

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

APPEAL CASE NO. 24 OF 2013-14

BETWEEN

M/S SOKONI PARTNERS.....APPELLANT

AND

**KARIAKOO MARKETS
CORPORATION.....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 |

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. Mr.Mohamed A.Kimweri -Marketing Manager
2. Mr. Jonah A.Mwambande -Collection Supervisor.
3. Mr.Khalfan Minule - Trade Officer.

FOR THE RESPONDENT.

1. Mr.Marko M. Mganga - Secretary, Tender Board,
Head of Procurement Management Unit.
2. Mr. Mr. J.Mnzava -Chairman,Evaluation
Committee.
3. Emmanuel Maro- Secretary, Evaluation
Committee.

This decision was scheduled for delivery today 21st January, 2014 and we proceed to deliver it.

The Appeal at hand was lodged by **M/S SOKONI PARTNERS** (hereinafter referred to as "**the Appellant**") against the **KARIAKOO MARKETS CORPORATION** (hereinafter referred to as "**the Respondent**").

The said Appeal is in respect of tender No. PA/106/2013-1/2013 for Revenue Collection at the Basement area at Kariakoo Market (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 tender under appeal was publicly invited through Uhuru Newspaper of 11th September, 2013. The advertisement was also posted on the Respondent's Notice Board.

The said tender was to be conducted through National Competitive Tendering Procedures specified in the Public Procurement (Goods, Works, Non- Consultant Services and disposal of public assets by Tender)

Regulations, 2005 (hereinafter referred to as “**the GN 97 of 2005**”).

The deadline for the submission of the tenders was set for 11th October, 2013 whereby four tenders were received from the following firms;

S/N	TENDERER’S NAME
1.	M/s Sokoni Partners
2.	M/s Lukozi General Supply
3.	M/s Public General Traders Co.Ltd
4.	M/s New Samba Enterprises.

The tenders were then subjected to three stages of evaluation namely preliminary, detailed and physical verification (sic).

During the preliminary evaluation stage, the tenders by M/s Public General Traders Co. Ltd and that by M/s New Samba Enterprises were disqualified for being non responsive to the Tender Document. The remaining two

tenders by M/s Sokoni Partners and M/s Lukozi General Supply were then subjected to detailed evaluation.

During the detailed evaluation stage, the Evaluation Committee examined tenderer's experience and the submitted Bank statements. The Evaluation Committee found both tenders to be substantially responsive to the Tender Document and were therefore subjected to physical verification.

During the physical verification stage, the Evaluation Committee requested the tenderers to produce their original documents for verification. The Evaluation Committee also requested tenderers to authorize the Respondent to verify their bank accounts with their bankers.

At this stage of evaluation, the Evaluation Committee observed that M/s Sokoni Partners did not submit the original documents of the attachments contained in their tender. They allegedly refused to authorize the Respondent to verify their bank accounts. On the other hand M/s Lukozi General Supply submitted original documents of their attached documents and they also agreed to authorize the Respondent to verify their bank accounts.

The Evaluation Committee therefore recommended the award of the tender to M/s Lukozi General Supply.

The Tender Board at its meeting held on 19th November, 2013 approved the recommendations by the Evaluation Committee and awarded the tender to M/s Lukozi General Supply.

The Respondent vide a letter referenced SMK/MM/C-30B dated 22nd November, 2013, informed the Appellant that their tender was unsuccessful.

The Appellant vide a letter referenced SP.GEN II/201/52 dated 27th November, 2013, wrote to the Respondent requesting reasons for their disqualification.

The Respondent vide a letter referenced SMK/HQ/292/68 dated 10th December, 2013 informed the Appellant that the tender was competitive and that under such a situation only one tenderer had to win the tender. Accordingly, the tender had been awarded to the tenderer who had scored higher marks than themselves.

Being dissatisfied with the said response the Appellant, on 20th December, 2013, lodged their Appeal to this Authority.

SUBMISSIONS BY THE APPELLANT

The Appellant's arguments as deduced from the 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 Respondent failed to avail them the reasons as to why they did not win the tender.

That, the Respondent's failure to avail the said reasons, irked them and also made them suspicious on whether the procedures guiding tenders in Tanzania had been adhered to by the Respondent in this tender.

That, at 7.00 pm on a Thursday, one Bahati on behalf of the Respondent sent a short message service (hereinafter referred to as "**the sms**") to the Appellant informing them that they would visit their offices on the next day to verify the original documents and to seek the authorization to authenticate their Bank accounts. On the next day (Friday), Bahati did visit the

Appellant's Dar es salaam offices and were told that the original documents required were in their head offices in Iringa, and the required authorization can only be done by one Sanga who was also in Iringa.

That, on receiving the above information, Bahati seemed satisfied and said that if anything further was required he would return the following Monday but he never showed up until the Appellant received the letter informing them that their tender had been rejected.

That, they believed that the Respondent deliberately disqualified them as revenge for their previous action of lodging an appeal against them to this Authority.

Finally, the Appellant prayed for the following;

- i. This Authority to examine on whether procedures for awarding the tender were adhered to by the Respondent.
- ii. Declaration that the tender process and the award made thereof was null and void.
- iii. Advocate's fees to the tune of Tshs. 1,000,000/-
- iv. General damages.

- v. Costs of the Appeal
- vi. Any other relief(s) that the Authority may deem just and 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, it is not true that the Appellant was not availed the reasons for their disqualification.

That, the Appellant did not show the original documents of the photocopies contained in their tender upon request. It was therefore difficult for the Respondent to award the tender to them for lack of proof and authenticity of the requested documents.

That, the Appellant deliberately refused to cooperate with the Respondent on the reason that the original documents were at Iringa, while actually they also have an office in Dar es salaam.

That, the Appellant refused to authorize the Respondent to verify their bank account upon request after being found responsive at earlier stages of the evaluation. It was therefore difficult for the Respondent to verify the financial capability of the Appellant for the execution of the tender.

That, the Appellant's tender was fairly disqualified for their own omission and refusal to cooperate with the Respondent.

That, they did their work within the ambits of the law and that they had properly responded to the Appellant's requests for reasons for their disqualification.

The Respondent therefore prayed for the dismissal of 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 issues:

- i. Whether the tender process for the tender was conducted in compliance with the law.**

ii. Whether the Appellant's disqualification was justified.

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

iv. To what reliefs, if any, are parties entitled to.

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

1. Whether the tender process for the tender was conducted in compliance with the law

In resolving this issue the Authority considered the Appellant's contention that the Respondent's failure to avail reasons for their disqualification, made them suspicious on whether the procedure guiding tenders in Tanzania had been adhered to by the Respondent; and their prayer that this Authority should examine the Respondent's compliance or otherwise of the said procedures.

In its endeavour to ascertain whether the tender process for the tender in question was properly conducted or not, the Authority reviewed the

documents submitted as well as the Tender Document vis-a vis the applicable law.

In the course of doing so, the Authority observed that the Respondent neither used the Public Procurement Regulatory Authority's (hereinafter referred to as "**the PPRA**") standard document nor an approved variation thereof as stipulated under Section 63 of the Act which reads as follows;

S.63 (1) "The procuring entity shall use the appropriate standard model documents specified in the Regulations for the procurement in question.

Rather they used a Tender Document of their own making. The Authority observed that the Tender Document they deployed lacked quantifiable evaluation criteria which are fundamental factors in evaluating tenders. Furthermore it did not specify the various key stages for a sound evaluation process. Consequently, the Evaluation Committee assumed the role of the Tender Document and the law by creating the criteria and the stages for evaluation contrary to Section 65(1) and (2) of the Act and Regulation 14 (5) and 90 (4) of GN No.97 of 2005 which provides as follows;

S.65 (1) "The basis for tender evaluation and selection of the lowest evaluated tender **shall be clearly specified in the instructions to tenderers or in the specifications to the required goods or works.**

(2) The Tender Document **shall specify any factor**, in addition to the price, **which may be taken into account in evaluating a tender** and how such factors **may be quantified or otherwise evaluated"**. (Emphasis Added).

Reg. 14(5) "The procuring entity shall evaluate the qualification of suppliers, contractors, service providers or buyers in accordance with the qualification criteria **and the procedures set forth in the pre-qualification documents**, if any, **and in the solicitation documents or other documents for solicitation of proposals, offers or quotations"**

Reg. 90(4) the tender evaluation shall be consistent with the terms and conditions set forth in the tender document and such evaluation shall be carried out using the

criteria explicitly stated in the tender document.” **(Emphasis supplied).**

The stages which were created by the Evaluation Committee were preliminary, detailed and physical verification. The Authority observed that the physical verification stage is alien to the Act.

Assuming that the said verification meant post qualification, the Authority will have occasion to discuss it later.

To add salt to injury, the Respondent evaluated the tenders on the basis of additional criteria which were not in their own controversial Tender Document. The Authority observed, for instance, the Tender Form which the Respondent had considered to be the Tender Document contained only five requirements which tenderers were to submit in their tenders to determine their responsiveness. These were;

- a) Business license
- b) VAT/TIN Certificates
- c) Photocopy of the tender fees
- d) Bank statement; and
- e) Tenderer’s experience of at least three years.

Contrary to the above requirements, the Evaluation Report contained two more criteria over and above those provided in the Tender Form and the same were used to evaluate the tenders. The two additional criteria were; company registration certificate and a Power of Attorney.

The Authority observed further that, the five criteria mentioned in the Tender Form were all used during the preliminary evaluation stage and all tenderers were found to have complied with the same. Surprisingly, the Authority observed that, some of the criteria which were used during the preliminary evaluation were again used during the detailed evaluation stage. The Authority observed for instance that, while at the preliminary evaluation stage, both tenderers were found to have complied with the three years experience criterion, the same criterion were further used during the detailed evaluation stage as a basis for evaluation.

The Authority observed further that, the Respondent did not seem to know what exactly they wanted from the tenderers and clearly they did not know the difference between a certificate of incorporation and business registration certificate. This is clearly discernable from their Evaluation Report in which they

indicated a sole proprietor to have submitted a certificate of incorporation. Upon being asked whether they knew the difference between the two documents, they confirmed their ignorance.

The Authority now proceeds to examine the so called physical verification stage contained in the Evaluation Report. As observed earlier this stage is nowhere to be found in the procurement Act and practice. During the hearing, the Respondent seemed to suggest that what they were doing was post qualification and quoted Section 48 (3) of the Act to that effect.

Assuming that, the said stage was a post qualification provided for under the law and the standard tendering document by PPRA as purported by the Respondent, the Authority hastens to say that, the said process was to be conducted in accordance with the law. That is Section 48 (1) and Regulation 94 (5) which read as follows;

Section 48 (1) "If tenderers have not been pre-qualified, the procuring entity and the tender board **shall determine whether the tenderer whose tender or proposal has been determined to offer the lowest evaluated tender or proposal,** in the case of

procurement or the highest evaluated tenderer in the case of disposal of public assets by tender, **has the capability and resources** to carry out effectively the contract as offered in the tender.”

Reg. 94(5). **“Post qualification shall be undertaken for the lowest evaluated tenderer only”**.

(Emphasis supplied).

The above provisions connote that, first, that post qualification applies only where there had been no pre-qualification and second, post qualification is to be conducted to the lowest evaluated tenderer, and third, post qualification is conducted to one tenderer. To the contrary and strangely, the purported post qualification was conducted to two tenderers.

The Authority wonders what would have happened if the Appellant would have submitted the original documents and allowed the Respondent to verify their bank account. There would be two lowest evaluated tenderers for the tender. A bizarre outcome indeed.

The Authority is of the settled view that, it was not proper for the Respondent to conduct post qualification

to two lowest tenderers since the law does not provide to that effect.

In view of the above findings and observations, the Authority is of the settled view that, the criteria for determination of the tenderers' responsiveness and the award thereof were neither certain nor quantifiable and that the entire tender process was deeply flawed.

Accordingly, the Authority's conclusion with regard to the first issue is that, the tender process for the tender was not conducted in compliance with the law.

ii. **Whether the Appellant's disqualification was justified.**

In resolving this issue, the Authority took cognisance of its findings and conclusion on the first issue above and observed that, since the entire tender process was marred by irregularities, there was no legal basis to make an award or disqualify tenderers. Accordingly, the Authority's conclusion with regard to the second issue is that, the Appellant's disqualification was not justified.

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

As observed in the first and the second issues above, that, the tender process was deeply flawed; and the Respondent's own concession during the hearing that the award of the tender to the successful tenderer was erroneous, The Authority so finds.

Even assuming that the tender process was properly conducted, the Authority observes that, the purported successful tenderer was a mere business name and not a legal person. It is settled law that a business name lacks legal personality; consequently it cannot legally be awarded a tender or enter into legally enforceable contract as it happened in this matter.

Accordingly the Authority's conclusion with regard to the third issue is that the award of the tender to the successful tenderer was not proper at law.

Last but not least, the Authority wishes to make two observations. First, the Appellant demanded to be given the reasons for their disqualification. This demand is supported by Regulation 97(14) (d) and (e) of GN.NO.97 of 2005. They have the right to know as to why they were disqualified. Contrary to the provisions of the law above, the Respondent proceeded beating the bush in rather vague terms without giving the precise reasons that were used by the Evaluation

Committee, adopted by the Tender Board and minuted accordingly. In their words, the Respondent said;

“Napenda kukujulisha kwamba zabuni iliyotangazwa ilikuwa ya ushindani na kwamba penye ushindani huchaguliwa yule aliyewazidi wenzake kwa vigezo. Kwa bahati mbaya hukuwa mshindi wa kwanza na hivyo kumpata mwingine aliyepata alama za juu”.

Literally meaning that,

“I would like to inform you that the advertised tender was highly competitive and that whenever there is such competition, he who meets the criteria over and above others is selected. Unfortunately, you were not the first winner; hence, the tender had been awarded to another who scored highest marks”.

This, to say the least, is not good governance and is in breach of express provision of the law.

Second, the Authority observes that the head of the Procurement Management Unit (hereinafter to be referred to as **“the PMU”**) and the Secretary to the Tender Board is professionally and behaviorally disaster. He has an exalted view of his knowledge on

procurement law and practice. During the hearing, he repeatedly boasted about his professionalism and expertise in procurement. Curiously however, he did not seem to know elementary matters like his own official title. He kept saying he was "Katibu wa Zabuni" literally meaning "Secretary of tender" (sic). He also referred to the Tender Board as "kamati ya Tenda" literally meaning as "Tender Committee". When subjected to questions on the applicable law in this tender, he displayed profound ignorance and perverted understanding of the law. Being the head of PMU and secretary of a Tender Board, his influence is without doubt considerable. The flaws in this tender is in the opinion of the Authority to a large extent is a direct result of his knowledge or lack of it and competence.

It should be noted that, the same Respondent is appearing before this Authority for the second time for issues surrounding the same tender with similar flaws. It is our ardent hope that such flaws will be addressed by the Respondent to avoid unnecessary future complaints from tenderers.

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

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

- With regard to the prayer for the Authority to inquire whether the procedures for awarding tenders were adhered to by the Respondent in this tender process, the Authority observes that, the tender process for this tender was marred by a number of procedural and substantive irregularities.
- With regard to the prayer for declaration that the award of the tender to the successful tenderer was null and void, the Authority hereby declares that, the award of the tender to the purported successful tenderer was null and void.
- With regard to the prayer for this Authority to award general damages to the Appellant, the Authority observes that the said prayer is outside its jurisdiction. Thus, it cannot award the same to the Appellant.
- With regard to the prayer for compensation of Tshs.1,300,000/- being the costs incurred for the

Appeal, the Authority is of the view that, the Appellant deserves to be compensated the actual costs incurred of Tshs. 1,300,000/ as per the following breakdown;

- i. Appeal filing fees Tshs.120,000/-
- ii. Transport costs Tshs. 180,000/-
- iii. Advocates fees Tshs. 1,000,000/-

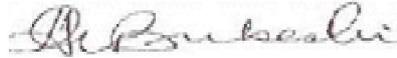
The Authority also considered the Respondent's prayer that, the Appeal be dismissed for lack of merits. The Authority does not agree with the Respondent as the submissions made by the Appellant have merits. Accordingly, this prayer is hereby rejected

On the basis of the aforesaid findings, the Authority upholds the Appeal and orders the Respondent to;

- Pay the Appellant a sum of Tshs. 1,300,000/- as reasonable costs incurred.
- Restart the tender process afresh in observance of the law.

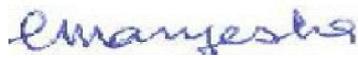
Right of Judicial Review as per Section 85 of the PPA/2004 explained to parties.

Decision delivered in the presence of the Appellant and
in the Respondent this 21st January, 2014.



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

MEMBERS:

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