

IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY
AT DAR ES SALAAM.

APPEAL CASE NO. 47 OF 2013-14

BETWEEN

M/S DIAMOND MOTORS
LIMITED.....APPELLANT

AND

TANZANIA SOCIAL ACTION FUND.....RESPONDENT

DECISION.

CORAM

- | | |
|--------------------------------------|----------------|
| 1. Hon. Augusta G. Bubeshi, J. (rtd) | -Chairperson |
| 2. Mr. Kesogukewe M.Msita | -Member |
| 3. Ms. Esther J. Manyesha | -Member |
| 4. Mr. Haruni S. Madofe | -Member |
| 5. Mr. Ole-Mbille Kissioki | -Ag. Secretary |

SECRETARIAT

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

FOR THE APPELLANT

1. Raymond Baravuga -Legal Manager
2. Ms. Reena Ganatna -Sales Manager
3. Mr. Harsh Suryeranshi - Legal Manager

FOR THE RESPONDENT

1. Mr. Keneth Maganga -Advocate- Great Harvest Attorneys
2. Ms. Angela Hoyya -Procurement Manager
3. Eng. Fabian Baeka -Member Evaluation Committee
4. Mr. Michael Malebo -Procurement Officer

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

The Appeal at hand was lodged by M/S DIAMOND MOTORS LIMITED (hereinafter referred to as “the Appellant”) against TANZANIA SOCIAL ACTION FUND commonly known by its acronym TASAF (hereinafter referred to as “the Respondent”).

The said Appeal is in respect of Tender No. IE/011/2013-14/HQ/G/05-LOT 2 for the Supply of Motor Vehicles (hereinafter referred to as “the tender”).

According to the documents submitted to the Public Procurement Appeals Authority (hereinafter referred to as “the Appeals Authority”), as well as oral submissions by the parties during the hearing, the facts of the Appeal may be summarized as follows:

The Respondent vide the Daily News Newspaper dated 6th December, 2013, Public Procurement Regulatory Authority Procurement Journal and UN Development Business (UNDB) online dated 4th, 5th and 6th December, 2013 respectively, invited tenderers to submit tenders for the tender.

The said tender was to be conducted through the International Competitive Tendering procedures specified in the World Bank Guidelines for the Procurement of Goods, Works and Non-

Consultancy Services under IBRD loans and IDA Credits and Grants of January 2011.

The deadline for the submission of tenders was set for 17th January, 2014, whereby three tenders were received from the following firms:-

S/N	NAME OF THE BIDDER	QUOTED PRICE	LOT
1.	M/s Toyota Tanzania Limited	Tshs. 13,110,669,070.00 Exclusive of Duties and VAT	1 & 2
2.	M/s Diamond Motors Limited	Tshs. 4,816,513,404.78 Exclusive of Duties and VAT	2
3.	M/s CMC Automobiles Limited	USD. 5,172,176.00 Exclusive of Duties and VAT	2

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

During the preliminary evaluation the tender by M/s Toyota Tanzania Limited was disqualified for being non responsive.

The remaining two tenders by M/s Diamond Motors Limited and M/s CMC Automobiles Limited were subjected to technical evaluation whereby the tenders were checked to determine their compliance with the technical specifications provided in the Tender Document.

The tender submitted by M/s Diamond Motors Limited was found to be non responsive because they had offered to supply vehicles with Front Suspension Wishbone and Coil Spring type instead of the Specified Rigid Axle and Coil or Leaf Spring or Rigid Axle or Coil Spring with Hydraulic Dampers. Furthermore, the Appellant's Technical Specifications for their tender did not state the payload of the vehicles to be supplied.

The remaining tender by M/s CMC Automobiles Limited was therefore subjected to detailed evaluation whereby the Evaluation Committee checked for arithmetic errors and was found to be error free.

Thereafter, the Evaluation Committee conducted post qualification to the tenderer and found them to be capable of performing the work. Accordingly, the Evaluation Committee

recommended them for the award of the tender for Lot No. 2 at the contract price of USD. 5,172,176.00 (Exclusive of VAT and Duties)

The Tender Board at its meeting held on 14th February, 2014 approved the award of the tender as recommended.

On 7th May 2014, the Respondent vide a letter referenced IE/011/2013-14/HQ/G/05 communicated award of the tender to the Successful tenderer and also informed the other two tenderers that their tenders were not successful.

On 26th May, 2014, the Appellant vide a letter referenced DML/Sales/Tender/002/05/2014 requested the Respondent for clarifications as to why their tender was rejected.

On 28th May, 2014, the Respondent vide a letter referenced IE/011/2013-14/HQ/G/05 informed the Appellant that the reasons for rejection of their tender had been published on the Respondent's Website as per the applicable rules of the tender.

On 14th June, 2014, the Appellant wrote another letter to the Respondent acknowledging the receipt of the reasons for the rejection of their tender. However, they indicated their grievances and dissatisfaction for the award of the tender to M/s CMC Automobiles Limited on the reason that the same had

offered to supply a “turbo charged cooled engine” instead of “naturally aspirated diesel engine”. Furthermore, the Appellant informed the Respondent that according to their understanding, Land Rover defender 110 models come without Turbo engine, while the model which has been awarded is a turbo engine. Thus, they requested more clarification on the matter.

On 18th June, 2014, the Respondent vide a letter referenced IE/011/2013-14/HQ/G/09 informed the Appellant to comply with the procedures specified in the guidance to tenderers by lodging their complaint to the donors pursuant to paragraph 15 of Appendix 3 of the International Competitive Tendering procedures specified in the World Bank Guidelines for the Procurement of Goods, Works and Non-Consultancy Services under IBRD loans and IDA Credits and Grants of January 2011.

Being dissatisfied with the response of the Respondent on the matter, on 30th June, 2014, the Appellant lodged their Appeal to the 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, they were among the three tenderers who participated in the tender under Appeal.

That, they are dissatisfied with the award of the tender made by the Respondent to the successful tenderer since the said tenderer did not meet the requirement of the Tender Document.

That, the Respondent did not issue a Notice of Intention to award the tender pursuant to Section 60(3) of the Public Procurement Act, 2011.

That, the tender award had been preferred to a tenderer who offered to supply vehicles with turbo engine while their tender was disqualified for submitting a similar specification.

That, the Vehicle Model 110 Defender offered by the successful tenderer does not have a Natural Aspirated Diesel Engine as provided in the Tender Document; and that none of the Land Rover models mentioned come with the above engine specification. All have turbo engines.

That, as per the Tender Document, the Respondent requested vehicles with five (5) doors with a minimum sitting capacity of 8 people. However, the defender model offered by the successful tenderer does not have more than seven (7) seats. Thus, the

successful tenderer did not comply with the requirements of the Tender Document and that they ought to have been disqualified.

Finally, the Appellant prayed for the annulment of the award of the tender to the successful tenderer and the Authority to order for the re-tendering of the tender.

RESPONDENT'S REPLIES TO THE APPELLANT'S SUBMISSIONS

The Respondent's documentary and oral submissions were preceded by the argument that the tender was to be conducted through the World Bank Guidelines of January, 2011; and that according to the procedures specified therein, read together with Section 4(1) of the Public Procurement Act No. 7 of 2011 the Appellant ought to have lodged their complaint to the World Bank for review and not to this Authority.

That, by virtue of the Guidelines, the Authority has no jurisdiction to entertain the Appeal at hand.

Without prejudice to the above submission, the Respondent submitted further that, the Appellant did not indicate the specified range of the payload in their tender while the Tender Document specifically provided to that effect.

That, the Appellant offered to supply turbo charged and inter cooled engine (Combustion System), while the Tender Document provided for the Naturally Aspirated Diesel Engine.

That, the requirement for the Notice of Intention to award the tender contravenes paragraphs 2.47, 2.60 and 7 of the World Bank Guidelines which require borrowers not to disclose tender information until the award is made, and the requirement that the award of the tender is to be published within fourteen days from the date of No Objection from the donors.

That, according to Clause 15 of Appendix 3 of the World Bank Guidelines, the Appellant is barred from discussing tenders by their competitors; in this case, the successful tenderer's tender.

That, evaluation of the tenders was done based on the pre-determined specifications provided for in the Tender Document and that award of the tender was made to the lowest evaluated tenderer.

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

ANALYSIS BY THE AUTHORITY

Having heard submissions by the parties, the Authority deemed it necessary to ascertain whether or not it has jurisdiction to

entertain the Appeal at hand as contended to by the Respondent.

In the course of doing so, the Authority observed that, while the Appellant based their Appeal on the Public Procurement Act, 2011, the Respondent on the other hand relied on the World Bank Guidelines for the Procurement of Goods, Works and Non-Consulting Services under IBRD Loans and IDA Credits and Grants of January 2011, which according to them, the Appellant was under an obligation to comply with instead of lodging their Appeal to this Authority.

Upon perusal of the documents availed to the Authority, the Authority observed that Clause 3 of the Tender Advertisement stated in clear terms that, the tender under Appeal was to be conducted through the World Bank Guidelines.

The Clause reads as follows;

Clause 3 "Bidding will be conducted through the International Competitive Bidding (ICB) procedures as specified in the World Bank's Guidelines Procurement of Goods, Works and Non-Consulting Services Under IBRD Loans IDA Credits and Grants by World Bank Borrower, January 2011 and is open to all eligible bidders as defined in the Procurement Guidelines".

The Authority revisited the above referred World Bank Guidelines and observed that they do provide an avenue for an aggrieved tenderer to lodge their complaint. The Guidelines provide that, in case a bidder is not satisfied with the tender process, they are firstly required to lodge their complaint to the borrower. In the event that, a tenderer is dissatisfied with the reasons given by the borrower, they may further Appeal to the World Bank in terms of Clause 6.25 of Appendix 3 of the Guidelines.

The Authority revisited Clause 15 of Appendix 3 of the Guidelines which provide for appeal procedures and observed that, the said provision bars a tenderer and the World Bank to discuss the tenders of competitors which stipulates as follows;

“Clause 15: As stated in paragraph 2.65, if, after notification of award, a bidder wishes to ascertain the grounds on which its bid was not selected, it should address its request to the Borrower. If the bidder is not satisfied with the written explanation given and wishes to seek a meeting with the Bank, it may do so by addressing the Regional Procurement Manager for the Borrowing country, who will arrange a meeting at the appropriate level and with relevant staff. The purpose of such meeting is only to discuss the

bidder's bid, and neither to reverse the Bank's position that has been conveyed to the Borrower nor to discuss the bids of competitors." (Emphasis Added)

Accordingly, a tenderer's complaint against other tenderers cannot be entertained by the World Bank. This means that, in the event of an unlawful or unfair award the World Bank cannot provide relief to the complainant.

In this Appeal, the Appellant firstly lodged their complaint to the Respondent in order to ascertain the reasons for their disqualification. Upon knowing the reasons for their disqualification, they agreed with the said reasons given thereof. However, they learnt that the successful tenderer could not have complied with the specifications provided in the Tender Document as they are aware that Land Rover models tendered by them do not have Naturally Aspirated Diesel engines. Furthermore, the Defender models do not have a seating capacity of more than seven persons as demanded by the specifications.

Thus, the main contention of the Appellant in this Appeal is that the successful tenderer's tender did not meet two of the key criteria in respect of the type of engine and the seating capacity. Procedures to deal with such complaints are not

catered for under the World Bank Guidelines. Instead, the World Bank Guidelines ousts the World Bank jurisdiction in relation thereto. Therefore, the only avenue for tenderers with such complaints is this Authority which caters also for such type of complaints. Otherwise, wrongful, unlawful or unfair award would not be redressed and complaints natural right to seek legal relief would be curtailed.

In light of the above observations, the Authority has jurisdiction to hear such complaints since the World Bank is not in a position to provide such remedy.

Accordingly, the Authority's conclusion with regard to the question of jurisdiction is that it has jurisdiction to entertain and hear the Appeal at hand.

The above findings and conclusion notwithstanding, in the course of reviewing the availed documents, the Authority observed that, the Appellant was notified of the tender results on 7th May, 2014 vide a letter referenced IE/011/2013-14/HQ/G/05. The Authority observed further that, according to Section 82(2) (a) of the Public Procurement Act, 2004, the Appellant ought to have lodged their Appeal directly to this Authority within fourteen days from the date when they become aware of the circumstances giving rise to a dispute.

The Authority revisited Clause 40.1 of the Tender Document and observed that, it provided clearly that, immediately after the communication of the award of the tender, the Respondent was under an obligation to publish amongst other things the names of the unsuccessful tenderers together with the reasons for the rejection of their tenders.

The Clause reads as follows;

Clause 40.1" prior to the expiration of the period of bid validity, the Purchaser shall notify the successful Bidder, in writing that its Bid has been accepted. The notification letter (hereinafter and in the Condition of Contract and Contract Forms called the "Letter of Acceptance") shall specify the sum that the Purchaser will pay the Supplier in consideration of the supply of Goods (hereinafter and in the Condition of Contract and Contract Forms called the "Contract Price"). At the same time, the Purchaser shall also notify all other Bidders of the results of the bidding and shall publish in UNDB online the results identifying the bid and lot (contract) numbers and the following information:

- i. Name of each bidder who submitted a Bid;
- ii. Bid prices as read out at Bid Opening;

- iii. Name and evaluated prices of each Bid that was evaluated;
- iv. Name of bidders whose bids were rejected and the reasons for their rejection; and
- v. Name of successful Bidder; and Price it offered, as well as the duration and summary scope of the contract awarded.”
(Emphasis Added).

It is the Authority considered view that, much as the Appellant received a notification letter on 7th May, 2014, by virtue of the above cited Clause, the Appellant became aware of the circumstances (reasons for rejection of their tender) on the same day; thus, the fourteen days required by the law lapsed on 21st May, 2014.

Assuming that, the Appellant was not aware of the reasons for the rejection of their tender on 7th May, 2014, but on 28th May, 2014, when they received Respondent’s letter informing them to visit the Respondent’s Website, then, fourteen days required by the law lapsed on 11th June, 2014. To the contrary, the Appellant lodged their Appeal to this Authority on 30th June,

2014. Counting from that date to the time when the Appellant lodged their Appeal on 30th June, 2014, almost 32 days had lapsed.

Furthermore, in all above circumstances, the Appellant ought to have lodged their complaint directly to this Authority and not to the Respondent, since, neither the procuring entity nor the Public Procurement Regulatory Authority (as the law then was) had jurisdiction to entertain their Appeal since the procurement contract had already entered into force in terms of Sections 82(2) (a) and 55(7) of the Act which read as follows;

“S. 82(2) a supplier, contractor or consultant entitled under section 79 to seek review may submit a complaint or dispute to the Public Procurement Appeals Authority:-

(a) If the complaint or dispute cannot be entertained under section 80 or 81 because of entry into force of the procurement contract and provided that the complaint or dispute is submitted within fourteen days from the date when the supplier, contractor or consultant submitting it became aware of the circumstances giving rise to the complaint or dispute or the time when the supplier, contractor or consultant

should have become aware of those circumstances.

“S. 55(7) the procurement contract shall enter into force when a written acceptance of a tender has been communicated to the successful supplier, contractor or consultant”.

Furthermore, the Authority wishes to enlighten the Appellant that, the tender in dispute was floated way back on 6th December, 2013. At that time, the new law, that is, the Public Procurement Act, 2011 (relied upon by the Appellant) was not operational. The new law became operational on 15th December; 2013. Due to that, the Public Procurement Regulatory Authority issued a Circular dated 17th February, 2014 to the effect that, all procurements undertaken by using the Public Procurement Act, 2004 shall continue using the said old law. Therefore, it was not proper for the Appellant to use the new Act.

In view of the above findings, despite the fact that the Authority has jurisdiction to hear the Appeal at hand, it cannot do so because the Appeal has been filed hopelessly out of time.

Accordingly, the Appeal is hereby dismissed for being filed out of time and each party is ordered to bear its own costs.

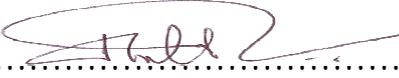
Right of Judicial Review as per Section 101 of the PPA/2011 explained to parties.

Decision delivered in the presence of the Appellant and the Respondent this 7th August, 2014.



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

MEMBERS:

1. MR. K. M. MSITA.....

2. MS. E. J. MANYESHA.....

3. MR H. S. MADOFE.....