IN THE PUBLIC PROCUREMENT APPEALS AUTHORITY

APPEAL CASE NO. 04 OF 2021-22

BETWEEN

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

AND

DAR ES SALAAM INSTITUTE OF TECHNOLOGY..... RESPONDENT

RULING

CORAM

1. Hon. Justice (rtd) Sauda Mjasiri - Chairperson
2. Eng. Stephen Makigo - Member
3. Adv. Rosan Mbwambo - Member
4. Ms. Florida Mapunda - Ag. Executive Secretary

SECRETARIAT

1. Ms Agnes Sayi - Senior Legal Officer
2. Ms. Violet Limilabo - Senior Legal Officer

FOR THE APPELLANT

1. Dr. Moses Elisante Mkony - Managing Director
2. Ms. Dorothy Subilaga Mahunja - Administrator
3. Ms. Diana Rwegasira - Legal Officer

Tender to be conducted in accordance with the World Bank Procurement Regulations for IPF Borrowers, issued in July, 2016 and Revised in November 2017.

On 22nd April 2021, the Respondent issued a Request for Proposal (RFP) to eight (8) shortlisted firms including the Appellant. The said RFP indicated that the selection process for this Tender would be in accordance with the Quality and Cost Based Selection (QCBS) procedures. The deadline for submission of proposals was set for 03rd June 2021. By the deadline only seven (7) proposals were received, including that of the Appellant.

The received proposals were subjected to evaluation which was conducted in two phases, namely; evaluation of technical and financial proposals. The technical proposals were evaluated in two stages, namely; preliminary and detailed evaluation. Each responsive technical proposal was given scores based on the earmarked criteria and sub-criteria. The pass mark stated in the RFP was 75 points out of 100. At the preliminary evaluation stage, the proposals of three (3) firms, the Appellant inclusive were disqualified for being non-responsive to the RFP.

The Respondent by a letter dated 22nd July 2021, informed the Appellant that its technical proposal was not responsive to the requirements provided in the RFP. The Appellant on its proposal indicated the tender validity period of one hundred and eleven (111) days instead of one hundred and twenty (120) days as required by the RFP.

b) **Whether the disqualification of the Appellant's tender is justified; and**

c) **What reliefs, if any, are the parties entitled to**

SUBMISSIONS BY THE RESPONDENT ON THE PO

The learned counsel for the Respondent submitted that, the Appeals Authority lacks jurisdiction to entertain this Appeal as the Tender process was conducted under the World Bank Procurement Regulations. The learned counsel expounded that, according to the Financing Agreement the procurement for the project was to be conducted under the World Bank Procurement Regulations. The Respondent when floating this Tender indicated in the Request For Proposal letter as well as in the RFP that, the tender will be conducted in accordance with the World Bank Procurement Regulations for IPF Borrowers issued in July, 2016 and Revised in November, 2017.

The learned counsel added that, the World Bank Procurement Regulations specified avenues which consultants should follow when dissatisfied with the tender process. According to the said Procurement Regulations, this Appeals Authority is not empowered to entertain procurement related complaints. In view of Section 5.96 read together with Annex III of the World Bank Procurement Regulations, a consultant who is dissatisfied with the tender process is required to first submit its complaint to the borrower. After a borrower issues its decision and a consultant is still dissatisfied, the

The learned counsel concluded his argument by praying that, the Appeal be dismissed with costs as the Appeals Authority lacks jurisdiction to entertain the same.

REPLY BY THE APPELLANT ON THE PO

In response to the PO, the Appellant submitted that in the disputed Tender, consultants were guided by the RFP. According to Clause 1b of the Instruction to Consultant Data Sheet, the applicable law for this Tender was the laws of Tanzania. The Appellant submitted further, that much as Clause 1b has specified the applicable law, Clause 35(1) of the Instruction to Consultant Data Sheet has provided that procedures for submission of procurement related complaints are to be in accordance with Procurement Regulations for IPF Borrowers (Annex III).

The Appellant submitted further that, Annex III of the World Bank Procurement Regulations is silent on what procedure should be invoked by a consultant who is dissatisfied with the decision of the procuring entity (the borrower). Clause 3.6 of Annex III provides guidance on resolution of a complaint by a borrower, however the same is silent on what steps should be taken by a consultant who is dissatisfied with the borrower's decision. Due to such a lacuna, the Appellant opted to invoke the provisions of the Act by lodging an Appeal to this Appeals Authority as the Tender was governed by both the laws of Tanzania and the World Bank Procurement Guidelines.

learned counsel concluded his argument by stating that, the PO has merit hence the Appeal be dismissed with costs.

Having submitted on the PO, parties proceeded to submit on the merits of the Appeal as hereunder: -

SUBMISSIONS BY THE APPELLANT ON THE MERITS OF THE APPEAL

The Appellant's grounds of appeal stated in the Statement of Appeal as well as oral submissions during the hearing may be summarized as follows:-

1. That, the Appellant disputes its disqualification from the Tender process on the ground that it failed to comply with the bid validity requirement. The Appellant conceded that the bid validity period for the Tender was one hundred and twenty (120) days. However, when preparing its technical proposal it mistakenly presented the bid validity period of one hundred and eleven (111) days. The Appellant claimed that the anomaly was just a human error or an arithmetic error and the same could have been corrected. In expounding its argument the Appellant made reference to the Tender process on the same project conducted by the Respondent with respect to Dar es Salaam Campus. It stated that, in that Tender the Appellant's proposals were found with some errors and it was accorded an opportunity to correct them. Thus, since it is the same project the

REPLY BY THE RESPONDENT ON THE MERITS OF THE APPEAL

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

1. That, the Appellant was disqualified from the Tender process after it was found that its technical proposal has indicated the bid validity period of 111 days instead of 120 days as required in the RFP. The Appellant's non - compliance with the bid validity period requirement was a major deviation as it contravened Clause 12.1 of the Instruction to Consultant Data Sheet.

   The learned counsel for the Respondent expounded its argument by indicating that, the Tender was conducted under the World Bank Procurement Regulations. Section II of the Procurement Guidance – Evaluation Criteria of the said Regulations provides that: -

   "Justification to reject must therefore be based on the existence of one or more major deficiencies or deviations which cannot be permitted to be rectified or accepted in any case, and rejection would be justified and sustainable. A material deviation is one which:

   a) has an effect on the validity of the bid;

   b) .....

   c) ....."

opening of the same was conducted in accordance with paragraph 7.3 (h)(i) of Annex XII of the World Bank Procurement Regulations.

3. That, on 4th August 2021, the Respondent informed the Appellant that its complaint could not have been entertained for being filed out of time. On 6th August 2021, the Appellant submitted another complaint to the Respondent through a letter with Ref. No: MAC/DIT/21/SF6. On receipt of the second complaint, the Respondent decided to notify the World Bank on 12th August, 2021 by submitting the complaint in Systematic Tracking of Exchanges in Procurement (STEP) under complaints World Bank's reviews, as per Clause 3.27 of section III of the World Bank Procurement Regulations. The said Clause requires all complaints to be recorded by the Borrower in the appropriate tracking and monitoring system, as agreed between the Bank and the Borrower. The Respondent added that, the procurement complaints were dealt with pursuant to Clause 3.2 to 3.6 of the World Bank Procurement Regulations.

4. The Respondent's reply to the Appellant's reliefs were as follows: -

   i. The claimed re-evaluation of technical proposals should not be honored at this stage as procurement process has reached an advanced stage whereby financial proposals have been opened and evaluated pending notification of award of the contract. Re-evaluation of the technical proposals will not change the position that

Section 5.13 *"All goods, works, and services required for the Project and to be financed out of the proceeds of the Loan* ***shall be procured in accordance with the requirements set forth or referred to in the Procurement Regulations and the provisions of the Procurement Plan.***"

Paragraph 17 *"Procurement Regulations" means, for purposes of paragraph 87 of the Appendix to the General Conditions, the* ***"World Bank Procurement Regulations for IPF Borrowers," dated July 2016, revised November 2017.***"

Paragraphs 85 "*Procurement Regulations" means the* ***"World Bank Procurement Regulations for Borrowers under Investment Project Financing" as further defined in the Loan Agreement.***"

(Emphasis provided)

The Appeals Authority reviewed Section 4 (1) of the Act which provides as follows: -

Section 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

The Appeals Authority observed further that, Clause 35.1 of the Instruction to Consultants Data Sheet provides guidance on the procedures to be followed by a consultant who is dissatisfied with the tender process. The said clause reads as follows: -

Clause 35 (1) "***The procedures for making a Procurement-related complaint are detailed in the "Procurement Regulations for IPF Borrowers (Annex III).*** *" If a Consultant wishes to make a Procurement-related complaint, the Consultant shall submit its complaint following these procedures, in writing (by the quickest means available, such as by email or fax), to:*

***For the attention**: Prof. Preksedis Marco Ndomba,*

***Title/position**: Principal*

***Client**: Dar es Salaam Institute of Technology (DIT)*

***Email address**: principal@dit.ac.tz*

In summary, a Procurement-related complaint may challenge any of the following:

1. *The terms of this Request for Proposal;*
2. ***The Client's decision to exclude a Consultant from the procurement process prior to the award of contract**; and*
3. *The Client's decision to award the contract".*

(Emphasis provided)

The Right of Judicial Review as per Section 101 of the Act is explained to the Parties.

This Ruling is delivered in the presence of the Appellant and the Respondent this 3rd day of September 2021.

HON. JUSTICE (RTD) SAUDA MJASIRI

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CHAIRPERSON

MEMBERS:

1. **ENG. STEPHEN MAKIGO** .....

2. **ADV. ROSAN MBWAMBO**.....