the World Bank's Procurement Guidelines and disputes arising thereof were to be resolved in accordance with procedures prescribed under the said guidelines.

The Appellant being one of the tenderers who participated in the Tender, upon being dissatisfied with the decision issued by the Respondent in respect of its complaint, it ought to have requested for a debriefing to the

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Regional Procurement Manager World Bank's country office. To the contrary, the Appellant lodged its Appeal directly to this Appeals Authority. The learned Principal State Attorney stated that the Appellant's act of lodging this Appeal was in contravention with the World Bank's Procurement Guidelines as rightly admitted by the Appellant during its submissions.

Therefore, the Appellant filed this Appeal prematurely, thus the Appeals Authority lacks jurisdiction to entertain the same. In that regard, the Respondent prayed for dismissal of the Appeal with costs.

ANALYSIS BY THE APPEALS AUTHORITY

1.0 Whether the Appeals Authority has jurisdiction to entertain the Appeal

In resolving this issue, the Appeals Authority took cognizance of the Appellant's admission on the point of law raised *suo motu* and finds it proper to analyse the above framed issue for the sake of enlightening the parties. In so doing the Appeals Authority revisited the record of Appeal and observed that the Tender emanated from the Financing Agreement entered between the United Republic of Tanzania and the International Development Association for the project to be carried out through the Ministry of Natural Resources and Tourism and TANAPA. The Financing Agreement entails to facilitate the project named Resilient Natural Resource Management for Tourism and Growth (REGROW) in order to improve management and development of priority tourism assets in the Southern Circuit. The received funds for the REGROW project was intended to apply part of the proceeds for Construction of Building(s) Infrastructures

for Staff and Tourist Amenities for Ruaha, Mikumi (the Tender), Udzungwa Mountains and Nyerere National Parks. The Financing Agreement requires procurement for the project to be conducted in accordance with the requirements of the World Bank's Procurement Guidelines.

The Appeals Authority revisited Paragraph 1.1 of the World Bank's Procurement Guidelines which reads as follows:-

"Purpose

*1.1 The purpose of these Guidelines is to inform those carrying out a project that is financed in whole or in part by a loan from the International Bank for Reconstruction and Development (IBRD), a credit or grant from the International Development Association (IDA), a project preparation advance (PPA), a grant from the Bank or a trust fund administered by the Bank and executed by the recipient of the policies that governs the procurement of goods, works and non-consulting services required for the project. **The Loan Agreement governs the legal relationship between the Borrower and the Bank and the guidelines are made applicable to procurement of goods, works, and non-consulting services for the project, as provided in the agreement...**"*

The Appeals Authority revisited Section 4(1) of the Public Procurement Act, No. 7 of 2011 as amended (hereinafter referred to as "**the Act**") which provides as follows: -



S.4(1) *To the **Extent** that this Act conflicts with an obligation of the United Republic under or arising out of-*

(a) any treaty or other form of agreement to which the Government is a party with one or more other states or political sub-divisions of such states; or

(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 aspects the procurement shall be governed by this Act". (Emphasis supplied)

The above quoted provisions imply that the project is funded by the World Bank and according to the Financing Agreement; the procurement has to be guided by the World Bank's Procurement Guidelines. Section 4(1) of the Act stipulates clearly that once the agreement specifies the governing rules or guidelines for the procurement of the project, the requirement of the financing agreement would prevail. Under the circumstances the Appeals Authority observed that this tender is governed by the World Bank's Procurement Guidelines.

Having established that the applicable rules for this Tender are the World Bank's Procurement Guidelines, the Appeals Authority revisited the record of Appeal and observed that Item 6 of the Invitation for Bids specified that the Tender would be conducted pursuant to World Bank's Procurement Guidelines. Item 6 of the Invitation for Bids reads as follows:-



"Item 6 *Bidding will be conducted through the International Competitive Bidding procedures as specified in the **World Bank's Guidelines: Procurement of Goods, Works and Non-Consulting Services under IBRD Loans and IDA Credits & Grants by the World Bank Borrowers dated January 2011, revised July 2014 ("Procurement Guidelines")**, and is open to all eligible bidders as defined in the Procurement Guidelines...*" (Emphasis supplied)

Furthermore, Clause 40 of the ITB provides guidance in relation to notification of award and procedures to be followed by tenderers who are dissatisfied with tender results. Specifically, Clause 40.1 of the ITB requires the Respondent to notify tenderers the results of the Tender and for the unsuccessful tenderers to be informed reasons for their rejection. Clause 40.3 of the ITB requires the Respondent to respond in writing to any complaints raised by the unsuccessful tenderers in relation to their disqualification.

The Appeals Authority further reviewed the World Bank's Procurement Guidelines which were applicable in this Tender and observed that Clause 2.65 of the said guidelines provides guidance regarding dispute resolution procedures by the Borrower (the Respondent). Clause 2.65 of the World Bank's Procurement Guidelines reads as follows:-

"2.65 *In the publication of the award of contract referred to in paragraph 2.60 and paragraph 7 of Appendix 1, **the Borrower shall specify that any bidder who wishes to ascertain***



the grounds on which its bid was not selected, should request an explanation from the Borrower. The Borrower shall promptly provide in writing an explanation of why such bid was not selected. If a bidder requests a debriefing meeting, the bidder shall bear all their costs of attending such a debriefing meeting'.

Item 15 of Appendix 3 to the World Bank's Procurement Guidelines provides guidance in relation to debriefing by the World Bank. Item 15 reads as follows:-

*"Item 15 As stated in paragraph 2.65, if, after notification of award a bidder wishes to ascertain the grounds on which its bid was not selected, it should address its request to the Borrower. **If the bidder is not satisfied with the written explanation given and wishes to seek a meeting with the Bank, it may do so by addressing the Regional Procurement Manager for the Borrowing country, who will arrange a meeting at the appropriate level and with relevant staff.** The purpose of such meeting is only to discuss the bidder's bid and neither to reverse the Bank's position that has been conveyed to the Borrower nor to discuss the bids of competitors".*

The Appeals Authority reviewed the World Bank's Procurement Regulations for IPF Borrowers (Procurement of Goods, Works, Non-Consulting and Consulting Services) of 2020 (hereinafter referred to as the "World



Bank's Procurement Regulations") and observed that it provides clear guidance on disputes resolution procedures particularly for disputes arising out of procurement process conducted as per the World Bank's Procurement Guidelines. Clauses 5.81 to 5.92 of the World Bank's Procurement Regulations provide clear guidance on the time limit within which the tenderer should request for debriefing and the time the procuring entity should issue its decision thereof. Clause 5.96 of the same Regulations provides guidance on the debriefing with the World Bank if a tenderer would be dissatisfied with the decision of the Respondent (the Borrower). Clauses 5.81, 5.82 and 5.96 of the World Bank's Procurement Regulations are reproduced as follows:-

"Debriefing by the Borrower

*5.81 On receipt of the Borrower's Notification of Intention to Award referred to under Paragraphs 5.72 to 5.74 (Goods, Works and Non-consulting Services), or Paragraphs 5.75 to 5.77 (Consulting Services), **an unsuccessful Bidder/Proposer/Consultant has three (3) Business Days to make a written request to the Borrower for a debriefing.** The Borrower shall provide a debriefing to all unsuccessful Bidders/Proposers/Consultants whose request is received within this deadline".*

*"5.82 Where a request for debriefing is received within the deadline, **the Borrower is required to provide a debriefing within five (5) Business Days,** unless the borrower decides for justifiable reasons, to provide debriefing outside this time..."*



"Debriefing by the Bank

5.96 If, after publication of the Contract Award Notice, a Bidder/Proposer/Consultant who has not received a satisfactory explanation from the Borrower as to why its Bid/Proposal was not successful, may request a meeting with the Bank. Such request should be addressed to the Accredited Practice Manager for the Borrower's country, who will arrange a meeting at the appropriate level and with relevant staff. The purpose of such meeting is not to discuss the Bids/Proposals of competitors or, in the case of prior review contracts, the Bank's position that has been conveyed to the Borrower". (Emphasis supplied)

Given the above provisions, the Appeals Authority is of the settled view that the Tender was conducted under the World Bank's Procurement Guidelines which also provide guidance on procedures for dealing with procurement related complaints.

In ascertaining if the Appellant exhausted dispute resolution procedures as provided under the World Bank's Procurement Guidelines, the Appeals Authority reviewed the record of Appeal and observed that, after receipt of the Notice of Intention to award issued on 7th March 2023 and being dissatisfied, the Appellant lodged a complaint to the Respondent on 11th March 2023. In view of the requirements of Clause 40.3 of the ITB, Clause 2.65 of the World Bank's Procurement Guidelines and Clause 5.81 of the World Bank's Procurement Regulations, the Appeals Authority finds the

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Appellant's act of lodging complaints to the Respondent to be proper and in accordance with the guiding rules.

The record of Appeal indicates further that the Respondent issued its decision with respect to the Appellant's complaint on 20th March 2023. Aggrieved with the decision issued on 29th March 2023, the Appellant filed this Appeal. According to Item 15 of Appendix 3 to the World Bank's Procurement Guidelines read together with Clause 5.96 of the World Bank's Procurement Regulations, the Appellant having been dissatisfied with the Respondent's decision, it ought to have sought debriefing with the procurement regional manager of the World Bank's country office. To the contrary, the Appellant lodged its Appeal to this Appeals Authority.

In view of the above, the Appeals Authority finds the Appeal to be improperly before it as it has no jurisdiction to determine the same. Under the circumstances, the Appeals Authority hereby dismiss the Appeal for want of jurisdiction. Given our findings made herein above, the Appeals Authority would not delve into the remaining other issues.

The Appeals Authority considered the Respondent's prayer for costs and observed that since no details were furnished for the Appeals Authority to assess the same and that the point of law that led to the dismissal of the appeal was raised by the Appeals Authority *suo motu*, the prayer for costs is declined. Therefore, each party is to bear its own 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 absence of both parties though duly notified this 27th day of April 2023.

HON. JUSTICE (rtd) SAUDA MJASIRI



.....
CHAIRPERSON

MEMBERS:

1. ENG. STEPHEN MAKIGO.....

2. MS. NDEONIKA MWAIKAMBO.....

