

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

APPEAL CASE NO. 2 OF 2014-15

BETWEEN

BONIFACE SILWAN SANGA.....APPELLANT

AND

MUHEZA DISTRICT COUNCIL.....RESPONDENT

DECISION

CORAM

- | | |
|--------------------------------------|----------------|
| 1. Hon. Augusta G. Bubeshi, J. (rtd) | -Chairperson |
| 2. Mrs. Nuru 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 |

FOR THE APPELLANT

- | | |
|------------------------------|----------------------|
| 1. Mr. Boniface Silwan Sanga | -Managing Director |
| 2. Mr. John Silwan | -Financial Assistant |

FOR THE RESPONDENT

- | | |
|---------------------|----------------------------|
| 1. Mr. Juma Uhega | -District Supplies Officer |
| 2. Ms. Aisha Mhando | - District Legal Officer |

This decision was scheduled for delivery today 28th August, 2014 and we proceed to deliver it.

The Appeal at hand was lodged by **BONIFACE SILWAN SANGA** (hereinafter referred to as "**the Appellant**") against **MUHEZA DISTRICT COUNCIL** (hereinafter referred to as "**the Respondent**").

The said Appeal is in respect of Tender No. LGA/132/2014-2015/NC/14 for the Revenue Collection (agricultural products save forest products) at Muheza District Council (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 Daily Newspaper dated 7th May, 2014, invited tenderers to tender for the tender.

The deadline for the submission of the tender was set for 27th May, 2014 whereby five tenders were received from the following tenderers as indicated below;

S/N	NAME OF THE TENDERER	QUOTED PRICE IN TSHS.	DURATION
1	M/s Junale General Supplies	20,050,000.00	Per Month
2	M/s Wakol Internal Ltd	29,200,000.00	Per Month
3	Boniface S. Sanga	23,100,000.00	Per Month
4	M/s Proper Services (T) Ltd	20,200,000.00	Per Month
5	M/s Mng'ombe Marketing Co.	22,000,000.00	Per Month
6	M/s Amsterdam Marketing	20,150,000.00	Per Month

The tenders were then subjected to evaluation by using criteria as contained in clause 1.3 of the Tender Document. In that process, the Evaluation Committee observed that four tenderers out of the six were not responsive to the tender document hence they were disqualified. The remaining two tenderers namely the

Appellant and M/S Proper Services Co. Ltd were found to be responsive. However, on further examination, the Appellant was found to have a history of tendering high, and then during the execution of the contract, suspends the contract and request for price variation. For this reason, the Evaluation Committee negated recommending award of the tender to the Appellant and instead recommended the award to M/s Proper Services Co Ltd at a contract price of Tshs. 20,200,000/= per month.

The Tender Board at its meeting held on 17th June, 2014, deliberated on the recommendations by the Evaluation Committee and approved the award of the tender as recommended.

On 24th June, 2014, the Respondent's Accounting Officer vides letters referenced LGA/132/2014/2015/NC/14/04 and LGA/132/2014/2015/NC/14/04/05 respectively, communicated award of the tender to the successful tenderer as well as to the unsuccessful tenderers, the Appellant inclusive. The Appellant received the letter on the 4th July, 2014.

Having received the Respondent's letter and being aggrieved by the contents thereof, on the 16th July, 2014, the Appellant lodged their Appeal to the Authority.

SUBMISSIONS BY THE APPELLANTS

The Appellant's submissions as deduced from the documents filed in this Authority and oral submissions during the hearing are summarised as follows:

That, the Respondent did not issue a letter of Intention to award the tender hence contravened the procurement law and denied the Appellant the right to lodge his complaints to the Accounting Officer.

That, the Appellant's tender price was higher than the successful tenderer therefore he deserved the award.

Further, that the reasons for the Appellant's tender disqualification were not correct. To substantiate on this aspect, the Appellant contended as follows;

Firstly, on the reason that the Appellant's tender price was higher than the Council's estimates; the Respondent did not specify any maximum deviation hence the argument of tender price being higher than

the council estimates does not arise. Besides, the Appellant is experienced in revenue collection hence he was sure of his quoted price.

Secondly, it is not true that the Appellant has the habit of suspending revenue collection contract and requesting for re-negotiation during contract execution. That, in the financial year 2012/13 he had a similar contract with the Respondent for revenue collection at the Muheza main market but the Respondent later changed the scope of work by excluding 19 stalls around the market. By so doing the Appellant requested for a revised contract for the new scope of work, as it affected the estimated revenue collections which was accepted by the Respondent. Thereafter they continued with the contract smoothly.

In view of the above submissions, the Appellant prayed for the following orders;

- i. Annul the award decision by the Respondent.
- ii. Order the Respondent to re-evaluate the tender.
- iii. Order the Respondent to pay costs incurred in pursuit of the Appeal which is, Tshs.120,000/=

appeal filling fees and Tshs. 1,000,000/= which is for transport and accommodation costs incurred for two trips as he was coming for this appeal from Tanga using his private motor vehicle.

REPLIES BY THE RESPONDENT

The Respondent's reply to the grounds of appeal as deduced from the documents filed to this Authority and oral submissions during the hearing are summarized as follows:

That, the Public Procurement Act, 2011 does not require the Accounting officer to issue the intention to award tender. Further that, the Respondent was correct in issuing the letter of tender results notification pursuant to Section 36(1) (f) **(sic)** of the Public Procurement Act, 2011 (hereinafter referred to as "**the Act**") and that the award decision was approved by the Tender Board and the District Finance and Planning Committee. This ground was however withdrawn by the Respondent during the hearing and instead, they conceded to have contravened the law by not issuing the notice of intention to award the tender.

That, it is unfortunate that the Appellant forwarded his complaints to PCCB contrary to Sections 95 and 96 of the Act.

That, the Respondent was fair to the tenderers since they communicated the tender results prior to contract signing. Notwithstanding that, the tenderer who was awarded the tender deserved the award since he had the highest evaluated price.

That, the Appellant is a sole proprietor whereas the winning tenderer M/s Proper Services Co. Ltd is a Limited Company registered under the Companies Act, Cap 212 hence for the sake of reducing risks regarding the produce cess revenue collection which is a prime source of Council revenue, they decided to award the tender to M/s Proper Services Co. Ltd.

That, the Appellant had the history of lodging complaints during the contract execution. For example during the 2012/13 Financial Year the Appellant was engaged to collect revenue from the market area. However he collected revenue in other 19 stalls which were not included in the contract.

That, the Appeal at hand is time barred in terms of Section 97 of the Act which provides for the right to appeal within 14 days.

Finally, the Respondent prayed that the Appeals Authority decline to honour the Appellant's prayers.

ANALYSIS BY THE AUTHORITY

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

1. Whether the evaluation process and issuance of award was proper at law

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

Having identified the issues in dispute and before proceeding with deliberation of the same, the Appeals Authority addressed on the legal issue raised by the Respondent that the Appeal is time barred.

Indeed, Section 97(2) (b) of the Act provides for a limitation of time of fourteen working days within which

to lodge an appeal in this Authority. However the fourteen days commence **from the date of communication of the decision by the Accounting Officer to the Appellant**. In this case, the Appellant stated that though the letter was dated 24th June, 2014, he received the notification of award letter on the 4th July, 2014. Therefore in terms of section 97(3) of the Act, that is the date when he became aware of the circumstance that gave rise to his appeal. For ease of reference, the said provisions are reproduced as hereunder;

“S.97 (2) Where:-

(a)...

(b) the tenderer is not satisfied with the decision of the accounting officer, the tenderer may make a complaint to the Appeals Authority within fourteen working days from the date of communication of the decision by the accounting officer.

“S.97(3)

A tenderer may submit a complaint or dispute directly to the Appeals Authority if the complaint or dispute cannot be entertained under section 96 because of entry into force of the procurement or disposal contract, and provided that the complaint or dispute is submitted within fourteen days from the date when the tenderer submitting it became aware of the circumstances giving rise to the complaint or dispute or the time when that tenderer should have become aware of those circumstances”.

The Respondent did not refute to that explanation. The appeal at hand was filed on 16th July, 2014, well within time.

Therefore, the Appeals Authority is of the settled view that the appeal is not time barred and thus properly before it.

The Appeals Authority now proceeds to resolve the issues framed as hereunder;

1. Whether the evaluation process and issuance of award was proper at law

This issue was further divided into two sub issues as follows;

a) Whether the Appellant's tender disqualification was justified.

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

a) Whether the Appellant's tender disqualification was justified

In ascertaining this issue, the Appeals Authority considered the Appellant's contentions that the ground for his tender disqualification was not correct and that his tender price was higher than the awarded tenderer.

According to the evaluation report and the minutes of Respondent's Tender Board meeting, the Appellant's tender was disqualified on two grounds namely;

- that, the price tendered by the Appellant was higher than the Council estimates and
- that the Appellant has the history of tendering high, but in the cause of the contract execution he suspends the same and requests for price variation.

However, as regards the issue of Appellant's price being higher than the councils estimates, there was no upper limit of deviation provided. Hence the Respondent cannot later use that basis to disqualify tenderers.

Regards the second ground of disqualification, during oral submission the Appellant clarified that the issue was amicably settled between him and the respondent and the contract in question was smoothly executed.

According to the tender document Part 1 clauses 1.2 to 1.4 stipulate the evaluation criteria. The grounds for the Appellant's disqualification as indicated above were not

among the criteria stipulated therein. That is to say, the Appellant was disqualified based on alien criteria. That is contrary to Section 72(1) of the Act and Regulation 203 of the Public Procurement Regulations (hereinafter referred to as "**GN 446/2013**") which provide that tender evaluation should be based on the criteria as set out in the Tender Document. For ease of reference, the said legal extracts are reproduced as hereunder;

"S. 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 document and such evaluation shall be carried out using the criteria explicitly stated in the tender documents.

Furthermore the Authority observes that in the Respondent's statement of reply the Appellant was also disqualified for being a sole proprietor and not a limited liability company. With due respect to the Respondent, that reason cannot hold water since it was neither a criterion of the tender document, nor one of the ground given by the Evaluation Committee.

In view of the above findings, the Appeals Authority's conclusion with regard to sub issue one is that the Appellant's tender disqualification was not justified.

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

The Appellant complained that the Respondent did not issue a notice of intention to award in terms of Section 60(3) of the Act. The thrust of the said provision is to give tenderers the right to complain, in case there are disputes as regards to the proposed award. Where there are no complaints lodged pursuant to section 60(3) the Accounting Officer shall issue a notice of acceptance to the successful tenderer in accordance with section 60(5) of the Act.

The Appeals Authority unanimously holds that the Respondent contravened the law by not issuing the notice of intention to award.

Based on the above analysis, it is therefore the finding of this Authority with regard to sub issue two that; the award of the tender to the successful tenderer was not proper at law.

Summing up the findings of the above two sub issues, the Authority's conclusion with regard to the first issue

is that the evaluation process and issuance of award was not proper at law.

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

Having established that the evaluation process and the issuance of award to the successful tenderer were not proper at law, this Authority hereby allows the appeal since the same has merit.

Thereafter the Authority considered the prayers by the Appellant which were;

- i. Annul the award decision by the Respondent.
- ii. Order the Respondent to re-evaluate the tender.
- iii. Order the Respondent to pay costs incurred in pursuit of the Appeal which is, Tsh. 120,000/= appeal filling fees and Tsh. 1,000,000/= which is for transport and accommodation costs incurred for two trips as he was coming for this appeal from Tanga and with a private motor vehicle.

As regards to prayers (i & ii), The Appeals Authority considered the Appellant's prayers and observed that, since the execution of the Tender commenced on 1st July 2014, it would not be in the public interest to annul and re- evaluate the Tender.

However, taking cognizance that, the Appellants' disqualification was not justified by the Respondent, this Appeals Authority by virtue of its powers vested unto it by Section 97 (5) (f) of the Act, orders the Respondent to compensate the Appellant a sum of Tshs. 21,620,000 as per the following breakdown;

- Appeal Filling Fees.....Tshs. 120, 000/=
- Transport and Accommodation for 3 trips.....Tshs.1,500, 000/=
- Compensation to the tune of Tshs. 20,000,000/=

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


It is also the ardent wish of this Authority that the Respondent's Accounting Officer will take appropriate measures to ensure that flaws in their tendering processes are avoided by observing the law.

On the basis of the aforesaid findings the Authority upholds the Appeal and orders the Respondent to compensate the Appellant a sum of Tshs. 21,620,000/- 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 to 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 28th August, 2014.


.....


JUDGE (rtd) A. BUBESHI

CHAIRPERSON

MEMBERS:

MRS. N.S.N. INYANGETE 
.....

ENG. F.T MARMO 
.....

MRS. R.A LULABUKA 
.....