

**IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY**

AT DAR ES SALAAM

APPEAL NO. 11 OF 2013/14

BETWEEN

M/S MODHAN CAR

PARKING SYSTEM.....APPELLANT

AND

TANGA CITY COUNCIL..... RESPONDENT

DECISION

CORAM:

- | | |
|-----------------------------|----------------|
| 1. Mr. Haruni S. Madoffe | - Chairperson |
| 2. Ms. Esther A. Manyesha | - Member |
| 3. Mrs. Nuru S.N. Inyangete | - Member |
| 4. Mr. Ole-Mbille Kissioki | - Ag.Secretary |

SECRETARIAT

- | | |
|---------------------------|-----------------|
| 1. Ms. Florida R. Mapunda | - Legal Officer |
| 2. Ms. Violet S. Limilabo | - Legal Officer |
| 3. Mr. Hamis O. Tika | - Legal Officer |

FOR THE APPELLANT:

1. Mr. Benjamin Mwakagamba -Advocate- BM Attorneys
2. Mr. Mohamed R. Jumbe - Managing Director
3. Alli M. Bungallah - Manager

FOR THE RESPONDENT:

1. Mr. Mkama B. Makori – Head, of Procurement Management Unit

This decision was scheduled for delivery today 12th September, 2013, and we proceed to deliver it.

The Appeal at hand was lodged by **M/S MODHAN CAR PARKING SYSTEM** (hereinafter referred to as "**the Appellant**") against the **TANGA CITY COUNCIL** (hereinafter referred to as "**the Respondent**").

The said Appeal is in respect of Tender No. LGA/128/2013/2014/NC/01- for Revenue Collection. The said tender had twenty six Lots but the Appeal at hand is confined to Lot No. 3 which was for **Revenue Collection of Car Parking at all Markets Allocated at Central Ward, North Ngamiani, Central Ngamiani, Mwenzange and Majengo** (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 the parties during the hearing, the facts of the Appeal may be summarized as follows:

The Respondent vide the Majira newspaper dated 16th April 2013, invited tenderers to submit their tenders for the tender under Appeal.

The deadline for submission of the tenders was set for 21st May, 2013 and two tenders were submitted from the following firms;

S/NO	Tenderers Name	Quoted Price in Tshs
1	M/s Kurwaki Supplies and Services Co. Ltd	1,500,000/-
2	M/s Modhan Car Parking System	Nil

The said tenders were subjected to evaluation which was carried out in three stages; namely Preliminary Evaluation, Detailed Evaluation and Financial Comparison.

During Preliminary Evaluation, tenders were checked for their completeness and compliance with the eligibility criteria. In that stage of evaluation, the Evaluation

Committee found the tender submitted by the Appellant to be none responsive for failure to indicate the amount of money to be collected and remitted to the Respondent per month.

After completion of the evaluation process, the Evaluation Committee recommended award of the tender to M/s Kurwaki Supplies and Services Co. Ltd subject to negotiations to meet the Respondent's budget of Tshs.2,800,000/- per month.

Having conducted the negotiations with M/s Kurwaki Supplies and Services Co. Ltd the Tender Board at its meeting held on 1st July, 2013, approved award of the tender at the negotiated contract sum of Tshs.2,500,000/-.

On 1st July, 2013, the Respondent vide a letter Referenced TCC/PMU/VOL1/196 communicated the award of the tender to successful tenderer.

On 3rd July, 2013, the Respondent vide a letter referenced TCC/PMU/VOL V/5 informed the Appellant that

their tender was unsuccessful on the ground that they did not indicate the amount to be remitted to the Respondent per month. The said letter was received by the Appellant on 2nd August, 2013.

Being dissatisfied with the reason given for their disqualification, on 13th August, 2013, the Appellant lodged their Appeal to this 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 Authority during the hearing, may be summarized as follows;

That, the Appellant was one of the tenderers who participated in the tender under Appeal.

That, they were dissatisfied with their disqualification which was based on their failure to indicate the amount of money to be remitted to the Respondent per month.

That, they were unfairly disqualified from the disputed tender on a tender requirement that, even the successful tenderer did not meet.

Finally, the Appellant prayed for the following reliefs:

- i. The Authority to review the whole tender process and quash the award of the tender to the successful tenderer
- ii. To order the Respondent to re-start the tender process on the disputed Lot
- iii. To order the Respondent to compensate them a sum of Tshs 2,670,000/- as per the following breakdown;
 - a) Legal fees Tshs.2,500,000/-
 - b) Tender Document fees. Tshs 50,000/ and
 - c) Appeal filing fees Tshs.120,000/-
- iv. Any other relief this Authority deems fit to grant.

SUBMISSIONS 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, the tender was awarded to the highest evaluated tenderer, namely, M/s Kurwaki Supplies and Services Co. Ltd.

That, the Appellant did not indicate in their tender the amount of money that they would remit to the Respondent per month while the successful tenderer quoted Tshs. 1,500,000/- per month.

That, the Appellant was not awarded the tender under Appeal on the ground that, they failed to indicate the amount of money which they would remit to the Respondent per month as required in the Tender Document.

That, the successful tenderer indicated a sum of Tshs 1,500,000/-, however the same was increased up to Tshs 2, 500, 000/- after negotiations with the Respondent in order to meet their budget estimates and the same was approved by the Respondent's Tender Board.

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

ANALYSIS BY THE AUTHORITY

Having gone through the documents submitted and having heard the oral submissions from parties, the Authority framed the following three issues:

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

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

1.0 Whether the Appellant was unfairly disqualified

In resolving the parties contentions stated earlier on herein, the Authority finds it proper to revisit the Tender Document issued by the Respondent. In the course of doing so, the Authority observed that, tenderers were required under Clause 2(vii) of the Tender Document to indicate the amount of money to be remitted to the Respondent per month. The said clause provides as follows;

(2) BARUA ZA MAOMBI ZIAMBATANISHWE NA MAELEZO NA VIVULI VYA;-

- vii. "Muombaji ataje kiasi atakachoilipa Halmashauri".

Literally translated as;

(2)"APPLICATION LETTERS SHOULD BE ACCOMPANIED WITH INFORMATION AND COPIES OF;

- vii. **Applicant should indicate the amount to be remitted to the Council".** (Emphasis added)

Having noted that, the tenderers were required to indicate the amount of money to be remitted to the Respondent per month; the Authority revisited the Evaluation Report and noted that, the Appellant was disqualified at the preliminary evaluation stage for failure to comply with the above quoted criterion.

The Authority revisited the tender submitted by the Appellant and observed that, in the Form of Tender the space provided to indicate the amount to be remitted to the Respondent per month was left blank. During the hearing the Appellant conceded that, they had forgotten to indicate the amount of money to be remitted to the Respondent per month. The said Item 8 of the

Appellant's Form of Tender is reproduced hereunder as follows:

8. **"KIASI NITAKACHOLIPA HALMASHAURI
KWA MWEZI NI SHS----- ...,**

Literally translated as

8. **"THE AMOUNT TO BE PAID TO THE COUNCIL
PER MONTH IS TSHS-----...,**

From the above facts, the Authority is of the settled view that, the Appellant had failed to comply with Clause 2(vii) of the Tender Document. The Authority finds the Respondent's act of disqualifying the Appellant's tender to be in accordance with Regulation 90(7) and (16) of the Public Procurement (Goods, Works, Non- Consultant Services and Disposal of Public Assets by Tender) Regulations, 2005 (hereinafter referred to as **"GN No. 97 of 2005"**) which provides as follows;

Reg.90(7) **"A substantially responsive tender is the one which conforms to all the terms,**

conditions and specifications of the tender document(s) without material deviation or reservations". (Emphasis supplied)

Reg.90(16) **"If a tenderer is not responsive to the tender document, it shall be rejected by the procuring entity"**. (Emphasis added)

The above quoted provisions entail that, a substantially responsive tender is the one which conforms with all the terms and conditions of the Tender Document. A tender that fails to comply with the said requirements has to be rejected by the procuring entity.

Therefore, it was proper for the Respondent to reject the Appellant's tender for none compliance with the law.

Accordingly, the Authority's conclusion on the first issue is that, the Appellant was fairly disqualified.

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

In resolving this issue the Authority considered the Appellant's contention that, the tender of the successful tenderer ought to have been equally disqualified for failure to indicate the amount of money to be remitted to the Respondent per month. That complaint was based on the fact that, during the tender opening ceremony, it was apparent that both tenders that were submitted in respect of Lot 3 did not indicate the proposed amount to be remitted.

In order to ascertain the validity of the Appellant's argument, the Authority revisited the tender submitted by the successful tenderer; namely, M/s Kurwaki Supplies and Services Co. Ltd and observed that, they had indicated the sum of Tshs. 1,500,000/- in a letter attached to the tender being their proposed amount to be remitted to the Respondent. The said letter was initialled by the tenderers' representatives and the members of

the tender opening committee of the Respondent. The Authority noted further that, the same amount of Tshs. 1,500,000/- was shown under Item 8 of the successful tenderer's Form of Tender. The said Item 8 stated as follows:

8. **"KIASI NITAKACHOLIPA HALMASHAURI
KWA MWEZI SHS 1,500,000/- (Millioni
moja na laki tano")**.

Literally translated as;

8. THE AMOUNT TO BE PAID TO THE COUNCIL
PER MONTH IS TSHS 1,500,000/- (one
million and five hundred thousand).

The Authority noted further that, the signatures of the members of the tender opening committee and the tenderers' representative that appeared on the successful tenderer's letter which indicated the proposed amount of money to be remitted, were the same as those appearing in the Appellant's Form of Tender which did not indicate the amount of money to be remitted per month.

From the above facts, the Authority is of the firm view that, the tender submitted by the successful tenderer contained the proposed amount of money to be remitted per month. Thus, they complied with the requirements of the Tender Document. That means that, the award made to them by the Respondent was proper and in compliance with the law.

Therefore, from the above findings, the Authority's conclusion with respect to the second issue is that, the award made to the successful tenderer was proper at law.

3.0 To what reliefs, if any, are the parties entitled to

Having analyzed the contentious issues in dispute, the Authority proceeded to consider prayers by parties.

To start with, the Authority considered the Appellant's prayer that the whole tender process be reviewed, the award of the tender to the successful tenderer be nullified

and the same be re-tendered. The Authority observes that, since it has already been established in the first and second issues above that the Appellant was fairly disqualified and that the award of the tender to the successful tenderer was properly made, the Authority rejects all the Appellant's prayers.

With regard to the prayer for compensation to the tune of Tshs. 2,670,000/-, the Authority likewise rejects this prayer since the Appeal has no iota of merit.

The Authority also considered the prayer by the Respondent that, the Appeal be dismissed. The Authority accepts the prayer and hereby dismisses the Appeal in its entirety.

On the basis of the aforesaid findings, the Authority dismisses the Appeal and orders each party to bear their own costs.

Right of Judicial Review as per Section 85 of the PPA/2004 explained to parties

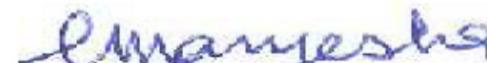
Decision delivered in the presence of the Appellant and the Respondent this 12th September, 2013.



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MR. HARUNI S. MADOFFE

CHAIRPERSON

MEMBERS:

1. MS. ESTHER J. MANYESHA 

2. MRS. NURU S. N. INYANGETE 