

IN THE PUBLIC PROCUREMENT APPEALS AUTHORITY

APPEAL CASE NO. 17 OF 2024 - 2025

BETWEEN

M/S HANKUK ENGINEERING CONSULTANTS.....APPELLANT

AND

IRINGA URBAN WATER SUPPLY

AND SANITATION AUTHORITY.....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. Agnes Sayi | - Principal Legal Officer |
| 3. Ms. Violet Limilabo | - Senior Legal Officer |
| 4. Mr. Venance Mkonongo | - Legal Officer |

FOR THE APPELLANT

- | | |
|-------------------------|-----------------------------|
| 1. Mr. Nereus Mutongere | - Advocate, Josam Attorneys |
| 2. Mr. Jovith Muhandiki | - Country Manager |



FOR THE RESPONDENT

1. Mr. Ayoub Sanga - State Attorney – Office of the Solicitor General
2. Mr. Bryson Ngulo - State Attorney – Office of the Solicitor General
3. Mr. Mathew Fuko - State Attorney – Office of the Solicitor General
4. Mr. Edwin Hyera - Head of Legal Services
5. Mr. Philbert Mbatina - Director of Procurement Management Services
6. Mr. Fabian Maganga - Director of Water Supply and Sanitation Services

This Appeal was lodged by **M/S Hankuk Engineering Consultants** (hereinafter referred to as "**the Appellant**") against **Iringa Urban Water Supply and Sanitation Authority**, commonly known by its acronym as "**IRUWASA**" (hereinafter referred to as "**the Respondent**"). The Appeal is in respect of the RFP No. TR164/2023-2024/C/1 for Consultancy Services for Detailed Design and Preparation of the Tender Documents and Supervision of Works for Improvement of Water Supply and Sanitation Services in Iringa Municipality Project (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 Economic Development Cooperation Fund (EDCF) Loan.

On 20th June 2024, the Respondent issued a letter of invitation to tender to all the shortlisted consultants. The invitation indicated that the Tender was to be conducted through Restricted Competitive Tendering method as specified in the Guidelines for the Employment of Consultants under the EDCF Loan. The deadline for submission of proposals was initially set on 16th August 2024 but extended to 30th August 2024.

Prior to the deadline for submission of proposals, the Appellant through a letter dated 25th July 2024 requested approval from the Respondent to associate with M/S GKW Consult GmbH. This firm was not among the Appellant's JV partners in the pre-qualification process which was conducted before floating this Tender. The Appellant's request was granted by the Respondent through a letter dated 5th August 2024.

On the deadline for submission of proposals, the Respondent received three proposals including that of the Appellant. The received proposals were subjected to evaluation which was conducted in two stages. The first stage was evaluation of the technical proposals and the second stage was evaluation of the financial proposals. Evaluation of the technical proposals was conducted into two steps namely preliminary and detailed evaluation. During preliminary evaluation, the Appellant's technical proposal was disqualified for having a JV with M/S GKW Consult GmbH. This firm was not from eligible source countries as required by the Tender Document. The remaining two tenders were subjected to detailed evaluation. After completion of the detailed evaluation process, the two firms were found to have attained a qualifying mark above the minimum score. Thus, they were to be invited for the opening of the financial proposals.

Before the financial proposals were opened, the Respondent through a letter dated 10th October 2024, notified the Appellant that its technical proposal was found to be non-responsive. This was due to the reason that it associated with M/S GKW Consult GmbH, a firm which was neither a Tanzanian local company nor a Korean company contrary to Clause 15 of the Instruction to Consultants-Data Sheet (hereinafter referred to as "**the ITC – Data Sheet**"). The Appellant was dissatisfied with the reason given for its disqualification. Thus, it submitted its complaint to the Respondent through a letter dated 14th October 2024. The record of Appeal indicates that on 16th October 2024, the Respondent issued its decision which rejected the Appellant's complaint.

The record of Appeal indicates further that the Respondent opened the financial proposals on 18th October 2024. The Respondent then communicated the minutes for the opening of the financial proposals to tenderers on 20th October 2024. On 21st October 2024, the Appellant wrote an email to the Respondent challenging its act of opening the financial proposals without considering the Appellant's filed complaint. On 22nd October 2024, the Respondent replied to the Appellant's concern and stated that its decision on the filed complaint was sent through email on 16th October 2024. Nevertheless, the Respondent re-submitted its decision to the Appellant on the same email on 22nd October 2024. Aggrieved with the Respondent's decision, the Appellant filed this Appeal before the Appeals Authority on 29th October 2024.

The Appellant's Appeal is centered on the ground that the Respondent erred in law for disqualifying its tender for including a JV partner M/S GKW Consult GmbH, a firm that was not from eligible source countries which are the Republic of Korea and the United Republic of Tanzania. The Appellant stated that M/S GKW Consult GmbH was registered in Tanzania by Business Registration Licensing Agency (BRELA), regulatory authorities and licensing institutions. Thus, M/S GKW Consult GmbH is a local company regardless of its share structure.

In response to the grounds of Appeal, the Respondent stated that the Appellant was fairly disqualified during preliminary evaluation as it did not comply with Clause 15 of the ITC – Data Sheet. The Respondent stated that the Appellant associated with M/S GKW Consult GmbH, a firm which was registered in Germany while Clause 15 of the ITC Data Sheet stated clearly that eligible companies which were to participate in this Tender were those from eligible source countries, the Republic of Korea and the United Republic of Tanzania, respectively. The Respondent stated further that the Appellant's contention that M/S GKW Consult GmbH had been locally registered is unfounded as being registered by BRELA, regulatory authorities and licensing institutions does not make a foreign firm to be a local firm. There are other several criteria for a company to be recognized as a local company. Therefore, the Respondent contended that the Appellant was fairly disqualified for failure to comply with Clause 15 of the ITC – Data Sheet.

On its Statement of Reply, the Respondent also raised Preliminary Objections (POs) on points of law to the effect that: -

- i) *"This Appeal is untenable in law as this Honorable Appeals Authority has no jurisdiction to entertain the matter as per Section 4(1) (b) of the Public Procurement Act;*
- ii) *In the alternative to the point of Objection No. 1 above, the Appeal is vexatious, frivolous and untenable in law for want of the decision by procuring entity capable of being Appealed against as the Appellant did not exhaust remedies available by lodging a complaint, contrary to Section 96(1) of the Public Procurement Act (as amended);*
- iii) *In the alternative to Point of Objections No. 1 and 2 above, the Appeal before this Appeals Authority is untenable in law for being filed out of time contrary to Section 96(6), (7) and Section 97 of the Public Procurement Act (as amended)."*

When the matter was called on for hearing and before framing up of the issues, Mr. Nereus Mutongere, the learned advocate for the Appellant, informed the Appeals Authority that having considered the Preliminary Objections, particularly the first point of law which relates to the jurisdiction of the Appeals Authority to determine the Appeal, the Appellant conceded that the Appeals Authority lacks jurisdiction to entertain the Appeal.

Mr. Ayoub Sanga, learned State Attorney from the Office of the Solicitor General who represented the Respondent in this Appeal, did not object to

the Appellant's concession that the Appeals Authority lacks jurisdiction to entertain this Appeal. The learned State Attorney also did not press for costs.

Despite the Appellant's concession, the Appeals Authority wishes to enlighten the parties on the dispute resolution procedures that were to be followed for this Tender. According to paragraph 1 of Section 1-Letter of Invitation, this Tender came up after the Government of the United Republic of Tanzania had received a loan from the resources of the EDCF of the Republic of Korea in the amount of United State Dollars Eighty-Eight Million Three Hundred Eleven Thousand (US\$ 88,311,000.00) towards the cost of the improvement of Water Supply and Sanitation Services in the Iringa Municipality project.

The Loan Agreement under Article I, Section 1.02 recognizes the Respondent as the project executing agency for the loan. In addition, 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 4 (procurement of goods) and Schedule 5 (employment of consultants) attached to the Loan Agreement.

Schedule 5 as attached to the Loan Agreement requires tenders for the employment of consultant services to be conducted in accordance with the Guidelines for the Employment of Consultants under the EDCF Loan. Paragraph 2 of Schedule 5 – Employment of Consultants 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)

As per the record of Appeal, it is crystal clear that this Tender relates to employment of consultant services under the EDCF Loan. Hence, the applicable guidelines are the Guidelines for the Employment of Consultants under the EDCF Loan.

Section 3.08 of the Guidelines for the Employment of Consultants under the EDCF Loan 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, Clause 30.1 of the RFP Document provides guidance on how a tenderer who is dissatisfied with the way the Tender process was conducted could challenge the same. Clause 30.1 reads as follows: -

"If the Standstill period is applied, upon receipt of the client's Notification of intention to Award referred to in ITC 27.1, 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)

The above quoted provision states clearly that a tenderer who is dissatisfied with the reason given for its disqualification, may submit its request for debriefing to the client within three business days. The client or the procuring entity is required to provide a response to all the requests for debriefing submitted to it.

The Appeals Authority reviewed the RFP document and observed that it is silent on procedures to be followed after the debriefing session has been completed by the client or procuring entity. In ascertaining on the right procedures to be followed, the Appeals Authority reviewed Section 4(1)(b) of the Public Procurement Act, No.10 of 2023 (hereinafter referred to as "**the Act**"). 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 International Financing Institution, and the financier has required the use of its own guidelines, the financier's guideline shall prevail over the applicability of the country's procurement law. Section 4(1)(b) of the Act reads as follows: -

"4(1) Endapo Sheria hii inakinzana na wajibu wa Jamhuri ya Muungano unaotokana na-

(a) au

(b) makubaliano yoyote ya msaada yaliyoingiwa baina ya Serikali na taasisi za kiserikali au mashirika ya fedha ya kimataifa ambayo Serikali ni mnufaika,

mahitaji ya mkataba wa kimataifa au makubaliano hayo yatatumika, isipokuwa kwa mazingira mengine yoyote, ununuzi utasimamiwa na Sheria hii.

(Emphasis added)

In view of the requirements of Section 4(1)(b) of the Act quoted above, and Article IV of the Loan Agreement which states categorically that the applicable rules for this Tender are the Guidelines for the Employment of Consultants under the EDCF Loan, it is crystal clear that disputes arising under the 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.

Section 4(1)(b) of the Act ousts the applicability of the Act when there is a specific donor's condition which requires its own guidelines to govern the Tender process. Therefore, since the RFP Document and the Guidelines for Employment of Consultants under the EDCF Loan provide a clear guidance on dispute resolution under the Tender, it goes without saying that the Appeals Authority lacks jurisdiction to entertain this Appeal.

Given the Appellant's concession to the first point of law of the Preliminary Objection that the Appeals Authority lacks jurisdiction to entertain this

Appeal, 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 delivered in the presence of the Respondent and in the absence of the Appellant this 12th day of December 2024.

HON. JUSTICE (rtd) SAUDA MJASIRI



CHAIRPERSON

MEMBERS: -

1. ENG. STEPHEN MAKIGO.....



2. MS. NDEONIKA MWAIKAMBO.....

