

COMPLAINT MATTER NO. 03 OF 2023

BETWEEN

AE & Q CONSULTING LIMITED COMPLAINANT

AND

ZANZIBAR UTILITIES REGULATORY AUTHORITY RESPONDENT

DECISION OF THE BOARD OF DIRECTORS

THIS DECISION IS MADE UNDER SECTION 85 (4) OF THE PUBLIC
PROCUREMENT AND DISPOSAL OF PUBLIC ASSETS ACT, ACT NO. 11 OF 2016.

28th September 2023

1.0 BACKGROUND

This review originated from the decision of the Zanzibar Utilities Regulatory Authority (the Respondent) made on the 09th August 2023 quantifying the proposal submitted by AE & Q Consulting Ltd (the Complainant) as unsuccessful.

To acknowledge a brief background that led to this review, we account for it as follows:-

Through a tender No. SMZ/F0118/C/NCB/2022-23/21 in the form of Request for Proposal (RFP), the Respondent invited bids for provision of Consultancy Services for Designing and Supervision of the Construction for the Zanzibar Utilities Regulatory Authority Office Building at Pemba from the following five bidders:-

S/N.	NAME OF THE COMPANY	COUNTRY OF RESIDENCE
1.	AE & Q Consulting Limited	Zanzibar
2.	Edge Engineering & Consulting Limited	Dar es Salaam
3.	Anova Consult Company Limited	Zanzibar
4.	Mekon Arch Consult Ltd	Zanzibar
5.	MJR Investment Co. Ltd	Zanzibar

All the invited bidders have positively responded by submitting their bids except MJR Investment Co. Ltd, thus to make the tender involving four participants then.

After finalizing the tender evaluation process, the Respondent, through the letter referenced BE.545/652/01/31 dated 09th August 2023, has issued notification of intention to award the tender to the purported evaluated winner, *Anova Consult Company Limited*, whose bid value is **TZS 560,483,920.00 -VAT inclusive** (the price).

The winner was undoubtedly obtained after the ineligibility of the other three bidders, which were also eventually served with the copies of the said notification of intention to award.

In the due process, the Complainant was not properly notified of the reasons for her ineligibility, thus through her letter with reference number ZURA/CW/OBC/2023/03 dated 23rd August 2023 requested to be furnished with the said reasons from the Respondent.

In answering the Complainant's request, the Respondent through a letter BE. 545/652/01/35 dated 24th August 2023 which was signed by the Accounting Officer, has outlined the reasons (as summarized hereunder) on which the Complainant was dismissed:-

1. The firm has little experience in projects of the similar nature with the tendered project and has never discharge roles of main consultancy but rather sub-consultancy only, contrary to the requirements stipulated in RFP,
2. The firm has not submitted the required proofs in the like of CVs of the qualifications of experts and trainers, contrary to the requirements stipulated in RFQ,
3. The firm has not submitted the required information regarding the key national experts and their CVs, contrary to the requirements stipulated in RFQ,
4. The firm has not submitted her organization structure, contrary to the stipulated requirement,
5. The submitted evidence regarding the mechanical engineer experiences (in plumbing) mismatch with the required levels of experiences (elevator, escalator, mechanical ventilator etc),
6. Upon the post-qualification by the Respondent, the firm was noted of the following shortfalls:-
 - a. presentation that the Complainant had previously discharged an assignment of consultancy role with ZURA on the construction of restaurant at ZURA building Maisara for TZS 10,000,000, which is untrue, and
 - b. the Respondent was not satisfied with the submission of proof (three copies of contracts) by the Complainant, instead of five contracts as required by the Respondent.

Being aggrieved by the decision and reasons as indicated herein above, the Complainant has forwarded her complaint here at the Authority.

2.0 COMPLAINT

Being dissatisfied with the Respondent's decision and reasons as stated herein above, through her letter referenced AEQ/ZPPDA/VOL.1/04 dated 24th August 2023, the

Complainant has instituted this complaint lies on the grounds that (as hereunder summarized):-

- a. the Respondent has evaluated technical proposal in combination with the financial proposals, which is contrary to clause 15.1 and Clause 21 of RFP;
- b. the Respondent has not notified the Complainant of her technical evaluation scores before opening the financial proposal, hence denying her the opportunity to challenge the decision, contrary to clause 22.1 of RFP and Regulation 170 of Public Procurement Regulations of 2021, although they believe their technical proposal had actually scored minimum qualifying mark.
- c. the Respondent has opened the Complainant's financial proposal in the absence of the Complainant's representative, which is contrary to the requirements of Regulation 171, and further the Complainant has shown her doubt on the possible tempering of her financial proposal by the PMU of the Respondent; and
- d. the Respondent's action of conducting post evaluation due diligence under Regulation 133 is unjustifiable, since it has not been pre-stated in the RFP, hence the results thereof can never be decisive.

Basing on the above stated grounds, the Complainant has literally prayed for intervention of the Authority in resolving this matter accordingly.

In contending the Complainant's claims, the Respondent has submitted that (as paraphrased):-

- a. they have conducted the evaluation of the technical and financial proposals in segregation on the 05th April 2023 and 25th April 2023 respectively within the e-procurement system, only that the system does not allow a distinct generation of the reports,
- b. the Complainant has actually failed to score the qualifying mark (70) at the technical proposal evaluation stage for lack of sufficient experience in the assignments of similar nature as of the tendered assignment, and that her advancement to the evaluation of financial proposals stage was mistakenly done,
- c. the Respondent had to carry out post qualification against the Complainant as a result of the Complainant's misrepresentation that she had previously worked as the consultant of the Respondent, which is completely wrong,

- d. the Respondent has denied the opening of financial proposal in the absence of the Complainant by stating that they have been accordingly invited all the bidders and the bidders who decided to attend were present, thus the Respondent has herself chosen not to attend,

Basing on those contentions, the Respondent has asked the Authority to generally nullify the complaint and allow the resumption of the process in favour of the Respondent.

3.0 CONSIDERED EVIDENCES

From the nature of the matter in question which founded solely on the documentary aspect of proofs which are sufficient to enable the appropriate decision, it became unnecessary to summon the attendance of officials of either party, thus this Board of Directors has confined itself to scrutinize the following submitted official documents: -

- a. Annual Procurement Plans (of 2022/2023 and of 2023/2024) of ZURA,
- b. Request for Proposal (RFP) Number SMZ/F0118/C/NCB/2022-2023/21 for Consultancy Services for Designing and Supervision of the Construction for the Zanzibar Utilities Regulatory Authority Office Building at Pemba used by the Respondent to invite tenders, floated in March 2023,
- c. Tenders submitted by the participating Bidders containing their Technical and Financial Proposals in response to the respective RFP issued by ZURA,
- d. Technical and Financial Evaluation reports generated from the procurement electronic system in relation to the said tender,
- e. Post Qualification Report in relation to the said tender,
- f. Minutes of the Respondent's Tender Board approving the results and recommendations of the tender evaluation,
- g. Respondent's Notice of Intention to Award with reference number BE.545/652/01/31 dated 9th August 2023, notifying the Complainant of its unsuccessful bid,
- h. Complainant's letter referenced ZURA/CW/OBC/2023/2 and dated 14th August 2023, to requesting the Respondent to offer the reasons justifying her disqualification, -

- i. Respondent's letter referenced BE. 545/652/01/34 dated 20th August 2023, giving conditions to be fulfilled so as the Complainant to be provided with the reasons for her dismissal,
- j. Complainant's letter referenced ZURA/CW/OBC/2023/03 and dated 23th August 2023, to request for reasons justifying her disqualification to the Respondent,
- k. Respondent's letter referenced BE. 545/652/01/35 dated 24th August 2023, maintaining its justifications to dismiss the Complainant, and
- l. Complainant's letter referenced number AEQ/ZPPDA/VOL.1/04 and dated 24th August 2023, laid down to the Authority to challenge the Respondent's justifications.

4.0 FINDINGS

4.1 Legality of the Complaint in terms of Procedure

Before determining the matter on its merit, it is necessary to address the legality of this complaint as per the procedural requirements under the Public Procurement and Disposal of Public Assets Act, Act No. 11 of 2016.

According to section 84(2) of the Act, the Complainant is supposed to begin her complaining course by invoking for review by Accounting Officer in not later than 10 working days since becomes aware of the Respondent's decision.

In this matter, initially the Respondent has issued a notification of unsuccessfulness of the Complainant without citing any reasons of such a verdict in it. After a series of exchanged corresponding, in which the Complainant requested the said reasons, finally they were made known through the Respondent's letter with reference BE. 545/652/01/35 dated 24th August 2023 which was signed by the Accounting Officer himself.

Acting on the said letter of the Accounting Officer, the Complainant, through her letter with reference number AEQ/ZPPDA/VOL.I/04 dated 24th August 2023 has instituted her complaint to this Authority on the 28th August 2023, without firstly pursuing the review of the Accounting Officer as per section 84 of the Act.

However, applying rational constructive translation of the provisions of the law and for the prevention of any inconveniencies as anticipated by the principal and

subsidiary rules of public procurement, the law doesn't make it condition precedent to disregard the complaint which has not firstly laid with the Accounting Officer.

Again, it is a very good logic to assume that, even if the complaint would have been laid to the Accounting Officer, the said Accounting Officer would have not had alternate answers from the ones he himself signed in the referred letter (AEQ/ZPPDA/VOL.1/04 dated 24th August 2023), we therefor of the view that the complaint has been properly instituted to this Authority in terms of timely and procedurally.

4.2 Legality of the Complaint in terms of Tender Process

On the other hand, it is also of vigorous significant value to examine the justification of the entire tender process prior to considering the complaint in its presented weight.

Additionally, in the due course of addressing the matter, the Authority has come across various main issues which necessitated the test of accuracy of the tender process as the complaint essentially traces its validity from the legitimacy of the tender process itself as a root.

From what transpired, this Board has formulated a specific task force comprised skilled personnel of the disciplines necessary for ultimate anticipated results that will offer vital assistance to attain a just verdict.

After thorough examination of the tender process, the following have been observed:-

4.2.1 Discrepancies in the Request of Proposal (RFP) issued by ZURA

- a) Firstly and foremost, Regulation 155 of Public Procurement Regulations of 2020, requires any Procuring Entity in the like of ZURA, before inviting tenders for consultancy, to invite tenders of "expression of interest".

By directly rushing to the stage of inviting tenders for consultancy services without firstly stepping to the "expression of interest" stage, ZURA has apparently violated the above mentioned regulation, which affects the root of the respective tender process validity.

- b) It has been also noted that, the "Bid Data Sheet" part of the RFP issued

by ZURA was primarily faulty and has amounted to material contravention of legal rules in the following elements:

- i. ZURA has abnormally dropped the usage of clause 4.1 of *RFP* (by declaring it *Not Applicable*) of which is essentiality linked with transparency and fairness (the championed basic principles of public procurement);
- ii. ZURA has violated instructions given under the Authority's guidelines by not including Memorandum of Undertaking in the clause 10.2 of *RFP*;
- iii. Under clause 13.1 of *RFP*, bidders were instructed to seek for clarification, shall they need it, through personal email and mobile phone of ZURA employee instead of ZURA official address as required under the Authority's Guidelines through standard document;
- iv. Under clause 14.1.1 of *RFP*, ZURA has contrarily declined (by declaring "*Not Applicable*") the appliance of "association" between the consultants, whereby the assignment is undertaken by a consultant in liaising with another one. Such "association" aspect is of distinctive eminence in this kind of assignment, taking into account the nature of the respective assignment which critically needs the diversified skills and professions.

Moreover, under the applicable procedures by the respective Regulatory Boards, the consultants are registered in confining to a singled profession only, thus under no way ZURA could get the consultant who possess diversified skills and professions and hence satisfactorily meets such a requirement;

- v. Under clause 16.2 of *RFP*, ZURA has incorrectly permitted price adjustment during the Supervision stage, which in fact has been planned to endure for 12 months only (as stipulated under clause 6 stage 4 of the Terms of Reference), contrary to the instructions give under Guidelines that allow price adjustment only when the time is of or above 18 months;
- vi. Contents of clauses 17.7 and 17.9 of *RFP* contravene model procedures and structure as specified in the Authority's

- guidelines by assigning the role of receiving the tenders to the Accounting Officer instead of the Tender Board as required; and
- vii. ZURA's *RFP* lacks essential contents of clause 25.1 of Model RFP issued by ZPPDA which provides conditions of "Conversion to Single Currency". In fact, this is mandatory, and it applies in cases where bids bear currencies other than Tanzania Shillings, so that it gives guidance on the applicable exchange rates, issuing authority and particular date when such indicative rates were set.

Leaving this clause out of the RFP, can cause terrific contradictions, and above all, it is contrary to the ZPPDA's guidelines.

- c) Terms of Reference (ToR) within the *RFP* are fundamentally insubstantial that shall undoubtedly weaken the confinement of the potential consultant. The following discrepancies are found in the ToR:-
- i. Clause 1.1 of *ToR* lacks important statements on the basic specifications of the intended building. The absence of such statements will obviously impose unwarranted extra costs to complete the intended construction;
 - ii. Clause 1.2 of *ToR* has clearly pointed out the assignment to include the three phases of "Designing, Preparation of Procurement Documents and Supervision". This clause contradicts with the RFP main statement which mentioned only two phases ("Designing and Supervision");
 - iii. Clause 2(a) of *ToR* has identified objective of this procurement is to secure a consultant who will conduct "*Quantity Surveying*", contrary to the professional procures which requires such stage to be preceded by *Land Survey*, *Topographical Survey*, etc. Additionally, the objectives stipulated under clause 2(b) of *ToR* "*Design a building that will provide offices and other services*" and clause 2(d) of *ToR* "*Provide services during the post construction maintenance period*" were supposed to be activities instead of objectives;
 - iv. Lack of clear identification of *ICT* personnel mentioned under clause 5(a)(vii) of *ToR* regarding "*Composition of the Consultancy Group*";

- such personnel is uncertain as to whether an *Officer* or *Engineer*;
- v. Clause 5(b) of *ToR* has listed five implementation stages of the respective consultancy services which are unnecessary voluminous in comparing with the following needed three stages as per the basic standards:-
- Designing sketches;
 - Preparing Procurement Documents; na
 - Supervision of construction which includes '*Defect Liability Period*'.
- vi. Clause 9 of *ToR* has not clearly stated on the necessary reports to be prepared and submitted by the potential consultant during discharge of her duties at all the project phases severally;
- vii. Clause 10 of *ToR* lacks necessary statements of payment conditions, which fundamentally important to any public procurement, let alone this particular tender; and
- viii. *ToR* itself has never identified any deliverables of the respective consultancy services after the contract completion, which are very essential in the standard procedures of consultancy assignment.

d) **Special Conditions of Contract**

ZURA has never filled any statement in the part of Special Conditions of Contract which is contrary to the Guidelines issued by the ZPPDA, thus the RFP contravened provision of section 48 (3) of Public Procurement and Disposal of Public Assets Act, Act No. 11 of 2016 which mandatorily instructs Procuring Entity to abide with guidelines issued by the ZPPDA.

4.2.2 Discrepancies in the Evaluation

- a. Evaluation has been conducted by testing, among others, the criteria which have not been pre-mentioned in the *RFP*, such as instructing bidder to submit their experiences (by summoning five contracts of performed similar nature assignments).

Further, the evaluation committee has considered by approving a Team Leader who possesses qualifications of *Resident/Civil Engineer* in all the submitted bids, this is quite contrary to the qualifications set out in

clause 11 of *ToR* which stated qualifications of *Architect* to the Team Leader for the assignment.

All that, has proved the contravention of section 57(3) of Public Procurement and Disposal of Public Assets Act which instructs that the evaluation should only be conducted basing on the criteria set out in the solicitation document (RFP in our case) and the submitted tender documents only.

b. Submitted Tender Documents;

- i. All the bidders have submitted that they will undertake the performance by “Association” contrary to clause 14.1.1 of *RFP* which declared it “not applicable”;
- ii. Power of Attorney of Mekon Arch Consult Ltd and that of Edge Engineering & Consulting Limited have discovered to contain marks which reasonably attract rational suspicious of their legality. This would have been noticed and questioned by the evaluation committee, but unfortunately that had never been done with unknown reasons.

This has clearly proved the infringement of Regulations 118(8) and (9) of Public Procurement Regulations of 2020 which direct the evaluation to be undertaken in compliance with the criteria set out in the *RFP* (clause 10.1 of *RFP* stipulates condition on submission of Power of Attorney); na

- iii. Only one bidder (Edge Engineering & Consulting Limited) has submitted “Technical Proposal Submission Form”, while none of remaining bidders has submitted it which deprive them the justification of contending in the Tender process.

c. Implementation of Annual Procurement Plan (APP)

In accordance with the approved annual procurement plan of 2022-2023 of ZURA which submitted to ZPPDA, the respective procurement was planned to cost TZS 125,000,000.00 which differs with TZS 200,000,000.00 mentioned in the Evaluation Report.

This gives impression that ZURA has either committed an unwarranted error or has made material changes in the costs without the needed

compliance of legal provisions requiring them to review their plan and notifying to the respective authorities accordingly.

Also, there has been noticed that, in the 2023-2024 annual procurement plan of ZURA, the same respective procurement has been allocated with TZS 500,000,000.00 which are closely nearer to the region of **TZS 560,483,920.00**, a bidding price of the bidder who has been issued with the "Intention to Award" after the evaluation completed in April 2023.

In that regard, it is obvious that the later procurement plan (2023-2024 APP) has been setup to accommodate the evaluation results, instead of actual assessment of the needed cost for the respective construction.

Moreover, the adjustment of procurement cost without notification to ZPPDA and Paymaster General is an infringement of section 42(4) of the Public Procurement and Disposal of Public Assets Act.

4.2.3 Illegality of the Tender Process

In accordance with clause 12 of Instruction to Consultants (ITC) in the *RFP*, the tender validity period was set to be 90 days from the submission deadline, which was 04th April 2023.

In that regards, the whole process was to come to an end by 03rd July 2023, while until the complaint was submitted to ZPPDA on the 28th August 2023. ZURA has never come close to such end, which is a clear violation of the clause and hence the contrary Regulation 109 of Public Procurement Regulations of 2020.

Therefore, it is clear that, from that date (03rd July 2023) the whole tender process became null.

4.2.4 Nullity of the Complaint

Basing on the above discussed discrepancies which have sufficiently proven to abort the root of the whole tender process, it is obvious that the complaint shall remain unfounded, and hence, in no way it can legally sustain.

5.0 DECISION

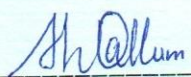
After an intensive determination of the whole tender process, including the relative complaint, and in exercising its power conferred upon it under section 85, and by virtue of sections 5, 6 and 7 of the Public Procurement and Disposal of Public Assets


Act, Act No. 11 of 2016, the Public Procurement and Disposal of Public Assets Authority hereby issue the following decisions and orders:-

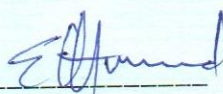
- a. The the entire proceedings of the respective tender subject to this complaint is a nullity,
- b. The respective tender is to be restarted afresh and properly, and
- c. The complaint is hereby dismissed accordingly.

Appeal is open for aggrieved party.

Dated in Zanzibar this 28th day of September 2023.

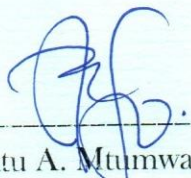

Dr. Sharifa O. Salim
Chairperson

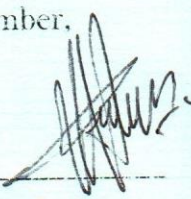

Ahmed M. Haji
Vice Chairperson,

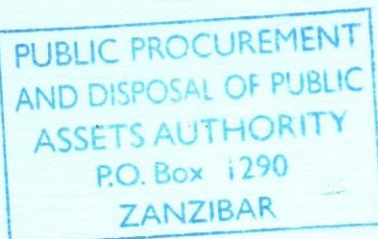

Mohamed Y. Mohamed
Member,

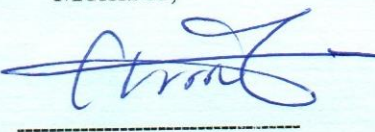

Mtumwa S. Sandal
Member,

Shaheen F. Mohammed
Member,


Tatu A. Mtumwa,
Member,


Othman J. Othman,
Member,




Abbas J. Fakihi
Secretary,

THE BOARD OF DIRECTORS OF
THE PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC ASSETS AUTHORITY