

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

APPEAL CASE NO. 43 OF 2013-14

BETWEEN

CONFERENCE AND EXHIBITION

SERVICES.....APPELLANT

AND

CONTRACTORS REGISTRATION

BOARD.....RESPONDENT

DECISION

CORAM

- | | |
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| 1. Hon. Augusta G. Bubeshi, J. (rtd) | -Chairperson |
| 2. Ms. Esther J. Manyesha | -Member |
| 3. Mr. Haruni S.Madoffe | -Member |
| 4. Eng. Francis T. Marmo | -Member |
| 5. Mr. Ole-Mbille Kissioki | -Ag. Secretary |

SECRETARIAT

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

FOR THE APPELLANT

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| 1. Mr. Donati Leoni Moshia | -Managing Partner, CES. |
| 2. Mr. Ally Mlonje | - Staff, CES. |

FOR THE RESPONDENT

- | | |
|-------------------------|-------------------------------------|
| 1. Mr. Salehe Njaa | - Advocate,Mzizima
Law Chambers. |
| 2. Mr. Saddy Kambona | - Legal Officer CRB. |
| 3. Mr. Amos Mwakapalile | - IT Specialist CRB. |

This decision was scheduled for delivery today 27th June, 2014 and we proceed to deliver it.

The appeal at hand was lodged by **M/S CONFERENCE AND EXHIBITION SERVICES** (hereinafter referred to as "**the Appellant**") against the **CONTRACTORS REGISTRATION BOARD, commonly** known by its acronym **CRB** (hereinafter referred to as "**the Respondent**")

The appeal is in respect of Tender with Ref No. CRB/P.20/8/76 **for Request for Quotations for Provision of Tents, Exhibition Booths, Chairs and Tables on hiring basis at Diamond Jubilee Conference Centre from 29th to 30th of May, 2014** (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:

That, the Appellant was among the three (3) tenderers who had submitted their tenders in response to an

invitation for quotation by the Respondent through the Competitive Quotation procedures.

The quotations were opened on the 21st March, 2014 and their respective read - out prices at the opening ceremony were as follows;

S/N	Tenderer's Name	Quoted price in Tsh (VAT inclusive)
1.	M/s Expoterm Tanzania limited	21,240,000
2.	M/s Construction Industrial Event	13,016,000
3.	M/s Conferences & Exhibitions Services	12,800,000

The tenders were then subjected to the purported preliminary evaluation. At this stage, evaluation was done by evaluating the submitted quotations on the following criteria; adherence to the Schedule of Requirements, quality/advantage of using Octanorm

versus plywood panels, registration status with CRB and price.

The Evaluation team however took the view that quality of materials was the determinant criterion as all bidders adhered to the Schedule of Requirements provided to them by CRB.

Following evaluation per the said criterion, the results were as follows;

S/N	Bidder's Name	Assignmt	Adheranc e to Schedule of Reqmts	Quality of materials	Reg. Status with CRB	Price (VAT inclusive)	Score	Rank
1	M/s Expoteam Tanzania Ltd	Provision of Tents, Exhibition Booths, Chairs and Tables	10/10	9/10	10/10	21,240,000	29/30	1
2	M/s Conferences & Exhibitions Services	Provision of Tents, Exhibition Booths, Chairs and Tables	10/10	5/10	10/10	12,800,000	25/30	2
3	M/s Constructn	Provision of Tents,	10/10	5/10	0/10	13,016,000	23/30	3

	Events Specialists	Exhibition Booths, Chairs and Tables						
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Having ranked the so called preliminary results as above, the Evaluation team recommended M/s Expoteam Tanzania Limited for award of the tender and the same was forwarded to the Tender Board for approval.

The Tender Board on 2nd April, 2014 approved the recommendations and awarded the tender to M/s Expoteam Tanzania Limited at a contract sum of Tshs. 21,240,000/=

On 14th May, 2014, the Appellant received a letter with reference No. CRB/P.20/8/85 which informed them that they did not win the tender and that the same was awarded to M/s Expoteam Tanzania Limited at a contract price of Tshs. 21,240,000/= (VAT inclusive)

The Appellant being aggrieved by the award, appealed to this Authority on the 27th May, 2014.

APPELLANT'S SUBMISSIONS ON THE GROUNDS OF APPEAL

According to the documents submitted to the Appeals Authority as well oral submissions by parties during the hearing, the Appellant's grounds of appeal can be summarized as follows;

First ,that no notice of intention to award the tender was issued by the Respondent, contrary to Section 60(3) of the Public Procurement Act of 2011(hereinafter referred to as "**the Act**")

Second, that no reasons were stated for disqualifying their offer which was more competitive than that of the winning bidder. During the hearing, the Appellant submitted further that the Schedule of Requirements did not specify the types of booths required for the exhibition, however it appears they were disqualified on the basis of the type of the booths they had offered, as was contended by the Respondent in their Statement of reply. They complained that they were disqualified basing on an alien criterion.

Accordingly, the Appellant's Prayers before this Authority are as follows:

- i. The Appeals Authority to condemn the Respondent for not adhering to the the Act when undertaking procurements (lack of transparency and fairness)
- ii. Compensation to cover the following expenses incurred (in Tshs);
 - Appeal submission fees – 120,000/=;
 - Time input 2 persons at 500,000/= per day - 1,000,000/=
 - Cost for transport and communication – 100,000/=
- iii. Any other relief(s) that the Appeals Authority may deem fit to grant

RESPONDENT'S REPLY TO THE GROUNDS OF APPEAL

The Respondent's replies as deduced from their written and oral submissions during the hearing may be summarized as follows;

With regard to the first ground of appeal, the Respondent conceded to have not complied with the law due to an oversight of the law. During the hearing they explained further that indeed they failed to give such notice because of the limited time they had and the uncertainty of the exhibition date since the same was subject to confirmation by the State House.

On the second ground, it was replied that the law is clear that the Appellant was to be given reason(s) for disqualification upon request, in terms of Regulation 237(1) of the Public Procurement Regulations, 2013 (hereinafter referred to as "**GN. 446 of 2013**"). Therefore the burden of proof is on them to prove that they requested for reasons and were not given the same. The above notwithstanding, the Respondent asserted

that they gave reasons for the Appellant's disqualification vide their letter referenced CRB/P.20/8/85 dated 14 May, 2014 in which they were also informed of the evaluation criteria used and their low scores compared to the winner.

On the complaint that the Respondent used an alien criterion, the Respondent objected to it on the ground that it is a novel issue not previously raised in the Statement of appeal.

On the compensation claim, the Respondent objected to the same for lack of proof thereof.

Therefore, the Respondent prayed for the following orders;

- i. Dismissal of the appeal for lack of merits
- ii. The Appeals Authority to make no order for compensation.

ANALYSIS BY THE AUTHORITY

Having gone through the oral and written submissions by parties to this appeal, the following issues were framed by the Authority;

- 1. Whether the Respondent's failure to give notice of intention to award the tender was contrary to the law.**
- 2. Whether the reason(s) for tender rejection were unjustifiably denied, if at all**
- 3. To what reliefs, if any, are parties entitled to**

After identifying the issues in dispute, the Authority proceeded to determine them as follows;

Whether Respondent's failure to give notice of intention to award the tender was contrary to the law.

In analysing this issue, the Appeals Authority revisited the Respondent's qualified concession vis a vis the

applicable law in that regard, that is Section 60(2) and (3) of the Act. The provisions state as follows:

“60 (2) The accounting officer shall be notified by the tender board of its **award decision** within three working days of making the decision.

(3) Upon receipt of notification, the accounting officer **shall**, immediately thereafter issue a notice of intention to award the contract to all tenderers who participated in the tender in question **giving them fourteen days** within which to submit complaints thereof, if any.”

The wording of Sub Section (3) above is crystal clear and indeed nowhere in the law is the procuring entity exempted from complying with the requirement of issuing notice of intention to award the tender. The section uses the key legal word of (shall) to underline that issuing such a notice is mandatory and not optional.

It is the Appeals Authority settled view that failure to give notice of intention to award the tender is fatal for two reasons: firstly, it denies the tenderer of his legal right to complain, if at all; because, without knowing the reasons for his disqualification, he would have no basis to complain. Secondly, it is a condition precedent to awarding the tender by the procuring entity, without which no award can be made. This is pursuant to section 60(5) of the Act which reads as follows;

“60 (5) where no complaints have been lodged pursuant to subsection (3) the accounting officer shall issue a notice of acceptance to the successful tenderer”.

Since no such notice was given, it was unlawful to award the tender to the so called winning tenderer. Indeed the successful tenderer is a winner by default. Had the contract under this tender not been fully executed, the Appeals Authority would have nullified the award in terms of Section 97(5) (d) of the Act.

The Respondent informed the Appeals Authority that time was not favourable for them to send a notice of intention to award to the Appellant. With due respect to the Respondent, that is totally unacceptable because the law does not provide an exception to this requirement. Besides, had the Respondent observed the cardinal principle of procurement planning, time would have been on their side because in the planning process they would have factored in all the probabilities and forecasted all the uncertainties.

Accordingly, the Appeals Authority's conclusion with regard to the first issue is that the Respondent's failure to give notice of intention to award the tender was a major legal flaw and was not justified.

Whether the reason(s) for the rejection of Appellant's tender was unjustifiably denied, if at all

As explained by the Respondent during the hearing that in terms of Regulation 237(1) of the GN.446 of 2013, it was the Appellant who had to request for the reasons for

disqualification. The Appeals Authority totally concurs with the Respondent that indeed, the Appellant had to request for the same. In the absence of proof to that effect by the Appellant, it remains that the Appellant sat on their own rights of being availed reasons for their disqualification and the Respondent is certainly not to blame.

The Appeals Authority however considered the Respondent's submission that the Appellant was nevertheless given reasons for their disqualification, namely that, the winner scored 29/30 and the Appellants scored 25/30. Since the Appellant did not request reason(s) for their disqualification, the Appeals Authority deems it unnecessary to examine the validity or otherwise of the reasons given. It would suffice to say that the importance of giving reason(s) is, on the other hand, to uncover tenders weaknesses or faults that resulted into being non responsive with a view to enlighten the tenderer of the said faults, so that in future such faults are avoided. The reasons to be given therefore should essentially serve that purpose. This is

the essence of Regulation 238(1) of the GN.446 which states as follows;

“238.-(1) Where any tenderer for a contract on which a decision or recommendation has been made prefers to make a formal approach and accordingly requests information, he is to be given a written statement which shall list the material issues of fact and the broad reasons for the decision as recorded in the tender board’s minutes”.

From the above analysis, the Appeals Authority holds in passing, that reasons for tender disqualification should be those that uncover weaknesses or faults that resulted in a tender being non responsive as recorded in the minutes of the Tender Board.

The Appeals Authority’s conclusion with regard to the second issue is that reason(s) for the rejection of the Appellant’s tender was justifiably denied.

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

Having found that the Respondent breached the law by not giving notice of intention to award the tender to the Appellant, the Appeals Authority responds to the Appellant's prayers as follows;

First, the Appeals Authority cannot grant the Appellant's prayer to condemn the Respondent for two reasons; firstly, the Appeals Authority has no such powers. Secondly, even if the Appeals Authority had such powers, condemnation per se has no probative legal value. The Appeals Authority hastens to observe that condemnation may have diplomatic or political value. However the Authority is not into politics or diplomacy.

It is regrettable however, that such a reputable professional body would breach the law on such a fundamental and obvious requirement on the excuse of an oversight. It is expected that caution and reasonable steps will be taken by the Respondent to ensure that such anomaly do not recur.

The Appeals Authority further grants the Appellant's prayer for compensation for costs incurred in pursuit of this Appeal amounting to Tshs.1,220,000/=(one million, two hundred and twenty thousand only) whose breakdown is as follows:

- Appeal filling fees - 120,000/=
- Time input 2 persons at 500,000/= per day = 1,000,000/=
- Costs for transport and communication - 100,000/=

The decision is binding upon the parties and the Appellant has the right to execute the same in terms of Section 97(8) of PPA, 2011.

Right of Judicial Review as per Section 101 of the PPA/2011 explained to parties.

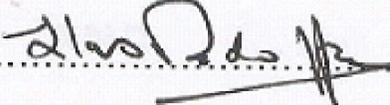
This Decision is delivered in the presence of the Appellant and in the absence of the Respondent this 27th June, 2014.


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JUDGE (rtd) A. BUBESHI
CHAIRPERSON

MEMBERS:

1. MS. E. J. MANYESHA.....

2. MR. H.S.MADOFFE

3. ENG. F. MARMO