

IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY
AT DAR ES SALAAM.

APPEAL CASE NO. 32 OF 2014-15

BETWEEN

M/S MKONGOWO TRADING COMPANY LTD...APPELLANT

AND

TWIGA BANCORP LTD.....RESPONDENT

DECISION

CORAM

- | | | |
|-------------------------------------|---|---------------|
| 1. Hon. Vincent K.D Lyimo, J. (rtd) | - | Chairman |
| 2. Mrs. Rosemary A. Lulabuka | - | Member |
| 3. Mr. Louis P. Accaro | - | Member |
| 4. Eng. Aloys J. Mwamanga | - | Member |
| 5. Mr. Ole-Mbille Kissioki | - | Ag. Secretary |

SECRETARIAT

- | | | |
|---------------------------|---|-------------------------|
| 1. Mrs. Toni S. Mbillinyi | - | Principal Legal Officer |
| 2. Ms. Florida R. Mapunda | - | Legal Officer |
| 3. Ms. Violet S. Limilabo | - | Legal Officer |
| 4. Mr. Hamisi O. Tika | - | Legal Officer |

FOR THE APPELLANT

1. Mr. Respicius Ishengoma - Advocate, BIN Attorneys
2. Mr. Peter R. Ngowo - Managing Director

FOR THE RESPONDENT

1. Mr. Daniford Chuchuka - Legal Counsel, Twiga Bancorp
2. Mr. Deus Sangu - Head, Procurement Management Unit.

This decision was scheduled for delivery today 9th March, 2015 and we proceed to do so.

This is an Appeal which was lodged by M/s MKONGOWO TRADING COMPANY LIMITED (hereinafter referred to as "the Appellant") against the TWIGA BANCORP LIMITED (hereinafter referred to as "the Respondent") in respect of Tender No. PA/099/2015/G/02 floated by the Respondent for Supply of Bank Printed Materials (hereinafter referred to as "the tender").

After going through the record of proceedings submitted to the Public Procurement Appeals Authority (hereinafter referred to as "the Appeals Authority"), as well as the oral submissions by the parties at the hearing, the facts of the Appeal may be summarized as follows:

On 30th September 2014, the Respondent through the Guardian Newspaper, invited tenderers to submit tenders for the supply of bank printed materials and the deadline for submission of the tenders was 20th October 2014. In that respect, five tenders with their respective tender prices were received from the following firms listed below: -

S/NO	Tenderers Name	Quoted price in Tshs
1.	M/s Mkongowo Trading Co. Ltd	66,819,000.00
2.	M/s Five Star Printers Ltd	103,004,060.00
3.	M/s Fast Delivery Co.	55,815,000.00
4.	M/s CI Group	236,700,000.00
5.	M/s Mapocho General Trading Co.	49,642,600.00

The tenders were then subjected to evaluation which was conducted in two stages namely; technical and cost analysis. At the technical evaluation stage, tenderers were checked on whether they had complied with the requirements of the Tender Document. In that process the Evaluation Committee awarded points for every requirement whereby, tenders submitted by M/s Fast Delivery Co and M/s Mapocho General Trading Co were found to have complied with all the tender

requirements and they were awarded equal points (i.e. 10 points each). The remaining three tenders were found to have some short comings; hence, were not given the maximum scores.

Thereafter, the Evaluation Committee conducted cost analysis of the tenders by ranking them in accordance with their quoted prices. Accordingly, the tender submitted by M/s Mapocho General Trading Co was ranked the first followed by M/s Fast Delivery Co. Nevertheless, the Evaluation Committee observed that, out of the two tenders with ten points each, the tender submitted by M/s Mapocho General Trading was found to have quoted unrealistic prices for some items comparing to the current market prices. Therefore, the Evaluation Committee recommended award of the tender to M/s Fast Delivery Co which was ranked the second at a contract price of Tshs. 55,815,000.00.

The Tender Board at its meeting held on 10th December 2014, deliberated on the recommendations made and was of the considered view that, there was need for them to visit and discuss with M/s Mapocho General Trading on some of the terms. After visiting M/s Mapocho General Trading, it was realized that the tenderer had poor working conditions and quite unable to supply all the required materials. In addition, it was established that M/s Mapocho General Trading intended to subcontract the work to another company. The Respondent

considered such an act to be very risky because the tender related to its banking business. The Tender Board ultimately approved the award of the tender to M/s Fast Delivery Co.

On 10th December 2014, the Respondent by its letter Ref: Tender No. PA/099/2015/HQ/G/02 notified all tenderers of its intention to award the tender to M/s Fast Delivery Co.

Being dissatisfied with the Respondent's intention to award the tender to M/s Fast Delivery Co Ltd, the Appellant on 24th December 2014, wrote a letter Ref. No. MTCL/TA/GL.027/14 to the Respondent seeking clarifications on two basic issues: -

- i. The Respondent's letter of intention to award the tender to M/s Fast Delivery did not indicate the contract price, so the Appellant wanted to be informed on the contract price as per Regulation 231(2) (4) (b) and(c) of the Public Procurement Regulations GN No. 446 of 2013 (hereinafter referred to as "GN No. 446/2013").
- ii. Reasons for disqualification.

On 29th December 2014, the Respondent's Accounting Officer by his letter Ref. No. PA/099/2015/HQ/G/02 replied to the Appellant informing him about the awarded contract price as well as the reasons for disqualification. It should be noted that although the Respondent's letter was written on 29th January

2014, it was posted on 13th January 2015 and received by the Appellant on the same date.

On the same day that is 29th December 2014, the Respondent by his letter Ref. Tender No. PA/099/2015/HQ/G/02 communicated the award of the tender to the successful tenderer, namely, M/s Fast Delivery Co.

Being dissatisfied with the responses from the Respondent in respect to disqualification, on 23rd January 2015 the Appellant lodged his Appeal with this Authority.

Upon receiving notification of the Appeal and as the Respondent was required to submit written replies, the Respondent raised a point of preliminary objection that the Appeal is bad and untenable in law for being premature before the Appeals Authority. In that regard, members of the Authority were obliged to resolve the Preliminary Objection raised before addressing the substantive appeal.

RESPONDENT'S SUBMISSIONS ON THE PRELIMINARY OBJECTION.

The Respondent's submissions can be summarized as follows:

First, that Appellant's letter seeking information on the awarded contract price was not a complaint against a decision in which an appeal may be lodged. The Respondent argued that, for an appeal to be properly before this Authority there

ought to be in place not only a formal complaint from a participating tenderer but also a written response or decision by the Accounting Officer in respect to the complaint raised. According to the Respondent, the Appellant did not lodge formal complaints with Respondents' office. Making reference to the Appellant's letter dated 24th December 2014 referred to above; the Respondent insisted that the Appellant had merely sought for clarifications on the reasons for his disqualification and the awarded contract price.

Second, the Respondent argued that, the Appellant did not seek for any orders or reliefs to be issued by the Accounting Officer but merely wanted to be informed on his weaknesses in order to avoid similar mistakes in future tenders. The Respondent made reference to the provisions of S. 96 of the Public Procurement Act of 2011, Cap 410 (hereinafter referred to as "the Act") stating that in as much as the Appellant had not sought for any orders or reliefs and had not obtained any written decision thereon, the conditions specified under S. 96 cited above had not been met. The Respondent's letter dated 29th December 2014, merely informed the Appellant the reasons for his disqualification; it was not a decision which can be challenged before this Authority. Consequently, the Respondent prayed for the dismissal of the Appeal for being prematurely filed before the Authority.

RESPONSES BY APPELLANT ON THE PRELIMINARY OBJECTION

In response to the Respondent's submissions, the Appellant submitted as follows;

That, the Appeal was filed pursuant to Section 97(3) of the Act, which allows complaints to be lodged directly to this Authority after a procurement contract has entered into force.

To elaborate he said that, the letter dated 24th December 2014 which was written by the Appellant to the Respondent in respect to the latter's disqualification was issued in order to have an informed decision on the reasons for the disqualification before lodging the intended appeal. The Appellant argued that after he had received the Respondent's written responses, he was dissatisfied, thereby filing the respective Appeal to this Authority. The Appellant informed the members of the Authority that his appeal was filed in time. He pointed out that he lodged the said Appeal within 14 days from the date he was notified of the Respondent's decision as stipulated by S. 97(3) of the Act. He showed that although the letter which notified the Appellant reasons for his disqualification was written on 29th December 2014 it was posted to him on 13th January 2015 and was received by the Appellant on the same date. The Appellant filed his Appeal on 23rd January 2015; thus, it was lodged within time. He prayed that the preliminary objection be dismissed for lack of merits.

ANALYSIS BY THE AUTHORITY ON THE PRELIMINARY OBJECTION.

Having gone through the filed documents together with the oral submissions by the parties, the Authority is of the firm view that one basic issue calls for consideration, and that is whether the Appeal is properly before it. Having formulated the issue, the Authority proceeded to resolve it as follows:

As clearly discernible from the arguments by parties there are conflicting views about the steps that are to be followed by a tenderer when lodging a complaint before this Authority. In resolving the conflicting arguments, the Authority revisited ss. 95, 96 and 97 of the Act which provide guidance on review mechanisms together with Regulations 104, 105, 106 and 107 of GN No. 446/2013.

It will be observed that s.95 provides for the tenderers' rights to seek review, while ss. 96 and 97 respectively provide specifically for two alternative avenues which may be followed when a supplier, contractor, or consultant wants to seek review of a procurement process. For ease of reference and enlightenment, the Authority analyses the two avenues as hereunder;

1. Where a procurement contract has not entered into force:

Under this avenue, a tenderer who seeks the review of a procurement process is obliged to start by first, invoking the provisions of s. 96 subsections (1) and (4) and section 97 subsections (1) and (2) of the Act. The Authority reproduces Sections 96(1), 96(4), 97(1) and 97(2) of the Act as follows -

“S.96 (1) Any complaint or dispute between procuring entities and tenderers which arise in respect of procurement proceedings, disposal of public assets by tender and awards of contracts shall be reviewed and decided upon a written decision of the accounting officer of a procuring entity and give reasons for his decision.

S.96 (4) The accounting officer shall, within fourteen days after the submission of the complaint or dispute deliver a written decision which shall;

- a) State the reasons for the decision; and
- b) If the complaint is upheld in whole or in part indicate the corrective measure to be taken.

S.97 (1) A tenderer who is aggrieved by the decision of the accounting officer may refer the

matter to the Appeals Authority for review and administrative decision.

(2) Where –

a) The accounting officer does not make a decision within the period specified under this Act; or

b) The tenderer is not satisfied with the decision of the accounting officer.”

2. Where a procurement contract has entered into force

Section 97(3) of the Act provides for circumstances under which an appeal may be filed directly to this Authority without submitting it to the accounting officer. The said Section 97(3) provides as follows: -

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 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 the tenderer should have become aware of those circumstances.

(Emphasis added)

Going by the above quoted extracts of the relevant laws, an appeal can be filed directly to this Authority once the notification of award has been communicated to the successful tenderer, since the procurement contract is considered or presumed to have entered into force. And according to Section 60(11) of the Act, a procurement contract enters into force when a written acceptance of the tender is communicated to the successful tenderer. That means, this Authority has sole original jurisdiction on complaints where a procurement contract is already in force.

Under the general guidance of review mechanism provided above, the Authority revisited the Respondent's submissions that the Appeal is not properly before it allegedly because it was lodged without following either of the review avenues provided under the law and observes as follows;

Pursuant to the documents submitted before the Authority as well as oral arguments by the two parties, it can be clearly shown that the circumstances which gave rise to the Appeal at hand arose after the Appellant was informed about the reasons for disqualification of his tender. The reasons were given through the Respondent's letter dated 29th December 2014 and which was received by the Appellant on 13th January 2015. The Respondent's letter to the Appellant informing him reasons for his disqualification was a reply to the latter's letter dated 24th December 2014 which inquired amongst other issues, the

reasons for the disqualification of his tender. The Appellant's act of inquiring reasons for his disqualification was triggered by a notice of intention to award the tender, which notice was received by the appellant on 10th December 2014 indicating that the Respondent intended to award the said tender to M/s Fast Delivery Co. Being dissatisfied with the reasons given for his disqualification, the Appellant lodged an Appeal to this Authority on 23rd January, 2015.

From the facts of this Appeal the Authority is of the view that, the Appellant's letter to the Respondent dated 24th December 2014, was not an application for administrative review but rather a letter seeking to be informed reasons leading to the disqualification of his tender. This observation is based on the Respondent's Tender Document, as under Instruction to Bidders (hereinafter referred to as ITB) Clause 48.2 which required that an application for administrative review to include;

- a) "Details of the procurement requirements to which complaints relates;
- b) Details of the provision of the Act or Regulations which has been breached or omitted;
- c) Explanation on how the provision of the Act, Regulation or provision of the Tender document has been breached or omitted;
- d) Documentary or other evidence supporting the complaint where available;

- e) Remedies sought; and
- f) Any other information relevant to the complaint”
(Emphasis added)

The Authority reviewed the Appellant’s letter dated 24th December 2014 addressed to the Respondent and noted that, it had not complied with the specified requirements mentioned under Clause 48.2 cited above. The said letter was framed in a manner showing that the Appellant merely wanted to know reasons for disqualification so as to avoid similar mistakes in future tenders. And indeed, the letter neither indicated remedies being sought.

Furthermore, the Authority revisited S. 60(3) of the Act which requires tenderers upon receiving the notice of intention to award, to file their complaint to the accounting officer within fourteen days from the date of receipt of such notice. The guidance on how the complaint should be drafted has been provided for under Clause 48.2 of the ITB which is in *pari materia* with Regulation 105(3) of GN No. 446 of 2013.

The Appeals Authority also observed that, as Regulation 231(4)(b) and (c) of GN No. 446 of 2013 require procuring entity to inform tenderers amongst other issues; the name of the successful tenderer, the awarded contract price and reasons as to why other tenders were not successful, Regulation 238 of the same GN also allows tenderers to be informed reasons for their disqualification if they so specifically

request. In the instant Appeal, the Appellant's letter of 24th December 2014 to the Respondent had not fully complied with the requirements specified under Regulation 231(4)(b) and (c) of GN No. 446 of 2013 cited above. In this respect, it was noted that much as the Respondent erred in law for not informing the Appellant on the contract sum and reasons for his disqualification, there was no prejudice caused to the Appellant since the Appellant exercised his right of requesting for such information as provided under Regulation 238 of GN No. 446 of 2013 and that he was duly informed.

Therefore, the Authority finds that, contrary to the Respondents submission's the Appellant's letter of 24th December 2014 was not an application for administrative review instead it was a letter that demanded he be informed the contract price and reasons for his disqualification.

The Authority observes further that, on the same date i.e. on 29th December 2014 when the Respondent gave to the Appellant the reasons for the disqualification of his tender, the Respondent issued the letter of acceptance to the successful tenderer, meaning that the procurement contract came into force on that date. In law, any aggrieved tenderer is required to lodge complaints directly to Appeals Authority once the procurement contract has entered into force as pointed herein above.

Having reviewed the documents submitted, this Authority noted that, the award to the successful tenderer, namely, M/s Fast Delivery Co was communicated on 29th December 2014 by letter Ref No. Tender NO.PA/099/2015/HQ/G/02. Thus, the procurement contract entered into force on 29th December 2014. That is to say, when the Appellant received the Respondent's letter which informed him reasons of being unsuccessful, the procurement contract had already entered into force. Therefore, Appellant had no option other than filing his complaints directly to this Authority pursuant to Section 97(3) of the Act. Since the Appellant filed his Appeal on 23rd January 2015, he had done so within ten (10) days from the date he was notified of the disqualification of his tender.

Therefore the Authority is satisfied that, this Appeal is properly before this Authority as it has been lodged pursuant to Section 97(3) of the Act which gave sole original jurisdiction to the Authority to hear and determine procurement complaints when the procurement contract has entered into force.

In view of the above findings, the Authority is of the settled view that, the Appeal is properly before it and the preliminary objection so raised is dismissed for lack of merits.

Having done away with the preliminary objection, the Authority proceeded to determine the Appeal.

SUBMISSIONS BY THE APPELLANT ON THE MERITS OF THE APPEAL

In this Appeal, although the Appellant raised five grounds contesting the award of the tender to M/s Fast Delivery Co. these could conveniently be grouped into two main grounds summarized as follows:

- That he was unfairly disqualified because errors noted in his tender could easily be rectified by the Respondent; and
- That the successful tenderer had neither experience nor legal capacity to enter into a contract as provided by the Tender Document.

The Appellant prayed for two reliefs, viz: the nullification of the award and order for re-advertisement of the same. During the submissions, the Appellant indicated he had an existing contract with the Respondent and he prayed that should the Authority order nullification of the award, he should then be allowed to continue as the successful supplier of the said bank printed materials.

SUBMISSIONS BY THE RESPONDENT ON THE MERITS OF THE APPEAL

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 successful tenderer had enough experience and had executed many contracts with different institutions.

That, the successful tenderer is not a limited company but one registered as a business name and that the Tender Document required only a registered tenderer, a matter which the successful bidder had complied with.

That, a successful tenderer being registered with a business name is capable of entering into contracts as it has a legal capacity.

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

ANALYSIS BY THE APPEALS AUTHORITY ON THE MERITS OF THE APPEAL

Having gone through the tender proceedings including the various documents submitted by both parties and the oral submissions during the hearing of the appeal, this Authority is of the view that, there are three main issues calling for determination and these are: -

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

2.0 Whether the Appellant was fairly disqualified

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

Having framed the above issues, the Authority proceeded to resolve them in the following manner-

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

In resolving this issue, this Authority considered the Appellant's contentions that the successful tenderer M/s Fast Delivery Co had no requisite experience as required in the Tender Document and that it is not a limited company as portrayed by the Respondent in various correspondences.

In order to resolve the above contentions, this Authority deemed it necessary to revisit the whole evaluation process as conducted by the Respondent. In the course of doing so, this Authority examined the oral and the documentary evidence availed to it at the hearing vis-a-vis the Tender Document and the applicable law. The Appeals Authority observed that, the Respondent's Tender Document, specifically Clauses 28, 29, 30, 32 and 35 of the ITB provided in no uncertain terms that the Evaluation process for this tender had to undergo four stages namely; preliminary, technical, detailed and post qualification.

The Appeals Authority observed further that, at the preliminary evaluation stage, the tenders were to be checked on whether or not they had met the eligibility criteria contained under Clause 28 of the Tender Document. At the same time, Clause 29 of the Tender Document provided that tenders were to be checked on whether they conform to all terms and conditions specified in the General and Special Conditions of the Contract together with compliance to technical specifications before price comparison and post qualification as mandatorily provided for in the Bid Data Sheet (herein after called "BDS").

The Appeals Authority observed that, the evaluation criteria for every stage was clearly identified in either ITB or BDS. However, during the evaluation stage, the evaluation criteria were not used. The Evaluation Committee assumed the roles of the Tender Document. For example Clause 13 of the ITB as modified by Clause 14 of the BDS provided for evaluation criteria for the tender which were clear and uncertain.

For ease of reference, the Appeals Authority reproduces the said Clause as hereunder-

Clause 14 "The qualification criteria required from the Bidders in ITB Clause 13.3 (b) is modified as follows:

Local Bidders should provide evidence for:

- Certificate of Registration,
- Business License
- Tin Registration
- Provide evidence of at least 3 contracts of similar nature and value for the past 3 years.
- Provide evidence of production capability by submitting information of sales turnover of not less than Tshs. Forty eight (48,000,000/=) in any one year for the past three (3) years.
- Provide evidence of liquid asset or line of credit of not less than Tshs. Fifty Million (50,000,000/=)".

The Appeals Authority revisited the Evaluation Report and regrettably noted that, the Evaluation Committee did not adhere both to the Evaluation Guidelines issued by Public Procurement Regulatory Authority (hereinafter referred to as "PPRA") and the specific conditions contained in the Tender Document. It is observed that the evaluation was conducted randomly and by ignoring key aspects contained in the Tender Document. For instance, the Evaluation Committee started the evaluation process by conducting the technical analysis of tenders and without taking into account the technical aspects contained in the schedule of requirements. Rather, the committee looked at the completeness of the bids, bid securities and eligibility documents of the tenders; matters which ought to have been tackled at the preliminary evaluation

stage so as to determine eligibility and commercial responsiveness of the tenders as provided under Clauses 28 and 32 of the ITB. Further, the Evaluation Committee awarded scores for each item/ document the tenderer had submitted without indicating the basis for such scores.

Furthermore, the Appeals Authority deliberated on the Appellant's complaint that M/s Fast Delivery Co was a mere business name and an entity with no legal capacity to enter into contract. In order to resolve this issue the Appeals Authority considered various documents submitted by the parties. It was noted that, Clause 3.1 of the ITB provide for eligibility of persons to tender in the following terms: -

Clause 3.1 "A bidder may be a natural person, private entity, government-owned entity, subject to ITB sub-clause 3.4 or any combination of them with a formal intent to enter into an agreement in the form of a joint venture, consortium, or association".
(Emphasis Added)

The Appeals Authority further revisited Regulation 116 (1) (b) of GN No.446 of 2013 and observed that it allows procuring entities to enter into a procurement contract with a person or persons with legal capacity to do so. For ease of reference the said provision is reproduced hereunder-

Reg. 116 (1)" For the purpose of qualifying to participate in procurement proceedings, a tenderer shall-...

a) N/A

b) have legal capacity to enter into the procurement contract".(Emphasis supplied)

The Appeals Authority revisited the tender by M/s Fast Delivery Co which was the successful tenderer and found that the said M/s Fast Delivery Co is a business name registered under a Certificate of Registration with No. 225620 issued on 19th August 2011. It is not a corporate name within the meaning of ITB Clause 3.1 and Regulation 116(1)(b) supra. The Appeals Authority revisited the Business Names (Registration) Act; Cap 213 relied upon by the Respondent but none of the provisions under the said law confers legal capacity to a business name to enter into a binding contract.

When asked by the Members of the Appeals Authority during the hearing to clarify on the essence of the above provisions and the award made, the Respondent strongly and persistently submitted that, the award made to the said tenderer was proper and that they complied to all above cited provisions.

Contrary to the Respondent's submissions that the successful tenderer was a legal entity with capacity to enter into contract, this Appeals Authority is of the settled view that, M/s Fast

Delivery Co lacked the necessary legal prerequisites - it has no legal capacity to enter into a contract under the circumstances. According to the ITB it's a corporate entity duly registered or a natural person being above the age of majority who is capable of entering into a legally binding contract and to sue or be sued in its own name. Thus had the evaluation being properly conducted, this successful tenderer should have been disqualified at the preliminary stage for lack of legal capacity to tender.

Even assuming that the evaluation had been properly conducted basing on the PPRA Guidelines, evaluation criteria specified in the Tender Document and the stages thereof; this Appeals Authority is of the further view that, the successful tenderer should have been disqualified at the preliminary stage due to the fact that the said tenderer did not possess the requisite experience stipulated under the Tender Document. Clause 14 of the BDS required a tenderer to provide evidence of at least 3 contracts of similar nature and value for the past 3 years. The successful tenderer contained no such experience. To the contrary, the said tenderer contained call off order from;

- Printing of ID cards and business card-Kobil Tanzania- in progress-50,250,000.00
- Printing of examination answer book-Mzumbe University, year 2012-5,925,000.00

- Printing of Examination answer book-Mzumbe University, year 2012-7,900,000.00
- Printing various materials- Kibo March Group Ltd, year 2012-3,300,000.00
- Printing of ID Cards- National Insurance Corporation, Year 2014-20,250,000.00

The attached contracts do not meet the requirements of the Tender Document. The Evaluation Committee considered this tenderer to be responsive. When asked by the Members of the Appeals Authority on this glaring anomaly, the Respondent was unbending and adamant by insisting that, the materials which the successful tenderer had supplied to the above entities were in conformity to the Tender Document and that the successful tenderer had experience to execute the tender. We need not point out that most likely the accounting officer had lost sight of his own Tender Document because the quoted contracts relied upon by the successful tenderer are by far different from bank printed materials.

From the above findings the Appeals Authority is of the firm opinion that, the Respondent contravened Section 72 of the Act and Regulations 203, 204 and 211 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”

“Reg. 211 A procuring entity shall evaluate and compare all tenders that are in order to ascertain the successful tender, in accordance with the procedures and criteria prescribed in the solicitation documents”. (Emphasis Supplied)

Furthermore, the Appeals Authority observed that, the purported successful tenderer was not post-qualified as per requirement of the Tender Document. When asked by the Members of the Authority on whether they had post qualified the successful tenderer, the Respondent simply submitted that indeed post qualification had been carried out on the successful

tenderer. However, the Evaluation report does lend support to those allegations.

Apart from the contravention of section 72 cited above, the Appeals Authority is also of the firm view that, the Respondent contravened Clause 42 of the BDS as well as section 53 (1) and (2) of the Act and Regulations 224 (1) and (2) of GN No. 446/2013 which mandatorily required post qualification to be conducted. It reads: -

Clause 42. "Post-qualification will: Shall be undertaken".

Sec. 53(1) "The procuring entity shall, where tenderers have not been pre-qualified, determine whether the tenderer whose tender or proposal has been determined to offer the lowest evaluated, in case of procurement or highest evaluated tender in case of disposal of public assets by tender, has the capacity, capability and resources to carry out effectively the contract as offered in the tender before communicating the award decision.

(2)The criteria to be met shall be set out in the tendering documents and if the tenderer does not meet any of these criteria, the tender shall be rejected and the procuring entity shall make a similar determination for the next lowest evaluated

tenderer, in the case of procurement or the next highest evaluated tender, in the case of disposal of public assets by tender” .

Reg.224 (1) Where appropriate, post-qualification may be undertaken to determine whether the lowest evaluated tender or the highest evaluated price in case of revenue collection, has the legal capacity, capability and resources to carry out the contract.

(2) the criteria for post-qualification shall be set out in the solicitation documents and shall include-

- (a) experience and past performance on similar contracts;
- (b) knowledge of local working conditions;
- (c) capability with respect to personell;
- (d) N/A
- (e) financial capability to perform the contract;
- (f) current commitment
- (g) legal capability to make binding decisions on its rights, duties and obligations;

(h) compliance with health and safety laws, tax and employment laws where applicable

(i) litigation record

(j)N/A

In view of the findings above, the Appeals Authority is of the settled view that, award of the tender to the purported successful tenderer was not proper at law.

2.0 Whether the Appellant was fairly disqualified.

In resolving this issue, the Authority took cognizance of the fact that the evaluation process was marred by procedural irregularities and that it was not easy to determine whether the tenderers had complied with all specifications and conditions as were provided in the Tender Document. The Appeals Authority in addition, considered the Appellant's contention that he was unfairly disqualified. During the submissions, the Appellant appeared to contend that the error made in quoting boxes instead of pads per annum was of no serious consequences as the Respondent could have easily corrected the same. We do not agree.

The Appeals Authority revisited the Respondent's Tender Document and observed that, tenderers were supposed to quote their tenders per pads of the specified items in the

schedule per annum as provided under SECTION VII - Technical Specifications for Lot No. 1. To the contrary, the Appellant quoted in boxes items 1 and 2 of Lot No.1 -TRA pay in Slip (BPAF) and TRA pay in Slip (BPAF) CASH (4ply NCR paper as per sample)-Carbonized, while the Tender Document provided clearly that the said items were to be quoted in units of 500 and 2000 pads respectively. A tender is considered to be responsive if it conforms to all terms, conditions and specifications of the Tender Document. Therefore, the disqualification with regard to the above criterion was in conformity with Regulations 202 (5), 205 (c) and 207 (2) (b) of GN No.446/2013 which read thus: -

Reg. 202 (5) "for the purpose of this regulation, a tender is considered to be substantially responsive if it conforms to all the terms, conditions and specifications of the tender document without material deviation or reservations".

Reg. 205 "All tenders shall be checked for substantial responsiveness to the technical requirements of the tendering documents and non-conformity to the technical requirements, which are justifiable grounds for rejection of a tender includes the following:

(c) failure to meet major technical requirement, such as offering completely different types of

equipment or materials from the types specified...

In view of the above findings, this Appeals Authority affirmatively holds that in regard to the second issue, the Appellant was fairly disqualified.

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

Having resolved the issues in dispute the Authority considered the prayers by the parties.

To start with the Appeals Authority considered the Appellant's prayer that, award of the tender to the successful tenderer be nullified and to order retendering.

In this Appeal, the Authority has established that the award of the tender to M/s Fast Delivery Co was not proper in law. The Appeals Authority has also shown that both the Appellant and the successful tenderer should have been disqualified. The Appellant should have been disqualified at the technical evaluation stage while the successful tenderer should have been disqualified at the preliminary evaluation stage. Since the evaluation process was marred by irregularities the Appeals Authority hereby nullifies the said award of the tender to M/s Fast Delivery Co.

In view of the decision to nullify the award, the Appellant's prayer for retendering is not sustainable instead the Authority orders for re-evaluation of the tenders in line with tender documents, PPRA's evaluation guidelines and existing laws.

On the basis of the aforesaid conclusions, the Appeals Authority orders the Respondent to re- evaluate the tender in compliance with the law and its regulations.

This decision is binding upon the parties and may be enforced 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.

This Decision is delivered in the presence of the Appellant and the Respondent this 9th March, 2015.



VINCENT K. D. LYIMO (J. rtd)

MEMBERS:

1. MRS. R. A. LULABUKA 

2. ENG. A. J. MWAMANGA 

3. MR. L. P. ACCARO 