

IN THE PUBLIC PROCUREMENT APPEALS AUTHORITY

APPEAL CASE NO. 46 OF 2023 - 2024

BETWEEN

**M/S S & F CONSULTANCY LTDAPPELLANT
AND**

MINISTRY OF CULTURE, ARTS AND SPORTSRESPONDENT

RULING

CORAM

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| 1. Hon. Justice (Rtd) Sauda Mjasiri | - Chairperson |
| 2. Eng. Stephen Makigo | - Member |
| 3. Dr. William Kazungu | - Member |
| 4. Mr. James Sando | - Secretary |

SECRETARIAT

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

FOR THE APPELLANT

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| 1. Eng. Kerstin Njau | - Project and Business Manager |
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FOR THE RESPONDENT

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| 1. Mr. Vedastus Shibugulu | - Director of Procurement
Management unit |
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| 2. Dr. Emmanuel Ishengoma | - Director of Art Development |
| 3. Ms. Lugano Rwetaka | - Director of Legal Unit |
| 4. Dr. Addo Komba | - Assistant Director of Sports
Development |

This Appeal was lodged by **M/S S & F Consultancy Ltd** (hereinafter referred to as "**the Appellant**") against the **Ministry of Culture, Arts and Sports** (hereinafter referred to as "**the Respondent**"). The Appeal is in respect of Tender No. 96/2023/2024/C/04 for Provision of Consultancy Services for Designing and Supervision of the Proposed Construction Works of a Football Stadium within Dodoma City Council (hereinafter referred to as "**the Tender**").

The Tender was conducted through the Quality and Cost Based Selection (QCBS) method as specified under 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 to as "**the Regulations**").

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: -

On 12th September 2023, the Respondent through National e-Procurement System of Tanzania (NeST) invited eligible consultants to participate in the Tender by using International Competitive Selection method. The deadline for submission of proposals was set on 12th October 2023. By



the deadline, seven consultants including the Appellant submitted their proposals.

The received proposals were subjected to evaluation, which was conducted in three stages, namely, Commercial, Technical and Financial Evaluation. After completion of the commercial and technical evaluations, all seven proposals were found to be successful and were subjected to financial comparison. According to the record of Appeal, tenderers' quoted prices submitted by M/S Mekon Arch Consult Limited TZS 1,109,554,000.00, M/S B.J Amuli Architects Partnership TZS 1,695,837,000.00, M/S Nimeta Consult (T) Limited TZS 2,089,992,400.00, the Appellant TZS 2,147,836,000.00 and M/S Volumetric Arch Consult Limited TZS 2,520,480,000.00, all VAT inclusive, were found to be abnormally low. Thus, the Respondent recommended the rejection of all the five proposals. Following such a finding, the Respondent recommended award of the Tender to the sixth ranked tenderer, M/S Sites International for Engineering Consultancy.

On 29th March 2024, the Tender Board approved the recommendations of award to M/S Sites International for Engineering Consultancy subject to successful negotiations. The approved contract price was Tanzania Shillings Four Billion Three Hundred Eighty Nine Million Eight Hundred Forty Thousand Six Hundred Seventy Three and Forty Six Cents only (TZS 4,389,840,673.46) VAT inclusive for the period of thirty six (36) months.

Negotiations took place on 17th and 18th May 2024. After completion of the negotiation process, the Tender Board approved the award of the Tender



to M/S Sites International for Engineering Consultancy at its meeting held on 27th May 2024. The approved negotiated contract price was Tanzania Shillings Seven Billion Seven Hundred Thirty Nine Million Eight Hundred Ninety Four Thousand only (TZS 7,739,894,000.00) VAT Exclusive for a period of thirty six (36) months.

On 04th June 2024, the Respondent issued a Notice of Intention to Award the Tender through a letter with Ref. No. 96/2023/2024/C/04/3 to the Appellant. The Notice stated that the Respondent intends to award the Tender to M/S Sites International for Engineering Consultancy. The Appellant was also informed that its Tender was disqualified for having quoted an abnormally low price. Aggrieved with the reason given for its disqualification, on 5th June 2024, the Appellant filed an application for administrative review to the Respondent. The Respondent through a letter dated 14th June 2024, rejected the Appellant's application for administrative review. Aggrieved further on 24th June 2024, the Appellant filed this Appeal before the Appeals Authority.

The Appellant's Appeal centered on the ground that the Tender was marred with irregularities as the Appellant's proposal was not abnormally low as contended by the Respondent. The Appellant asserted that the Tender under Appeal was conducted under the QCBS method. However, the Respondent failed to adhere to the requirements provided in the Tender Document. Thus, this depicts the Respondent's lack of knowledge on the subject matter of the Tender. The Appellant claimed to have understood the scope and the complexity of the assignment. As a result, it



came up with the proposed contract price which was sufficient for the execution of the intended project. The Appellant further contended that the quoted price complied with the requirements of the Architects and Quantity Surveyors By-laws of 2015 read together with ERB guidelines. The Appellant's price had an allowable range of profit of 4% of the contract sum. In addition, the Appellant stated that in execution of the intended project, it proposed to use its staff and personnel who execute other projects in Dodoma to minimize the running costs. However, the Appellant asserted that if such a proposition was found to be unacceptable, the Respondent ought to have invited it for negotiations and the same would have been settled. Thus, the Respondent's act of disqualifying the Appellant from the Tender process was not proper.

Upon receipt of this Appeal, the Appeals Authority notified the Respondent about the existence of the Appeal and required it to submit a Statement of Reply. In response to the grounds of Appeal, the Respondent stated that the Appellant's tender was fairly disqualified from the Tender process for having an abnormally low price. The Respondent contended that the Appellant's abnormally low price raised doubt as to whether it understood the scope of work or Terms of Reference as provided in the Tender Document. The Respondent asserted that the Appellant's quoted price did not comply with the requirements of the Architects and Quantity Surveyors By-laws of 2015 read together with ERB guidelines as it did not feature in a profit of 4% as required. In addition, the Appellant proposed to use staff and personnel who are executing other projects in Dodoma. As per the



Respondent's urgent need of the execution of the project, the use of staff or personnel who are also engaged in execution of other projects executed by the Appellant would jeopardize the success of the intended project. Thus, the Appellant's disqualification was fair and justified.

When the Appeals Authority called on the matter for hearing and during the framing up of issues, it informed the parties that it noted from the record of Appeal that there was a point of law to be determined before embarking on the substantive merits of the Appeal. The point of law was about the tender validity period. The Appeals Authority observed that the Tender validity period was 120 days from the date of the Tender opening which was 12th October 2023. Thus, since the course of action for this Appeal arose following the Respondent's issuance of the Notice of Intention to award on 4th June 2024, there is a need of ascertaining the validity of the Tender under Appeal. Based on this observation, the following issues were framed which covers both the point of law raised *suo motu* by the Appeals Authority and the substantive merits of the Appeal. These were as follows: -

- 1. Whether there is a valid tender for determination by the Appeals Authority;**
- 2. Whether the disqualification of the Appellant's tender was justified; and**
- 3. What reliefs if any are the parties entitled to?**



SUBMISSIONS BY THE APPELLANT ON THE POINT OF LAW

The Appellant's submissions were made by Eng. Kerstin Njau, the Project and Business Manager. He commenced by stating that Clause 25 of the Proposal Data Sheet (PDS) specified the tender validity period for this Tender to be 120 days from the date of the Tender opening. He contended that the Tender opening took place on 12th October 2023. Counting from 12th October 2023, the tender validity period expired on 9th February 2024.

Eng. Njau contended that by 4th June 2024 when the Respondent issued the Notice of Intention to award the Tender, the tender validity period had already expired. He asserted that there was no request for extension of the tender validity period from the Respondent. Thus, the same was not extended as required by the law. Eng. Njau concluded his submissions on this point by stating that since there was no request for extension of the tender validity period, it is crystal clear that the Tender under Appeal had already expired.

REPLY BY THE RESPONDENT ON THE POINT OF LAW

The Respondent's submissions were led by Mr. Vedastus Shibugulu, Director of Procurement Management Unit (DPMU). He was assisted by Ms. Lugano Rwetaka, Director of Legal Unit and Dr. Emmanuel Ishengoma, Director of Arts Development. The Respondent began by stating that the tender validity period for this Tender was 120 days as correctly pointed out by the Appellant. The Respondent elaborated that the tender validity period started to run from 12th October 2023, the Tender opening date.



The Respondent submitted that the tender validity period was to expire on 9th February 2024. However, before the expiry of the tender validity period DPMU tried to do the extension of the Tender validity period through NeST, but failed. The DPMU contended that he consulted the Public Procurement Regulatory Authority (PPRA) on the challenges faced in extending the tender validity period through NeST. He stated that PPRA promised that it would do the extension of the tender validity period in NeST on behalf of the Respondent. The DPMU emphasized that all the communication between the Respondent and PPRA were made verbally, there was no written document to that effect.

During the Respondent's submissions, Members of the Appeals Authority required the DPMU together with the Respondent's team to clarify the position of the tender validity period by considering the requirements of the law. The Respondent was informed by the Members of the Appeals Authority that Regulation 191(4) of the Regulations requires a specific procuring entity to request tenderers to extend the tender validity period and tenderers may accept or refuse the request. Having considered the requirements of the law and the sequence of events for this Tender, the Respondent conceded that the Tender validity period expired on 9th February 2024. The Respondent further conceded that no extension was made on the tender validity period.

Following such an admission, the Respondent went on to state that since the Tender had expired on 9th February 2024, all the Respondent's subsequent acts thereafter were not valid and were done in contravention



of the requirements of the law. In view of this fact, the Respondent stated that the Appellant's Appeal before the Appeals Authority is not proper as the same is based on the Respondent's acts after the expiry of the Tender validity period. Thus, the Appellant's prayers in this Appeal should also be disregarded.

REJOINDER BY THE APPELLANT

On his brief rejoinder Eng. Kerstin Njau submitted that, the role of requesting extension of time is solely the responsibility of the Respondent. Thus, the Respondent's failure to discharge its duties affected the rights of tenderers which genuinely participated in the Tender.

ANALYSIS BY THE APPEALS AUTHORITY ON THE POINT OF LAW

1.0 Whether there is a valid tender for determination by the Appeals Authority

In resolving this issue, the Appeals Authority took cognizance of the fact that the Respondent conceded that the tender validity period for the Tender under Appeal had already expired. Nevertheless, the Appeals Authority deemed it prudent to enlighten the parties on the importance of adhering to the tender validity period as specified in the Tender document.

In so doing, the Appeals Authority reviewed Clause 25.1 of the Instructions To Consultants (ITC) read together with Clause 25 of the PDS. These Clauses indicate that the tender validity period for this Tender was 120 days. The Appeals Authority further reviewed Section 71 of the Act which reads as follows: -



"The procuring entity shall require tenderers to make their tenders and tender securities including tender securing declaration valid for periods specified in the tendering documents, sufficient to enable the procuring entity to complete the comparison and evaluation of the tenders and for the appropriate tender board to review the recommendations and approve the contract or contracts to be awarded whilst the tenders are still valid".

(Emphasis supplied)

The above quoted provision clearly indicates that tenderers were required to make their tenders valid for a period specified in the Tender Document. In addition, a procuring entity is required to specify the tender validity period that would be sufficient to enable it to complete the evaluation of tenders. Furthermore, the time specified should be sufficient for the appropriate Tender Board to review the recommendations and approve award of the contract.

The Appeals Authority reviewed the record of Appeal. It observed that the Tender opening took place on 12th October 2023 and the tender validity period specified under Clause 25 of the PDS was 120 days. Counting from 12th October 2023, the tender validity period expired on 9th February 2024.

Regulation 191(4) of the Regulations allows in exceptional circumstances a procuring entity to request tenderers to extend the tender validity period of the Tender, provided such a request is made prior to the expiry of the



initial specified period. Regulation 191(4) of the Regulations reads as follows: -

191(4) "***In exceptional circumstances, prior to the expiry of the original period of effectiveness of tenders, a procuring entity may request tenderers to extend the period for an additional specified period of time'***

(Emphasis supplied)

In addition, Regulation 192(1) of the Regulations allows tenderers who agree to the request for extension of the tender validity period to also extend their tender securities or provide new tender securities to cover the extended tender validity period. Regulation 192(1) of the Regulations reads as follows: -

192(1) "***Tenderers who agree to an extension of the period of effectiveness of their tenders shall extend or seek an extension of the period of effectiveness of their tender securities provided by them or provide new tender securities to cover the extended period of effectiveness of their tenders'***".

(Emphasis supplied)


During the hearing, before the Respondent conceded that there was no extension of the tender validity period, it asserted that the extension of the tender validity period was made by PPRA. The Appeals Authority wishes to enlighten the Respondent that according to Regulations 191(4) and 192(1) of the Regulations, the request for extension of the tender validity period

must be made by a specific procuring entity to tenderers. Tenderers are required to respond to the request by either accepting or refusing it. In addition, if a tenderer accepts the request, it may also extend or submit new tender security. In view of the requirements of the law, the extension of the tender validity period must be initiated by the specific procuring entity. Thus, there is no institution that can do this on behalf of the procuring entity.

The Appeals Authority observed from the record of Appeal that, on 29th March 2024, the Tender Board approved the recommendations of award as was submitted by Evaluation Committee. Negotiations with the proposed successful tenderer were conducted on 17th and 18th May 2024. On 27th May 2024, the Tender Board approved the negotiation report and award of the Tender to the proposed successful tenderer. On 4th June 2024, the Respondent issued the Notice of Intention to award which resulted into this Appeal. Since the tender validity period expired on 9th February 2024 and there was no extension of the tender validity period, all the Respondent's acts after expiry of the tender validity period were null and void in the eyes of the law.

In view of the fact that the Respondent conceded that the tender validity period had expired and was not extended, the Appeals Authority finds that there is no valid tender for consideration. Given the circumstances, the Appeals Authority concludes the first issue in the negative.

Taking into consideration of our findings hereinabove, the Appeals Authority would not delve into the remaining issues. The Appeals Authority



hereby dismiss the Appeal and orders the Respondent to re-start the Tender process afresh in compliance with the law due to the expiry of the tender validity period. Since the point of law was raised by the Appeals Authority *suo motu*, 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 Appellant and in the absence of the Respondent though duly notified on this 26th day of July 2024.

HON. JUSTICE (rtd) SAUDA MJASIRI



CHAIRPERSON

MEMBERS: -

1. ENG. STEPHEN MAKIGO



2. DR. WILLIAM KAZUNGU

