

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

APPEAL CASE NO. 25 OF 2013-14

BETWEEN

**M/S BARAKA SOLAR
SPECIALIST..... APPELLANT**

AND

**MPANDA DISTRICT
COUNCIL.....RESPONDENT**

DECISION

CORAM:

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

SECRETARIAT:

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

FOR THE APPELLANT.

1. Mr. Ansi Gaudensi - Managing Director
2. Mr. Rotildius P.J. Massawe -Operations Manager

FOR THE RESPONDENT.

1. Mr. Malifimbo L. Malifimbo - Procurement Officer
2. Mr. Kahoya Paul Ibrahim - Evaluation Committee
Member
3. Mr. Malaka Morisho - Legal Officer

This decision was scheduled for delivery today 7th February, 2014, and we proceed to deliver it.

The appeal at hand was lodged by **M/s BARAKA SOLAR SPECIALIST** (hereinafter to be referred to as **"the Appellant"**) against the **MPANDA DISTRICT COUNCIL** (hereinafter to be referred to as **"the Respondent"**).

The said Appeal is in respect of Tender No. LGA.099/2013/2014/W/SOL/01 for the Supply and Installation of Solar Power System in Staff houses, Ward Dispensary and Secondary Schools in Mpanda District Council (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 Mwananchi Newspaper of 16th September, 2013, invited tenderers to submit their tenders for the tender under appeal.

The deadline for submission of the tender was set for 18th October, 2013, whereby four tenders were submitted as listed hereunder;

S/NO	Tenderer's Name	Quoted price in Tshs.
1.	M/s Living Center	258, 980,000.00
2.	M/s Baraka Solar Specialist	200,071,500.00
3	M/s Ensol (T) Ltd	208,706,400.00
4.	M/s New Dx (EA) Solar Power	231,267,150.00

The tenders were then subjected to three stages of evaluation namely; preliminary, detailed and post qualification.

At the preliminary evaluation, two tenders submitted by M/s Living Center and M/s New Dx (EA) Solar Power were disqualified for failure to comply with the requirements of the Tender Document. The remaining two tenders were found to be substantially responsive and therefore subjected to detailed evaluation.

During the detailed evaluation stage, tenders were checked for arithmetic errors and the tender submitted by the Appellant was found to contain arithmetic errors which were corrected and thereafter tenderers were ranked as follows:

S/ NO	TENDERER'S NAME	READ PRICE IN TSHS.	OUT CORRECTED PRICE	RANKING
1	M/s Baraka Solar Specialist	200,071,500.00	216,077,220.00	2 nd
2	M/s Ensol (T) Ltd	208,706,400.00	208,706,400.00	1 st

The tender submitted by M/s Ensol (T) Ltd was found to be the lowest evaluated tender hence was subjected to post qualification in accordance with Clause 34 of the Instructions To Bidder (hereinafter referred to as "**ITB**").

Upon completion of the evaluation, the Evaluation Committee recommended award of the tender to M/s Ensol (T) Ltd at a contract price of Tshs 208,706,400.00.

The Tender Board at its meeting held on 20th November, 2013 approved the award of the tender as recommended by the Evaluation Committee. However, it was observed that the amount quoted by the successful tenderer was higher than the estimated budget for the project of Tshs 193,952,500.00. The Tender Board therefore, ordered for negotiations with the successful tenderer.

On 3rd December, 2013 the Respondent convened a negotiation meeting which was confined to the reduction of the scope of work from three batteries of each with a capacity of 65w totaling to 195Ah to one battery of a capacity of 200Ah and to exchange DC lamp to AC lamp so as to tally with the available budget of Tshs 193,952,500.00.

The negotiations meeting was successfully conducted and parties agreed to revise the scope of works that reduced the tender price to Tshs 193,952,500.00. The Tender Board approved the recommendations of the Negotiations Committee and awarded the tender to M/s Ensol (T) Ltd.

On 5th December, 2013, the Respondent vide a letter referenced KTV/MDC/F.20/7/VOL.VII/107 communicated award of the tender to the successful tenderer. On the same date the Appellant was notified vide a letter referenced KTV/MDC/F.20/7/VOL.VII/109 that their tender was unsuccessful due to price competition.

Being dissatisfied with the award of the tender to the successful tenderer, the Appellant, on 30th December, 2013, 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, during the tender opening ceremony the Appellant's tender price was the lowest quoted compared to others and specifically to the successful tenderer M/s Ensol (T) Ltd, surprisingly the tender was awarded to the latter. They doubted if the award included all 42 sites the Respondent had proposed in the tender.

That, immediately before tender opening ceremony the Appellant's representatives questioned about discounts declaration but the Secretary of the Tender Board informed all tenderers present that at the opening ceremony only the quoted prices will be announced and that all other matters will be dealt with by the Evaluation Committee.

That, in the Tender Document the provisions of 30% for labour and 5% for transport does not allow competition since it forces tenderers to quote at a particular percentage.

That, upon being requested by the Respondent to clarify on the figure quoted for labour charges they maintained that their figure was correct. With regard to discount, they provided that their quoted price had no discount.

That, the award of the tender to the successful tenderer was not proper at law, because they were the ones to be awarded the tender.

Finally the Appellant prayed for the following orders;

- i. Nullification of the award of the tender to the successful tenderer and re-evaluation of the tender.
- ii. The award be made to them if found to be the lowest evaluated tenderer.
- iii. Re-tendering
- iv. Respondent to pay Tshs. 120,000.00 being costs of the appeal.

REPLIES BY THE RESPONDENT

The Respondent'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, indeed, during the tender opening ceremony the Appellant's quoted tender price was the lowest compared to that of the successful tenderer. However, during the evaluation process the Appellant's tender was found to contain arithmetic errors and when corrected their tender price became higher than that of the successful tenderer. Further to that the tender was awarded to the lowest evaluated tenderer who was found to be substantially responsive to the criteria set out in the Tender Document.

That, the provisions set out in the Tender Document were acceptable and allowed competition since the tenderers were at liberty to quote any amount below that percentages. Where there was any discount it has to be stated during the tender opening as per the requirement of Regulation 89 (9)(12) and (13) 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**").

That, during the opening ceremony, the Appellant's representative did not inquire on the issue of declaration of discount.

That, previously, the Appellant had participated and awarded a tender which did not contain any provision of percentages. To that effect they complained that they were getting losses and the Respondent, having reviewed the tenderers complaints, decided to improve the tender document by providing 30 % as labour and 5% as transport charges. In addition, the Appellant was the first tenderer to purchase the Tender Document hence they could have sought for clarification about the 30% and 5% if they felt those provisions were not acceptable.

That, the lowest tenderer is determined after correction of errors and not at the tender opening.

That, the tender was awarded to M/s Ensol (T) Ltd at a contract price of Tshs 193,952,500.00 after negotiations to reduce the scope of works to be executed and omit one secondary school which had no students yet.

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 centred on the following issues:

1.0 Whether the Appellant was unfairly disqualified.

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

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

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

1.0 Whether the Appellant was unfairly disqualified.

In resolving this issue the Authority considered the Appellant's contention that, their quoted tender price was the lowest at the time of tender opening. However, to their surprise the tender had been awarded to M/s Ensol (T) Ltd at a different price from the one quoted at the time of tender opening.

In order to ascertain the validity of the Appellant's contention, the Authority deemed it necessary to examine the documentary evidence submitted vis-à-vis the applicable law and the Tender Document. In the course of doing so, the Authority observed that, the evaluation process was conducted in three

stages namely, preliminary, detailed and post qualification.

The Authority observed further that, the Appellant's tender was disqualified during the detailed evaluation stage after making correction of errors whereby the Appellant's tender was found to contain arithmetic errors arising from labour charges of 30% and transport charges of 5% as provided for in the Tender Document.

In order to ascertain whether the Appellant's disqualification was a result of the correction of errors arising from the discrepancy noted in the labour and transport charges quoted by the Appellant, the Authority deemed it necessary to revisit the Tender Document and the Appellant's tender. In doing so, the Authority noted that, the Bills Of Quantity (hereinafter referred to as "**BOQ**") provided for labour and transport charges; the said BOQ provides as follows;

“LABOUR CHARGES 30 %’

“TRANSPORT CHARGES 5 %”

Having noted that the tenderers were required to quote labour charges of 30% and transport charges of 5%, the Authority revisited the tender submitted by the Appellant and observed that, they had indicated 30% of labour charge to be Tshs. 711,320.00 and 5% of transport charges to be Tshs177,830.00 of the total material cost of Tshs 3,556,600.00 Correction of arithmetic errors by the Respondent indicated that, labour charges ought to have been Tshs 1,066,980.00 and transport charges ought to have been Tshs 177,830.00. Thus the Appellant quoted cost was equivalent to 20% for labour and 3.3% for transport charges respectively.

During the hearing the Appellant submitted that, they had quoted below the required percentages of 30% and 5% on the reason that, they had their own transport to ferry materials and they had planned to

use casual labourers instead of permanent employees.

The Authority is of the firm view that, the Appellant had failed to adhere to the requirements of the Tender Document and also did not meet the requirements of the law as provided for under Regulation 90 (7) of GN No. 97 of 2005 which provide 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.

Thus, the Respondent was right pursuant to Regulation 90 (16) and (17) (c) of GN. No. 97 of 2005 to disqualify the Appellant. The said provisions reads as follows;

Reg. 90 (16) if a tender is not Responsive to the tender document, it shall be rejected by the procuring entity, and may not subsequently be made responsive by correction or withdrawal of the deviation or reservation”.

“Reg. 90(17) A procuring entity shall not accept a tender:

(c) If the tender is not responsive”.

The Authority further considered the Appellant’s contention that the percentage of 30% labour charges and 5% transport charges provided in the Tender Document were unacceptable as they did not allow competition among the tenderers since it forced them to quote at that particular percentages.

The Authority hastens to disagree with the Appellant because procedurally they were required to seek for clarification from the Respondent before submitting

their tender as provided for in Regulation 85 (1) (2) (3) of GN. No. 97 of 2005 which reads as follows:

“Reg. 85 (1) A supplier, contractor, service provider or an asset buyer may request a clarification of the solicitation documents from the procuring entity.

(2) The procuring entity shall respond to any request by a supplier, service provider, contractor or asset buyer for clarification of the solicitation documents that is received by the procuring entity at least two weeks prior to the deadline for the submission of tenders.

(3) The procuring entity shall respond within three working days of receipt of the query so as to enable the supplier, service provider, contractor or asset buyer to take into account the

clarification received in the preparation of its tender, without identifying the source of the request, communicate the clarification to all suppliers, service providers, contractors or asset buyers to which the procuring entity has provided the solicitation documents”.

It is therefore, the Authority’s findings that, the Appellant cannot complain at this stage on unacceptability of the provisions of the Tender Document.

On the issue that the Appellant quoted tender price was the lowest and therefore they deserved to be awarded the tender, the Authority wishes to enlighten the Appellant that, the fact that their quoted price was the lowest at the time of tender opening, could not necessarily mean that they must be the lowest evaluated tenderer. The law requires the procuring entity to evaluate all tenders in order to ascertain the successful tenderer that has

complied with the criteria set in the Tender Document as per Regulation 90 (18) (a) (b) (i) of GN. No. 97 of 2005 which is reproduced hereinunder as follows:

“Reg. 90 (18)(a) A procuring entity shall evaluate and compare all tenders that have been accepted in order to ascertain the successful tender, in accordance with the procedures and criteria set forth in the solicitation documents.

(b) The successful tender shall be:

(i) the tender with the lowest evaluated tender price in case of goods, works or services, or the highest evaluated tender price in case of disposal of assets, but not necessarily the lowest or highest submitted price, subject to any margin of preference applied”.

Based on the above it is clear that, the Appellant had not complied with the requirement of 30% for labour and 5% for transport as provided for in the Tender Document.

Accordingly, the Authority's conclusion with regard to the first issue is that the Appellant was fairly disqualified for failure to comply with the requirements of the Tender Document.

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

In resolving this issue the Authority took cognizance of the Appellant's contention that, the tender had been awarded to the tenderer who was the highest at the time of tender opening and at the price not quoted by the tenderer instead of them who were the lowest tenderer at the time of tender opening.

In order to ascertain the Appellant's contention, the Authority revisited the tender submitted by the successful tenderer, M/s Ensol (T) Ltd against the requirements of the Tender Document, the applicable law and the Evaluation Report.

The Authority observed from the tender submitted by the successful tenderer that the percentages quoted were 10% for labour and 5.51% for transport charges. This indicated deviation from the provisions in the Tender Document to wit 30% labour and 5% transport charges. However, the Evaluation Committee was blind on those discrepancies when making arithmetic corrections of errors in the tender submitted by the successful tenderer.

Upon being asked by the Members of the Authority as to why the Evaluation Committee did not make correction of errors on the tender by the successful tenderer since they had quoted different percentages from what was provided for in the Tender Document, the Respondent replied that the

increased amount for transport could have been reduced to the extent of 5% at the time of payment and that the lower percentage for labour charges was to their advantage.

The Authority is of the settled view that, the Respondent had contravened their own Tender Document since the successful tenderer did not comply with the criterion of percentages as set out in the Tender Document. Further to that, the Respondent also contravened the requirements of the law which provides that tenders shall be evaluated on a common basis and in accordance to the criteria set out in the Tender Document as per Regulation 90(3) and (4) of GN. No. 97 of 2005 which read as follows;

Reg. 90(3) The tender evaluation committee shall evaluate on a common basis opened tenders in order to determine the cost or price to the procuring entity of each tender in a

manner that permits a comparison to be made between the tenders on the basis of the evaluated costs or prices.

(4) The tender evaluation shall be consistent with the terms and conditions set forth in the tender documents and such evaluation shall be carried out using the criteria explicitly stated in the tender documents”.

Consequently the successful tenderer ought to have been disqualified at the detailed evaluation stage for failure to comply with the requirement of the Tender Document as provided in the BOQ as well as the law already cited in issue number one above.

Accordingly, the Authority’s conclusion regarding the second issue is that the award of the tender to the successful tenderer was not proper at law.

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

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

To start with, the Authority considered the Appellant's prayer that the award of the tender to the successful tenderer be nullified and re-evaluation of the tender done.

The Authority observes that, since it has been established in the first and second issues that the Appellant was fairly disqualified and further that the award of the tender to the successful tenderer was not proper at law, the Authority hereby declares that the award to them was a nullity at law.

With regard to the prayer that the Appellant be awarded the tender, the Authority rejects that prayer

since it has no jurisdiction to do so and the Appellant did not deserve to be awarded this tender anyway.

With regard to the costs of appeal filing fees of Tshs 120,000.00, the Authority grants that prayer since the Appeal has some merits.

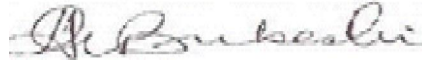
The Authority also considered the Respondent's prayer that, the Appeal be dismissed with costs. The Authority does not agree with the Respondent since the appeal has some merits.

Accordingly, the Authority partly upholds the Appeal and orders the Respondent to do the following;

- **re-start the tender process afresh in observance of the law; and**
- **to compensate the Appellant the sum of Tshs. 120,000.00 only.**

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 7th day of February, 2014.



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JUDGE (rtd) A.G.BUBESHI

CHAIRPERSON

MEMBERS:

1. MR. H. S. MADOFFE..... 

2. MRS. R. A. LULABUKA 

3. MS. E. J. MANYESHA..... 