

**IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY
AT DAR ES SALAAM.**

APPEAL CASE NO. 27 OF 2013-14.

BETWEEN

**M/S TYPOTECH IMAGING SYSTEMS
LIMITED.....APPELLANT**

AND

**TANZANIA STANDARD
NEWSPAPERS.....RESPONDENT**

DECISION

CORAM.

- | | |
|--------------------------------------|----------------|
| 1. Hon. Augusta G. Bubeshi, J. (rtd) | -Chairperson |
| 2. Ms. Esther J. Manyesha | -Member |
| 3. Mr. Haruni S. Madoffe | -Member |
| 4. Mrs. Rosemary A. Lulabuka | -Member |
| 5. Mr. Ole-Mbille Kissioki | -Ag. Secretary |

FOR THE APPELLANT

1. Mr. Alfred Kandarah- Managing Director.
2. Mr. Rosan Mbwambo -Advocate, Law Associates
Advocates
3. Mr. Herry Paradise -Legal Officer, Law Associates
Advocates

FOR THE RESPONDENT

1. Ms.Mwadawa Saqware -Company Secretary
2. Richard Kevisa -Head, Procurement Management Unit.

SECRETARIAT

1. Mrs.Toni Mbilinyi - Principal Legal Officer
2. Mr. Hamisi Tika - Legal Officer

This decision was scheduled for delivery today 12th March, 2014 and we proceed to deliver it.

The Appeal at hand was lodged by **M/s TYPOTECH IMAGING SYSTEMS LTD** (hereinafter referred to as "**the Appellant**"); a Kenya based Company with Country Office in Dar es salaam - Tanzania, against the **TANZANIA STANDARD NEWSPAPERS** commonly known by its acronym, **TSN** (hereinafter referred to as "**the Respondent**").

The said Appeal is in respect of Tender **No. PA/102/TSN/HQ/2013-2014/G/15 for Supply of Plates, Plate developer and Plate finishing gum** (hereinafter referred to as "**the tender**").

According to the documents submitted to the Public Procurement Appeals Authority (hereinafter referred to as "**the Authority**") as well as oral submissions by parties during the hearing, the facts of the Appeal may be summarized as follows:

The Respondent vide the Daily News and Habari Leo Newspapers dated 21st and 28th January, 2013 respectively, invited tenderers to submit their tenders for the tender under appeal.

The said tender was conducted through National Competitive Tendering procedures specified in the Public Procurement (goods, works, non-consultant Services and disposal of public

assets by Tender Government Notice No. 97 of 2005) (hereinafter referred to as **GN. No. 97 of 2005**).

The deadline for the submission of tenders was set for 29th July, 2013, whereby three tenders were received from the following firms;

S/N O	Tenderer's Name	Quoted price (USD).
1.	M/s Transpaper (T) Ltd	341,846.00
2.	M/s Typotech Imaging Systems Limited	346,000.00
3.	M/s Elite Computers.	340,194.00

The tenders were then subjected to evaluation which was conducted in three stages namely; preliminary, technical and detailed evaluation.

All three tenders were found to be substantially responsive during preliminary evaluation and were therefore subjected to detailed evaluation.

During detailed evaluation, the Evaluation Committee checked for arithmetic errors in all the tenders and found them to be free from errors. The Evaluation Committee therefore ranked

the tenderers as hereunder and recommended award of the tender to the 1st ranked tenderer;

S/NO	TENDERER'S NAME	QUOTED PRICE IN USD (VAT INCLUSIVE)	RANKING
1.	M/s Transpaper (T) Ltd	341,846.00	2 nd
2.	M/s Typotech Imaging Systems Limited	346,000.00	3 rd
3.	M/s Elite Computers	340,194.00	1 st

The Respondent's Tender Board at its meeting held on 21st September, 2013, approved the recommendations by the Evaluation Committee and awarded the tender to M/s Elite Computers Limited at a contract price of USD.340, 194.00

On 11th October, 2013, the Respondent vide a letter referenced JM/AG.ME/TSN/566/10/2013 communicated award of the tender to the Successful Tenderer and also informed the remaining two tenderers through postal mail that their tenders were unsuccessful. The Appellant however, received the said notification on 14th January, 2014.

Prior to receiving the notification letter, the Appellant was verbally informed by their Country Director while in Nairobi that they had lost the tender. The Appellant being surprised by the

manner in which information was delivered decided to conduct internal investigation of what had transpired. In that investigation, they discovered that, the tender submitted by M/s Elite Computers Limited was in association with a firm called M/s Old East International.

The Appellant discovered further that M/s Old East International was a mere registered business name whose proprietor was Mr. Moses Mwano who is also their Country Director and had participated in preparation and submission of their tender.

Having learnt of the said facts, the Appellant vide a letter dated 20th December, 2013 lodged their complaint to the Respondent requesting for nullification of the successful tenderer's tender.

The reasons for the request was that, their Country Director took unfair advantage of the details contained in the Appellant's tender to prepare "his own" tender; and that he did not disclose to the Appellant that they had teamed up with M/s Elite Computers Limited for this tender.

That , since the Appellant's Country Director had participated in preparation of the Appellant's tender, and the same Director represented them during the tender opening ceremony, his participation as a partner in the tender of the winning

consortium was in contravention with the law and that, the successful tenderer's tender ought to have been disqualified.

That, on receipt of the Appellant's complaint, the Respondent suspended the finalization of the tender process and wrote a letter referenced GN/AG.ME/TSN/FAM 43/8 dated 24th January, 2014, to the Public Procurement Regulatory Authority (hereinafter referred to as "**the PPRA**") requesting for advice on how to handle the matter.

That, while the Respondent was waiting for a response from PPRA, the Appellant lodged their complaint to this Authority on 28th January, 2014.

SUBMISSIONS BY THE APPELLANT

The Appellant's documentary, oral submissions as well as responses from the questions raised by the Members of the Authority during the hearing may be summarized as follows;

That, they were among the three tenderers who participated in the tender under Appeal.

That, their transactions in Tanzania are performed and executed by their Country Director called Mr. Moses Edward Mwano.

That, their Country Director represented them during the tender opening ceremony but he also teamed up with M/s Elite Computers Limited to participate in the same tender without disclosing his interest to the Appellant or the Respondent.

That, the successful tenderer in association with their Country Director misled the Respondent into believing that their consortium was eligible and qualified for the award of the tender while it was not the case.

That, they were dissatisfied with the award of the tender to M/s Elite Computers Limited since Mr. Moses Edward Mwano had submitted two tenders contrary to Clauses 3.4(a), (e) and (f) of the Instructions To Bidders (hereinafter referred to as "**the ITB**") and the Public Procurement Act (hereinafter referred to as "**the Act**").

That, having seen the Appellant's tender, Mr. Mwano had a chance to manipulate the Appellant's tender to the advantage of the successful tenderer's tender and to the detriment of the Appellant.

That, had the Appellant's Country Director divulged his interest in the two tenders, the Respondent would not have awarded the tender to the consortium.

That, the successful tenderer's partner namely Mr. Moses Edward Mwano's misconduct in participating in two tenders without disclosing the same, led to the Respondent's failure to discover the mischief that would have made their tender non-responsive.

That, the Appellant's financial, technical and supply capabilities to the tender were far superior to those of the successful tenderer.

Finally, the Appellant prayed for the following;

- i. That, the award of the tender to the successful tenderer be nullified;
- ii. That, the Appellant be pronounced the winner of the tender; or
- iii. Re-tendering order be issued and
- iv. Payment of reasonable compensation of costs and expenses the Appellant had incurred in pursuit of this Appeal as hereunder;
 - a. USD. 10,000.00 as legal fees

b. USD.4,000.00 as Transport and accommodation costs.

REPLIES BY THE RESPONDENT

The Respondent's documentary, oral submissions as well as responses from questions raised by the Members of the Authority during the hearing may be summarized as follows;

That, they received the Appellant's complaint on 20th December, 2013, informing them on irregularities of the tender by M/s Elite Computers Limited in partnership with M/s Old East International.

That, the Appellant did not inform them before, that Mr. Moses Mwano was their Tanzania Country representative. Further, the Appellant did not provide evidence to establish the relationship they had between them and Mr. Moses Mwano. What the Respondent knew was that Mr. Moses Edward Mwano is a proprietor of M/s Old East International and not otherwise.

That, Appellant failed to provide proof that Mr. Moses Edward Mwano had manipulated or was in a position to manipulate their tender to the detriment of the Appellant's tender.

That, they did their job thoroughly and found all tenders to be responsive to the Tender Document but the Appellant's tender price was higher than the two remaining tenders. Thus, they could not award the tender to them.

That, with regard to the disputed experience of the successful tenderer , Clause 13 (g) of the Bid Data Sheet provided for two options. The first option was to the effect that, the tenderer was required to have three years experience in supply of plates, plate developer and finishing gum. The second option was to the effect that, a manufacturer of the said equipment was to be a reputable and internationally recognized firm with three years experience in supply of plates, plate developer and finishing gum. The successful tenderer complied with the latter criterion.

That, in determining tenderers' responsiveness, what they looked for was the firm as whole and not individual persons. Therefore it was difficult for them to identify the problem raised by the Appellant.

That, the Appellant feels that their tender was superior to others but they have no justifiable grounds to complain before this Authority.

The Respondent therefore, prayed for the dismissal of the Appeal in its entirety.

ANALYSIS BY THE AUTHORITY

Having gone through the documents submitted and having heard the oral arguments from parties during the hearing, the Authority is of the view that the Appeal is centred on the following two issues;

- **Whether the award of the tender to the Successful Tenderer was proper at law.**
- **To what reliefs, if any, are parties entitled to.**

Having identified the issues in dispute, the Authority proceeded to resolve it as follows:

1. Whether the award of the tender to the Successful Tenderer was proper at law.

In resolving this issue, the Authority deemed necessary to frame the following sub-issues;

i. Whether the consortium was legally constituted and hence eligible to participate in the tender.

ii. Whether there was a conflict of interest in Mr. Moses Edward Mwano's participation in the tender under Appeal.

i. Whether the consortium was legally constituted and hence eligible to participate in the tender.

In resolving this sub-issue, the Authority considered the Appellant's contentions that the tender had been awarded to a consortium comprising of M/s Elite Computers (Tanzania) Limited and M/s Old East International, a mere business name which could not have met the tender requirements.

In ascertaining the Appellant's contentions, the Authority examined the oral and the documentary evidence availed vis-a-vis the applicable law and the Tender Document. In doing so, the Authority observed that, it is true that the tender was

awarded to a consortium comprising of M/s Elite Computers (Tanzania) Limited and M/s Old East International which is a mere business name.

The Authority revisited the Respondent's Tender Document in which terms of reference were made, and observed that, Clause 3.1 of the ITB allowed tenderers to tender as a joint venture, consortium or an association. The Tender Document however, required tenderers tendering as such, to submit a letter of intent to enter into an agreement or to have an existing agreement to tender under such arrangements. The Authority reproduces the said Clause as hereunder;

“Clause 3.1. A Bidder may be a natural person, private entity, and government owned entity, subject to ITB Sub-Clause 3.4, any combination of them with a formal intent to enter into an agreement or under an existing agreement in the form of a joint venture, consortium or association, unless otherwise specified in the Bid Data Sheet, all parties shall be jointly and severally liable”.

The Authority revisited the tender by the successful tenderer and observed that, it contained an agreement to form a joint

venture as the Tender Document required. However, the said agreement was between firms with different legal capacities. One firm being a corporate legal entity while the other being a business name. The Authority observed that, M/s Elite Computers (T) Limited was a legally constituted company while M/s Old East International was a mere registered Business name whose proprietor is Mr. Moses Edward Mwano.

The Authority opines that, a corporate entity duly registered is capable of entering into agreement and sue or be sued in its own name. This is not the case with a business name. Since a business name is not a legal entity, it is therefore neither capable of entering into contracts nor sue or be sued in its own name. The proprietor can do so and not a business name.

When asked by the Members of the Authority during the hearing to clarify on such a fundamental anomaly, the Respondent conceded that a contract cannot be entered with a business name and that it was an oversight on their part.

Indeed, Regulation 6 (7) (b) of GN.NO.97 of 2005 which is in *parimateria* with Regulation 9(10) (b) of GN.446 of 2013 clearly provide that where one party in a joint venture or consortium is deemed to be ineligible, the whole joint venture or consortium shall be declared ineligible. Thus, the Respondent ought to

have disqualified the successful tenderer's tender for non compliance.

Assuming that, the said consortium was legally constituted, the Authority is of the view that, the Respondent ought to have evaluated the successful tenderer's tender separately pursuant to Regulation 6(7) (e) which is in *parimateria* with Regulation 9(10) (e) of GN.NO.446 of 2013. To the contrary, the Respondent did not do so.

For purposes of clarity, the Authority reproduces the said provisions which read as follow;

Reg. 6(7). "Where a tenderer submits a tender as part of a joint venture, consortium or association, the solicitation or contract document shall state where appropriate:

- (b). that a party to a joint venture, consortium or association shall be eligible to participate in the procurement or disposal by tender and where one party is deemed to be ineligible, **the whole joint venture, consortium or association shall be declared ineligible.**

(e). that any tender from a joint venture, consortium or association shall indicate the part of proposed contract to be performed by each party and **each party shall be evaluated or pre qualified or post qualified with respect to its contribution only;** (Emphasis Added).

In view of the above findings, the Authority is of the settled view that, the joint venture between M/s Elite Computers (Tanzania) Limited and M/s Old East International was void ab initio. Consequently, the purported consortium could not tender for want of legal capacity.

ii. Whether there was a conflict of interest in Mr. Moses Edward Mwano's participation in the tender under Appeal.

In resolving this sub-issue, the Authority considered the Appellant's contentions that, the proprietor of M/s Old East International one Moses Edward Mwano engaged in two different tenders in the same tender process; and that his act violated requirements of the Tender Document and the law, thus, the successful tenderer's tender ought to have been disqualified.

In doing so, the Authority requested the Respondent to clarify on this matter during the hearing. In their clarification, the Respondent submitted that, Mr. Moses Edward Mwano appearing in the Appellant's tender Document was a different person from Mr. Moses Edward Mwano appearing in the successful tenderer's tender. They submitted that, the Appellant provided no evidence that Mr. Moses Edward Mwano was their Country Representative. Therefore, lack of proof to that effect negated the conflict of interest alleged by the Appellant.

In their oral rejoinder, the Appellant asserted that, the Respondent was not telling the truth. They submitted that, for six continuous years Mr. Moses Edward Mwano had been representing them in all their tendering process with the Respondent including submission of their tenders, participating in the opening ceremonies, following up on contracts concluded with them and the payments thereof. They concluded that, there is no way that key people in the procurement unit of the Respondent could not have known Mr. Moses Edward Mwano.

In resolving parties' contentions regarding this matter, the Authority revisited the Tender Document, the Appellant's tender together with the successful tenderer's tender and other availed documents. In doing so, the Authority noted that, the Appellant's tender contained a Curriculum Vitae of Mr. Moses

Edward Mwano as one of their key technical personnel in the capacity of a Country Director. The Authority observed further that, despite being the Appellant's Country Director, Mr. Moses Edward Mwano had also represented the Appellant during the tender opening ceremony held on 29th July, 2013, and the name appeared in the minutes (without a middle "Edward") to that effect.

Having revisited the Appellant's tender, the Authority then proceeded to scrutinize the successful tenderer's tender and observed that, in the Certificate of Registration of M/s Old East International which is a joint venture partner, Mr. Moses Edward Mwano had been presented as the proprietor of that firm.

The Authority observed further that despite being the proprietor of one of the partners to the joint venture, that is, M/s Old East International; Mr. Moses Edward Mwano's CV was appeared in the successful tenderer's tender as one of the key staff too.

In view of the above findings, the Authority hastens to disagree with the Respondent that Mr. Moses Edward Mwano appearing in the Appellant's tender is a different person from the one appearing in the successful tenderer's tender, since the names appearing in the Appellant's tender are identical. Indeed these

findings tend to corroborate the Appellant's submissions that Mr. Moses Edward Mwano was well known to the Respondent.

It is the Authority's view that, given the above facts supported by the Tender Documents, had the Respondent been diligent in their work, they would have certainly invoked Section 72(1) and (2) (a) and (b) of the Act, which is in *parimateria* with Section 83(1) and (2) of PPA/2011 and took appropriate cause of action.

The Authority hereby reproduces the said Section for ease of reference;

S.72(1) "Procuring and approving entities as well as tenderers, suppliers, contractors and consultants under public financed contracts shall proceed in transparent and accountable manner during the procurement and execution of such contracts.

(2) where a procuring entity or an approving authority is, after appropriate investigation, satisfied **that any person or firm, to which it is proposed that a tender be awarded, has engaged in corrupt or fraudulent practices in competing for the contract in question, the entity or authority may:-**

a) reject a proposal for award of such contract;

b)declare any person or firm ineligible for a period of ten years to be awarded a public financed contract". (Emphasis Added).

The word fraudulent practice referred under Section 72(2) above is defined under Section 3 of the Act to mean a misrepresentation of facts in order to influence a procurement process or the execution of a contract ...

Having established that Mr. Moses Edward Mwano was party to two tenders in the tender in dispute, the Authority hastens to conclude that this amounted to conflict of interest, which is contrary to Clause 3.4 of the ITB which reads as follows;

Clause 3.4. "A Bidder shall not have a conflict of interest. All Bidders found to be in conflict of interest shall be disqualified. A Bidder may be considered to have a conflict of interest with one or more parties in this bidding process, if they:

- a) Having an association in the past with the Respondent, whether directly or indirectly with a firm or any of its affiliates which have been engaged by the procuring entity to provide consulting services for the preparation of the design, specifications and

other documents to be used for the procurement of the supplies and services to be purchased under this invitation for Bids; or

b) Having controlling share holders in common; or

c) Receive or have received any direct or indirect subsidy from any of them; or

d) Having the same legal representative for purposes of this bid; or

e) Have relationship with each other, directly or through common third parties, that puts them in a position to have access to information about or influence on the bid of another Bidder, or influence the decisions of the procuring entity regarding this bidding process; or

f) Submit more than one bid in this bidding process...

(Emphasis Added)

Having revisited the above provisions, the Authority further revisited the tender by the successful tenderer and observed that it contained a declaration statement signed by one Mr.

Alnashir Madhani that they had no conflict of interest regarding this tender. The Authority noted further that the said Mr. Alnashir Madhani was given powers by Mr. Moses Edward Mwano to act on behalf of M/s Old East International who was a joint venture partner with M/s Elite Computers (T) Limited.

In light of the above, the Authority is of the considered view that, the successful tenderer through their joint venture partner was aware of what was transpiring. That's why Mr. Moses Edward Mwano appointed another person to act on his behalf in the consortium, since he knew that he had also to represent the Appellant during the tender opening ceremony.

In view of the above, the Authority's conclusion with regard to the second sub-issue is that there was a conflict of interest in Mr. Moses Edward Mwano's participation in the tender under Appeal. Accordingly, the Authority's conclusion with regard to the main issue is that, the award of the tender to the successful tenderer was not proper at law.

2. To what reliefs, if any, are parties entitled to?

Having resolved the contentious issues, the Authority revisited the Appellant's prayers as hereunder:

- Firstly, the Authority considered the Appellant's prayer that the award of the tender to the successful tenderer be nullified; the Authority agrees with the Appellant in this regard and hereby nullifies the award of the tender to the successful tenderer.
- Secondly, with regard to the prayer that the Appellant be declared the winner of the tender, the Authority cannot grant such a prayer for lack of jurisdiction. The law does not empower this Authority to award tenders or substitute the winner thereof. The said powers have been solely vested unto the Tender Boards of the respective procuring entities.
- Thirdly, with regard to the prayer for compensation of reasonable costs incurred for the Appeal, the Authority through its discretionary powers observes that the Appellant deserves to be compensated a sum of **USD 7,000 and Tshs. 120,000/-** as per the following breakdown;
 - **Appeal filing fees Tshs. 120,000/**
 - **Advocates fees USD.5,000**
 - **Transport and living cost in Dar es salaam USD. 2,000**

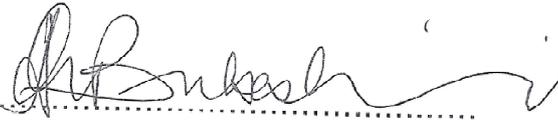
The Authority also considered the Respondent's prayer that, the Appeal be dismissed for lack of merits. As established in its analysis above, the Authority does not agree with the Respondent as the submissions made by the Appellant have merits.

On the basis of the aforesaid findings, the Authority upholds the Appeal and orders the Respondent to re-evaluate the tenders afresh in observance of the law and pay the Appellant a sum of **USD 7,000** and Tshs. **120,000/-** being reasonable costs incurred in pursuit of this Appeal.

Right of Judicial Review as per Section 101 of the PPA/2011 explained to parties.

The Appellant has the right to execute this decision in terms of Section 97(8) of the PPA/2011.

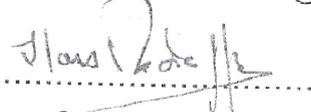
Decision delivered in the presence of the Appellant and in the Respondent this 12th March, 2014.



JUDGE (rtd) A. BUBESHI

CHAIRPERSON

MEMBERS:

1. MS. ESTHER J. MANYESHA.....
2. H.S. MADOFFE.....
3. MRS. R.A. LULABUKA.....