

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

APPEAL CASE NO 05 OF 2015-16

BETWEEN

**BONIFACE SILIWAN SANG
GENERAL TRADERS.....APPELLANT**

AND

**MUHEZA DISTRICT
COUNCIL.....RESPONDENT**

DECISION

CORAM

- | | |
|------------------------------|-------------|
| 1. Ms. Monica P. Otaru | Chairperson |
| 2. Mrs. Rosemary A. Lulabuka | Member |
| 3. Mr. Louis Accaro | Member |
| 4. Eng. Aloys Mwamanga | Member |
| 5. Mr. Ole-Mbille Kissioki | Secretary |

SECRETARIAT

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

FOR THE APPELLANT

Mr. Boniface S. Sanga

Boniface Siliwan Sang Gen. Traders

FOR THE RESPONDENT

Mr. Rashid Mohamed Said

Counsel for the Respondent

This decision was scheduled for delivery today 18th September 2015, and we proceed to do so.

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

The said Appeal is in respect of Tender No. LGA /132/2015/2016/ NC/03 for Revenue Collection of cereals, fruits and agricultural produce save for forest produce for the Financial Year 2015/16 (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:

On the 9th April, 2015, the Respondent invited the general public to submit tenders for the tender, the deadline for which was 30th

April 2015. Three tenders were received and their respective read out prices at the opening ceremony were as follows;

S/No	NAME OF THE BIDDER	QUOTED PRICE IN TZS	DURATION
1.	M/s Proper Services (T) Ltd.	23,000,000.00	Per month
2.	M/s Okoamuda Limited	55,750,350.00	Per month
3.	Boniface Siliwan Sang General Traders	25,300,000.00	Per month

The tenders were then subjected to combined preliminary evaluation and price comparison whereby all three tenders were considered to have met eligibility criteria. Their prices were then ranked. The tender price by M/s Okoamuda Ltd. was the highest of all, followed by the Appellant's and lastly, M/s Proper Service Ltd. As a result, the Evaluation Committee recommended award of the tender to M/s Okoamuda Ltd. at a contract price of TZS. 55,750,350.00. The recommendation was approved by the Respondent's Tender Board, at its meeting held on 15th May, 2015.

On 22nd May 2015, the Respondent vide a letter referenced LGA/132/2015/2016/NC/03 informed the Appellant of its intention to award the tender to M/s Okoamuda Ltd. without

indicating the proposed contract price. Two months later, on 28th July, 2015 the Respondent vide its letter referenced HW/MUH/F.60/27/115 informed the Appellant of its decision to award the tender to M/s Okoamuda Ltd. this time disclosing a contract price of TZS 27,317,671.00.

Aggrieved by the Respondent's decision to award the tender at a contract price of TZS 27,317,671.00, the Appellant appealed to this Appeals Authority on 7th August, 2015.

SUBMISSION BY THE APPELLANT

The Appellant's ground of Appeal is centred on one argument that, the Respondent was wrong to award the tender to M/s Okoamuda Ltd. at a contract price of TZS 27,317,671.00 while at the opening ceremony the latter's read out tender price was TZS 55,750,350.00.

During the hearing, the Appellant submitted that he was one of participants who attended the tender opening ceremony whereby he heard that the tender price of M/s Okoamuda Ltd. for that particular tender was TZS 55,750,350.00. That, he even asked for confirmation of the figure which was indeed TZS 55,750,350.00.

That, when he received a letter of intention to award the tender to M/s Okoamuda Ltd. which was without the tender price, he had no reason to complain to the Respondent's Accounting Officer since he believed that the approved price was TZS 55,750,350.00. This however changed when he received the letter dated 28th July, 2015 notifying him that M/s Okoamuda Ltd. was awarded the tender at a contract price of TZS 27,317,671.00, and therefore this Appeal.

The Appellant prays for the following reliefs;

1. Nullification of the tender award decision,
2. Re-evaluation of the tender,
3. Costs of the case as follows;
 - TZS 200,000.00 Appeal filing fees
 - Transport and accomodation costs TZS 500,000.00 every time he comes for Appeal followups.

SUBMISSIONS BY THE RESPONDENT

The Respondent written submissions were preceded by two Preliminary Objections as follows;

1. The Appellant did not complain to the Respondent within time prescribed by law; and

2. The Appeal is incompetent and bad in law for being initiated by the Notice of Appeal which was lodged out of time.

During the hearing, the counsel for the Respondent withdrew the Preliminary Objections and proceeded with the merits of the Appeal as follows;

That, they advertised the tender and got three responses which were then evaluated and lastly; M/s Okoamuda Ltd. was recommended for award.

That, the notice of intention to award was sent to the Appellant, who had not complained, hence awarding the tender to M/s Okoamuda Ltd. The counsel therefore argued that the Appellant's claim is baseless hence it should be dismissed with costs.

That, during tendering, M/s Okoamuda Ltd. combined together the tender prices of two tenders which are; the tender under Appeal and tender for revenue collection for spices. That this error was not discovered up to the time of contract signing, when M/s Okoamuda Ltd. denied the tender price of TZS 55,750,350 TZS and insisted on TZS 27,317,671.00.

That, upon being faced with such controversy, the Respondent sought for Public Procurement Regulatory Authority's (hereinafter

referred to as "PPRA") advice. Before PPRA had responded, the Respondent signed the contract with M/s Ookoamuda Ltd. The rationale being that the Respondent had no capacity in Revenue Collection and that the contract was to be effective from 1st July, 2015 upon expiration of the previous contract and in any case, that the price of TZS 27,317,671.00 was the highest.

The counsel for the Respondent conceded that the Tender process was faulted and concurred with the Appellant's prayer for re-evaluation of the tender. Praying that in the meantime, M/s Ookoamuda Ltd. be allowed to proceed with such collections, since the Council has no ready capacity to take over the task.

ANALYSIS BY THE APPEALS AUTHORITY

Having gone through the documents submitted and having heard the submissions by the Parties, the Appeals Authority is of the view that the Appeal is centered on the following issues:

1. Whether the tender price awarded to the successful tenderer was legally justified.
2. To what reliefs, if any, are the Parties entitled to.

Having identified the issues, the Appeals Authority now proceeds to resolve them seriatim, as follows;

1. Whether the tender price awarded to the successful tenderer was legally justified

In analysing this issue, the Appeals Authority considered contentions that the successful tenderer's tender price read out during the opening ceremony was by far higher than that awarded to it. The Appeals Authority went through the Respondent's minutes of the tender opening ceremony and found that indeed it is on record that the tender price of the successful tenderer was TZS 55,750,000.00.

The Appeals Authority further went through the tender document of the successful tenderer and observed that its Form of Bid indicated that it was offering to execute a tender for Revenue Collection for cereals, fruits, other agricultural produce and spices save for forest produce; by paying the Respondent a total of TZS 55,750,000.00. For ease of reference, the wordings of the said Form are quoted as hereunder;

"nakubali kuendesha zabuni ya kukusanya ushuru wa mazao ya nafaka, matunda na mengineyo na ushuru wa viungo isipokuwa mazao ya misitu kulingana na maelezo na masharti ya zabuni, kwa kuilipa Halmashauri ya Wilaya ya Muheza shilingi 55,750,350/= kila mwezi..."

Loosely meaning *"I agree to execute a tender for Revenue Collection for cereals, fruits and other agricultural produce; and spices (save for forest produce) as per the terms of the tender,*

by paying Muheza District Council a total of TZS 55,750,000/= per month.

It is also not disputed that the Tender for Collection of Revenue for cereals, fruits and other agricultural produce (save for forest produce) was a separate tender with reference No. LGA/132/2015/2016 NC/03 and; for spices it was another tender with Ref. No. LGA /132/2015/2016 NC/04. That said, it is clear that each tender was separate and the same should not have been combined in any way whatsoever. Nevertheless, the successful tenderer combined the two into one tender. This connotes that the successful tenderer did not tender for any of the tenders floated by the Respondent. This anomaly should have been observed from the very beginning by the Evaluation Committee during evaluation process.

In any case, the Respondent's Procurement Management Unit, the Tender Board or the Accounting Officer ought to have discovered the anomaly before concluding the award. Unfortunately, it was not the case.

It is observed that the Tender Document issued by the Respondent, at Clause E, required tenderers to declare the amount it will pay the Respondent **per tender**. That was a

mandatory requirement. For clarity, the said Clause provides as follows:

"Mwombaji atamke wazi kuwa atailipa Halmashauri kiasi gani kwa mwezi kwa zabuni anayoomba".

Loosely meaning that *the Applicant (tenderer) is required to declare the amount it will pay the District Council **per tender.*** (emphasis ours).

Evaluation basing on the requirements of the Tender Document is backed by law whereby Regulation 203 of the Public Procurement Regulations, 2013 stipulates that;

"the tender evaluation shall be consistent with the terms and conditions prescribed in the tender document and such evaluation shall be carried out using the criteria explicitly stated in the tender document".

In this line, the Evaluation Committee ought to have complied with Clause E of the Tender Document as the amount declared by the successful tenderer was ambiguous since it was making reference to two tenders combined, contrary to the Tender Document requirement.

The second limb of this issue is how then did the figure change from TZS 55,750,350.00 to TZS 27,317,671.00. The Appeals Authority observed that the successful tenderer had a breakdown

of his tender price through his Tender Price Schedule and that, TZS 55,750,350.00 was arrived at after summing up the price of the tender under Appeal and that of spices which were TZS 27,317,671.00 and TZS 28,432,679.00 respectively.

The Appeals Authority has observed that technically, the breakdown of the tender price on the successful tenderer's Price Schedule had a wrong base *ab initio* since each tender was independent and each required a separate set of documentation as stipulated in the Instructions to Tender.

Amply stated, it was not proper for the Respondent to award the tender to a tenderer who did not follow instructions, thereby creating ambiguity of the tender price.

Futhermore , the Appeals Authority observed that PPRA advised the Respondent to satisfy itself if the successful tenderer's tender price was TZS 55,750,000.00 and if so, then it should proceed with contract signing process. It is on record that Respondent received PPRA's advice on the 2nd July, 2015 . However, it did not adhere to the advice so given and proceeded with contract signing on the 7th July, 2015. This observation negates the Respondent's defence that they received PPRA's letter after the contract had been signed. The Respondent could instead have extended the previous contract while waiting for PPRA's advice.

Accordingly, the Appeals Authority's conclusion with regard to the first issue is that, the tender price awarded to the successful tenderer was not legally justified.

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

Basing on the findings of the first issue, the Appeals Authority finds that the Appeal has merits and is therefore allowed to the extent herein below;

The Appeals Authority hereby nullifies the award of the tender to M/s Okoamuda Ltd and orders the Respondent to re-evaluate the tender afresh in accordance with the law.

On the issue of costs, the Appeals Authority has power to issue reasonable compensation at its discretion under S.97 (5) (f) of the Public Procurement Act, 2011 (hereinafter referred to as "**the Act**"). Considering that the Respondent's anomaly amounted to a wrongful act, the Appeals Authority orders the Respondent to pay reasonable compensation to the Appellant amounting to TZS 500,000.00 as per the following breakdown:

- Appeal filing feesTZS 200,000.00
- Transport and Accommodation...TZS 300,000.00

Considering the Respondent's prayer that M/s Okoamuda Ltd. be allowed to proceed with the contract until finalisation of the

reversed tender process, the Appeals Authority can not grant such a prayer for doing that may entail condoning the ongoing violations.

The decision is binding upon the parties and may be executed in any court of competent jurisdiction in terms of Section 97(8) of the Act.

The right to Judicial Review as per Section 101 of the Act is explained to Parties.

The Decision is delivered in the presence of the Appellant and in absence of the Respondent, this 18th day of September, 2015.



Ms. MONICA P. OTARU
CHAIRPERSON

MEMBERS

1. Mrs. ROSEMARY A. LULABUKA



2. Eng. ALOYS MWAMANGA



3. Mr. LOUIS ACCARO

