

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

**APPEAL CASE NO. 1 OF 2014-15**

**BETWEEN**

**M/S OKOAMUDA LIMITED.....APPELLANT**

**AND**

**KITETO DISTRICT COUNCIL.....RESPONDENT**

**DECISION**

**CORAM**

- |                                      |                |
|--------------------------------------|----------------|
| 1. Hon. Augusta G. Bubeshi, J. (rtd) | -Chairperson   |
| 2. Mrs. Nuru N. Inyangete            | -Member        |
| 3. Eng. Francis T. Marmo             | -Member        |
| 4. Mrs. Rosemary A. Lulabuka         | -Member        |
| 5. Mr. Ole-Mbille Kissioki           | -Ag. Secretary |

**SECRETARIAT**

- |                           |                          |
|---------------------------|--------------------------|
| 1. Mrs. Toni S. Mbilinyi  | -Principal Legal Officer |
| 2. Ms. Violet S. Limilabo | - Legal Officer          |
| 3. Mr. Hamisi O. Tika     | - Legal Officer          |

## **FOR THE APPELLANT**

1. Ms. Yusuf Nyahori -Managing Director
2. Mr. Keneth Maganga -Advocate, Great Harvest Attorneys
3. Amina Nyahori -Company Secretary.

## **FOR THE RESPONDENT**

1. Mr. Peter Lebalwa - Head, Procurement Management Unit
2. Mr. Cosmas A. Nsemwa -Legal Officer

This decision was scheduled for delivery today 22<sup>nd</sup> August, 2014 and we proceed to deliver it.

The Appeal at hand was lodged by **M/s OKOAMUDA LIMITED** (hereinafter referred to as "**the Appellant**") against **KITETO DISTRICT COUNCIL** (hereinafter referred to as "**the Respondent**").

The said Appeal is in respect of Lot No. 1 in Tender No. LGA/060/2014/2015/NC/1 specifically on the Revenue Collection at Kibaya, Bwagamoyo, Patrimbo, Name Lock Lengatei, Chapakazi, Magungu, Songambebe, Dosidosi, Sunya, Kijungu, Loolera, Engusero, Matui, Njoro, Kiperesa and Dongo wards (hereinafter referred to as "**the tender**").

According to the documents submitted to the Public Procurement Appeals Authority (hereinafter referred to as "**the Appeals Authority**"), the facts of the Appeal may be summarized as follows:

The Respondent vide the Mtanzania Newspaper dated 7<sup>th</sup> May, 2014, invited tenderers to tender for the tender under Appeal.

The deadline for the submission of the tender was set for 28<sup>th</sup> May, 2014 whereby two tenders were received for the said Lot namely M/s Okoamuda Limited and M/s Adosta Investment Limited. The read out prices were as follows;

<b>S/N</b>	<b>NAME OF THE BIDDER</b>	<b>QUOTED PRICE IN TSHS.</b>	<b>DURATION</b>
1.	M/s Okoamuda Limited	63,550,000/-	PER MONTH
2.	M/s Adosta Investment Limited.	58,400,000/-	PER MONTH

The tenders were then subjected to evaluation by giving scores for every component contained in the Tender. In that process, the Evaluation Committee observed both tenderers to have adequate experience in the performing the task save that, the Appellant's tender did not contain a Power of Attorney. The Evaluation Committee therefore, awarded 10 marks out of 10 to M/s Adosta Investment Limited, while the Appellant's tender was given 9 marks out of 10.

Thereafter, the Evaluation Committee recommended the award of the tender to M/s Adosta Investment Limited

The Tender Board at its meeting held on 10<sup>th</sup> June, 2014, deliberated on the recommendations by the Evaluation Committee and approved the award of the tender as recommended.

On 19<sup>th</sup> June, 2014, the Respondent's Accounting Officer vide a letter referenced HMW/KT/B/37/VOL.V/02/186 communicated the award of the tender to the successful tenderer but he did not notify the Appellant on the award made.

On 23<sup>rd</sup> and 25<sup>th</sup> June, 2014 respectively, the Appellant's Managing Director visited the Respondent's office to inquire about the tender. It was at this moment when they were told by the Secretary to the Respondent's Tender Board that, the tender had already been awarded to M/s Adosta Investment Limited and that they should wait for an official letter to that effect.

On 27<sup>th</sup> June, 2014, the Respondent vide a letter referenced LGA/ 060/2014/15/NC-1, informed the Appellant that their tender was not successful and that the award of the said tender has been made to M/s Adosta Investment Limited.

Having received the Respondent's letter and being aggrieved by the contents thereof and other legal anomalies contained in the tender process, on 8<sup>th</sup> July, 2014, the Appellant lodged their Appeal to the Appeals Authority.

## **SUBMISSIONS BY THE APPELLANT**

The Appellant's arguments as deduced from documents availed to this Authority, as well as oral submissions and responses to questions raised by the Members of the Appeals Authority during the hearing, may be summarized as follows;

That, they were among the two tenderers who participated in the tender.

That, they are dissatisfied with the award of the tender made by the Respondent to the successful tenderer.

That, the Respondent did not issue a letter of Intention to award the tender pursuant to Section 60(3) of the Public Procurement Act, 2011 (hereinafter referred to as "**the Act**"), rather the Respondent notified them that their tender was not successful.

That, the Respondent communicated award of the tender to them while the successful tenderer had already commenced execution of the contract prior to the lapse of fourteen days of Notice of Intention to award the tender as the law requires. Thus, they are dissatisfied with Respondent's actions and decision to that effect.

That, the Respondent's anomalies indicated above, denied them the right to lodge their complaint to the Respondent's Accounting Officer as the law requires.

That, the reason given by the Respondent for rejection of the Appellant's tender namely; failure to submit a Power of Attorney was contrary to the law, since, neither the Tender Document nor the Tender Advertisement contained such a requirement.

That, failure to attach a Power of Attorney is not a requirement which can be used to disqualify a tenderer in terms of Section 68(1) (2) and (3) of the Act and Regulation 192(a) (b) (c) (e) (f) (g) (h) and (i) of the Public Procurement(Goods, Works, Non Consultant Services and Disposal of Public Assets by Tender Regulations, 2013 (hereinafter referred to as **"the GN.NO.446 of 2013"**)).

Furthermore, Power of Attorney is nowhere to be found in the laws of Tanzania; rather, it is a Common Law principle which defines Principal and Agent relationship. In the Company Act, Chapter 12 of R.E. 2002, the instrument which expresses that relationship is a company resolution. Thus, the Respondent would have requested for an extract of the company resolution and not a Power of Attorney. Therefore, the criterion has been misconceived, and the same would not have been used by the Respondent to disqualify the Appellant.

That, the Respondent did not disclose the name of the successful tenderer who has been awarded the tender together with their contract price as the law requires.

That, they suspect that, the Respondent had awarded the contract to unqualified tenderer because the Appellant had met all qualification criteria and that they were the highest tenderer who tendered for Tshs. 63,550,000/ a month.

That, the Appellant's quoted price was reasonable to meet the Respondent's budget as the same exceeded the Respondent estimated revenue collection for the Financial Year 2014/2015. While the Respondent's estimates was Tshs 60,000,000/- per month, the successful tenderer's tender was for Tshs. 58,400,000/- which was below the Respondent's estimates.

That, the Tender Document issued by the Respondent was in conflict with the Tender Advertisement. While the Tender Advertisement required a successful tenderer to deposit a three months collection as security, the Tender Document required only two months collection. Therefore, the Respondent's acceptance of two months collection as security bond is contrary to the Local Authority Finance Memorandum Order 38(3) of 2010.

In view of the above submissions, the Appellant is of the view that their tender was unfairly rejected contrary to the law.

Finally, the Appellant moved the Authority for the following orders;

- i. Annul the decision of the Respondent to reject their tender.
- ii. Order the Respondent to reach a lawful decision.
- iii. The Respondent to pay the Appellant their expected profit for the tender which is Tshs. 144,588,000/ per year.
- iv. Costs incurred in pursuit of the Appeal and the tender process to the tune of Tshs. 3,120,000/- as per the following break down;
  - Appeal filing fees Tshs. 120,000/-
  - Advocates Fees Tshs. 3,000,000/- and
- v. Any other action the Authority deems necessary.

### **REPLIES BY THE RESPONDENT**

The Respondent's response as deduced from documents availed to this Authority, as well as oral submissions and responses to questions raised by the Members of the Appeals Authority during the hearing, may be summarized as follows;

That, the Respondent communicated the outcome of the tender to all tenderers who participated in the tender process. The Appellant was notified that they did not win the tender vide a

letter referenced HMW/KT/B/37/VOL.V/02/198 dated 19<sup>th</sup> June, 2014.

That, they did not issue an award letter to the Appellant since they did not win the tender as provided by Clause 4 of the Tender Document.

That, the District Council, vide its Finance, Administration and Planning Committee which met on 18<sup>th</sup> of June, 2014 resolved that, all tenderers for Fiscal Year 2014-2015, should commence revenue collection by 1<sup>st</sup> July, 2014. Thus, they could not wait any longer since they needed the revenue.

That, the Appellant's tender contained a number of anomalies, including failure to submit a Power of Attorney. Furthermore, the Appellant's proposed revenue collection per annum was Tshs. 1,445,808,000/-. Out of the said proposed collections, the Appellant indicated to use Tshs. 538,627,200/ equivalent to 37.25 per cent of the collection for their office administration. The Respondent was not prepared to accept their tender.

That, the Appellant made a conditional offer that, in event of drought or any other factor which shall affect revenue collection in the month of April, May and June, 2015, collection will also be affected to that extent. The Respondent could not accept the condition since it cannot forecast what will happen in future. The Respondent was of the view that, the Appellant did not do a proper study of the area of collection. Thus, the

tendered amount was not realistic and that they lacked experience.

That, the successful tenderer, M/s Adosta Investment Limited was the highest evaluated tenderer and not the highest tenderer.

That, one of the conditions in the Tender Document was that, the Respondent was not under obligation to accept the lowest or the highest tender.

Finally, the Respondent prayed for the dismissal of the Appeal in its entirety for lack of merits.

### **ANALYSIS BY THE AUTHORITY.**

Having gone through the documents submitted and having heard the oral arguments from parties, the Authority is of the view that the Appeal is based on the following issues:

- i) Whether the Appellant was unfairly disqualified**
- ii) Whether award of the tender to the successful tenderer was proper at law.**
- iii) To what reliefs, if any, are the parties entitled to.**

Having identified the issues in dispute, the Authority proceeded to resolve them as hereunder;

**i) Whether the Appellant was unfairly disqualified.**

In resolving this issue, the Authority considered the Appellant's contention that they were disqualified on the ground that they did not attach a Power of Attorney in their tender; a requirement which was not provided for in the Tender Document. Thus, the Respondent's act to reject their tender was in contravention of the law.

In its endeavour to ascertain whether the Appellant's disqualification based on this criterion was justified, the Appeals Authority reviewed the Tender Document as well as the applicable law. In so doing, the Authority observed that, both the Tender Document as well as the Tender Advertisement did not contain the requirement for a Power of Attorney. The Appeals Authority observed further that, Clauses 4 to 15 of the Tender Document contained evaluation criteria for the tender. However, neither the Tender Document nor the Tender Advertisement provided for the Power of Attorney as one of the criterion to be used in evaluation. The Authority observed that, the above cited Clauses contained only six requirements as listed below;

- i. Payments of tender fees.
- ii. The owners of the Company and their respective addresses.
- iii. Company Profiles
- iv. A Business License issued by Kiteto District Council
- v. The monthly collection which a tenderer shall remit
- vi. Tenderer's experience

From the above findings, the Appeals Authority is of the considered view that, the Respondent's act to disqualify the Appellant using an alien criterion was contrary to the requirements of Section 72 (1) of the Act and Regulations 203 and 204 (1) of GN. No. 446/2013 which provide as follows;

**"Sec.72 (1). The basis for tender evaluation and selection of the successful tenderer shall be clearly specified in the Tender Document.**

**"Reg. 203 the tender evaluation shall be consistent with the terms and conditions prescribed in the tender documents and such evaluation shall be carried out using the criteria explicitly stated in the tender documents.**

**Reg. 204 (1) All tenders shall be checked for substantial responsiveness to the commercial**

**terms and conditions of the tendering documents”**

(Emphasis Supplied).

In addition to the above findings, the Authority noted further that, the Respondent’s Tender Document and Evaluation Report were vague in the sense that the Tender Document was not elaborative enough on the criteria for evaluation. In addition to that, other criteria were missing; however the same were raised at the time of replying the Appellant’s statement of Appeal. For example, the Evaluation Report did not contain detailed analysis of the criteria which were used to check tenderers responsiveness, such as experience or conditional offer as claimed by the Respondent.

Lastly, and without prejudice to what has been earlier stated the Appeals Authority wish to comment that it did not find the relevance of the Appellant’s citing of Section 68(1) (2) and (3) of the Act in cementing the issue of Power of Attorney since the said section refers to Planning and Implementation. Likewise Sub Regulations (a) (b) (c) (e) (f) (g) (h) and (i) of Regulation 192 in GN No. 446 cited by the Appellant are nonexistent in that Regulation and in any case, neither does Regulation 192 make reference to issues of Power of Attorney.

In view of the above findings, the Authority's conclusion with regard to the first issue is that, the Appellant's disqualification was not proper at law.

**ii. Whether award of the tender to the successful tenderer was proper at law.**

In resolving this issue the Authority took cognizance of the Appellant's contentions regarding Respondent's failure to issue a Notice of Intention to award as per Section 60 (3) of the Act; and the issue of contradictory information regarding advance payments contained in the Tender Advertisement and the Tender Document, and observed as follows;

With regard to the Notice of Intention to award the tender, the Authority observed that, Section 60(3) of the Act, provides in clear terms that, prior to award of the tender, the accounting officer, in this regard the Respondent, upon being notified by the Tender Boards of their award decision, they are under an obligation to issue the Notice of Intention to award the tender to all tenderers who participated in the tender process, so as to accord them opportunity to submit their complaints regarding the tender if, any. The Respondent's failure to notify tenderers in this tender was a clear contravention of the law as conceded to by them during the hearing of the Appeal.

For purposes of clarity, the Authority reproduces the said provision as hereunder;

**“S.60 (3) upon receipt of notification, the accounting officer shall, immediately thereafter issue a notice of intention to award the contract to all tenderers who participated in the tender in question giving them fourteen days within which to submit complaints thereof, if any”.**

In view of the above findings, the Authority concurs with the Appellant that, the Respondent was wrong for not issuing the Notice of Intention to award, thus denied the Appellant’s right to lodge the complaint to the Respondent’s Accounting Officer as the law requires.

With regard to the contradictory information regarding advance payments in the Tender Advertisement and the Tender Document, the Authority revisited the said documents and observed that, it is true that, Item No. 9 contained in the Tender Advertisement required a successful tenderer to deposit a sum of three (3) months collections as tender securities while Item 10 of the Tender Document required successful tenderers to deposit two (2) months collections as the same.

The Appeals Authority revisited the Tender Document, the Tender Advertisement as well as the Evaluation Report. In so

doing, the Appeals Authority observed that, the said criterion did not prejudice the Appellant's right in the tender under Appeal since the same was applicable to both tenderers in evaluating the tender. Furthermore, the Appellant could have raised this issue at the appropriate time before submission of their tender pursuant to Regulation 13(1) of GN. NO. 446 of 2013, which reads as follows;

Reg. 13(1) a tenderer may request a clarification of the solicitation documents from a procuring entity, provided that such request is submitted to a procuring entity at least:

a) **in the case of competitive tendering methods, fourteen days prior to the deadline for the submission of the tenders;** and

b) in the case of non competitive tendering methods, three days prior to the deadline for the submission of the tenders.

Failure to do so means that, the Appellant had decided to sleep on their rights. Therefore, they cannot raise that issue at this juncture as the same has been over taken by events.

Furthermore, the Appeals Authority did not have any evidence with regard to Regulation 38 (3) of the Local Authority Financial Memorandum Order of 2010, relied upon by the Appellant,

since the Respondent submitted that, those Regulations change every year and the Appellant did not submit the current Regulation to prove their claims.

Basing on the above findings and taking cognizance of the first issue which was answered in the affirmative, the conclusion with regard to the second issue is that the award of the tender to the successful tenderer was not proper at law.

**iii. To what reliefs, if any, are the parties entitled to.**

Having analyzed the contentious issues in dispute, the Authority finds it prudent to consider prayers by the parties as hereunder;

To start with, the Authority considered the Appellant's prayers and observed that, since the execution of the Tender commenced almost seven weeks ago, that is from 1<sup>st</sup> July, 2014; it would not be prudent for the Appeals Authority to order re-tendering or re-evaluation of this tender.

However, taking cognizance that, the Appellants' disqualification was not justified, this Appeals Authority by virtue of its powers vested unto it by Section 97 (5) (e) of the Act, orders the Respondent to compensate the Appellant a sum of Tshs. **8,120,000/** as per the following breakdown;

- Appeal filing fees Tshs. 120,000/-

- Advocates fees Tshs. 3,000,000/
- Compensation to the tune of Tshs. 5,000,000/-

The Appeals Authority rejects the Appellant's prayer for compensation for expected profit since it does not have such jurisdiction. Thus, it cannot certain whether the Appellant would have won the tender if the evaluation process would have been properly done.

The Appeals Authority also considered the prayer by the Respondent that the Appeal be dismissed with costs and observes that, the Appeal has merit. Therefore the Respondent's prayer is rejected in its totality.

It is the ardent wish of the Appeals Authority that the Accounting Officer will take the appropriate measures to ensure that flaws in their tendering processes are avoided in future.

On the basis of the aforesaid findings, the Authority upholds the Appeal and orders the Respondent to compensate the Appellant a sum of Tshs. 8,120,000/- only, being costs incurred in relation to this Appeal and damages.

The decision is binding upon the parties and may be executed in any court of competent jurisdiction in terms of Section 97(8) of the PPA/2011

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

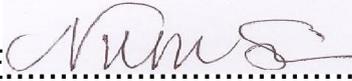
Decision delivered in the presence of the Appellant and the Respondent this 22<sup>nd</sup> August, 2014.



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JUDGE (rtd) A. BUBESHI  
**CHAIRPERSON**

**MEMBERS:**

MRS. N. S. N. INYANGETE



ENG. F. T. MARMO



MRS. R. A. LULABUKA

