

**IN THE  
PUBLIC PROCUREMENT APPEALS AUTHORITY  
AT ARUSHA**

**APPEAL CASE NO. 88 OF 2010**

**BETWEEN**

**WIMBI ENTERPRISES COMPANY LTD.... APPELLANT**

**AND**

**ARUSHA MUNICIPAL COUNCIL .....RESPONDENT**

**DECISION**

**CORAM:**

- |                                |                 |
|--------------------------------|-----------------|
| 1. Hon. A.G. Bubeshi, J. (rtd) | - Chairperson   |
| 2. Mr. M.R. Naburi             | - Member        |
| 3. Mr. K.M. Msita              | - Member        |
| 4. Mrs. R. Mang'anya           | - Member        |
| 5. Ms. E.V.A Nyagawa           | - Ag. Secretary |

**SECRETARIAT:**

- |                      |                 |
|----------------------|-----------------|
| 1. Ms. F. R. Mapunda | - Legal Officer |
|----------------------|-----------------|

## **FOR THE APPELLANT:**

1. Mr. Alphonse M. Mniko – Director
2. Mr. Ally A. Tesha – Director
3. Mr. Moses Mahuna – Advocate, Duncan Joel Oola & Co. Advocates Arusha.

## **FOR THE RESPONDENT**

1. Mr. Paul Mugasha – Municipal Solicitor
2. Mr. David M. Makolo – Ag. Municipal Supplies Officer

This decision was scheduled for delivery today 17<sup>th</sup> December, 2010, and we proceed to deliver it.

The appeal at hand was lodged by **WIMBI ENTERPRISES COMPANY LTD** (hereinafter to be referred to as "**the Appellant**") against **ARUSHA MUNICIPAL COUNCIL** (hereinafter to be referred to as "**the Respondent**").

The said Appeal is in respect of Tender No. LGA/003/2010-11/AMC/NC/004 for Revenue Collection from Billboards, Posters and Hoarding using Agencies (hereinafter to be referred to as "**the Tender**").

According to the documents submitted to the Authority as well as oral submissions by parties, the facts of the Appeal may be summarized as follows:

The Respondent re-advertised tenders for Agency for Revenue Collection from Billboards, Posters and Hoarding.

The tender attracted four tenders, including that of the Appellant.

The tender opening took place on 31<sup>st</sup> August, 2010, whereby four tenders were submitted as listed hereunder:

<b>S/No</b>	<b>Name of a tenderer</b>	<b>Price Quoted Per Month</b>
<b>1.</b>	<b>Didas Agency Limited</b>	<b>Tshs. 55,000,000/-</b>
<b>2.</b>	<b>Econ Consult &amp; Trading Company Limited</b>	<b>Tshs. 52,272,000/-</b>
<b>3.</b>	<b>New Metro Merchandise Company Limited</b>	<b>Tshs. 56,813,720/-</b>
<b>4.</b>	<b>Wimbi Enterprises Company Limited</b>	<b>Tshs. 50,000,000/-</b>

The tenders were evaluated and thereafter the tender was awarded by the Tender Board on 7<sup>th</sup> October, 2010, to New Metro Merchandise Ltd (hereinafter to be referred to as **"the Successful Tenderer"**) at the contract price of Tshs. 56,813,720/- per month.

On 15<sup>th</sup> October, 2010, the Respondent communicated the award to New Metro Merchandise Ltd *vide* letter referenced AMC/CTB/AWD/206.

The Appellant became aware that the tender had been awarded to the Successful Tenderer after making several telephone inquiries to the Respondent.

Being dissatisfied with the tender results, the Appellant wrote a letter to the Respondent dated 21<sup>st</sup> October, 2010, referenced WIMBI/AR/CORR/2010/15, requesting to be informed as to why the tender had been awarded to a tenderer who had a debt with the Council for Revenue Collection for the Year 2009/2010, contrary to the requirement of Item 6 on 6 page of the Tender Document.

On 26<sup>th</sup> October, 2010, the Respondent wrote a letter without reference addressed to **“KWA YEYOTE ANAYEHUSIKA”** (To Whom It May Concern) informing the general public that New Metro Merchandise Ltd had been appointed to be an agent for Revenue Collection from Billboards, Posters and Hoarding for the Year 2010/2011.

Having received no reply from the Respondent, the Appellant, on 3<sup>rd</sup> November, 2010, *vide* a letter referenced WIMBI/AR/CORR/2010/21, filed an application for administrative review to the Public Procurement Regulatory Authority (hereinafter to be referred to as **"PPRA"**).

On 8<sup>th</sup> November, 2010, the Appellant received a letter from PPRA referenced PPRA/LGA/00360 advising them to submit their appeal to the Public Procurement Appeals Authority (hereinafter to be referred to as **"the Authority"**) as the contract had already entered into force.

On 12<sup>th</sup> November, 2010, the Appellant lodged the Appeal to this Authority.

### **SUBMISSIONS BY THE APPELLANT**

The Appellant'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, it has been the practice of the Respondent not to inform unsuccessful tenderers in writing about tender results even where official inquiries are made.

That, the Appellant became aware of their disqualification through telephone inquiries. Thereafter the Appellant saw a letter from the Respondent introducing New Metro Merchandise Company Limited to the clients.

That, the tender was awarded to the tenderer who had a debt with the Respondent contrary to the requirement of Item 6 on page 6 of the Tender Document which clearly states that a tenderer should not have any debt with the Council.

That, the Respondent's Trial Balance as at 30<sup>th</sup> June, 2010, indicates that the Successful Tenderer had a debt of Tshs. 195,284,400/-. Hence, they were not qualified to be awarded the tender.

That, according of Item 12 on page 6 of the Tender Document, any tenderer who fails to comply with the

requirements of the Tender Document would be automatically excluded from the tender process. Thus the Successful Tenderer ought to have been disqualified for failure to comply with Item 6 on page 6 of the Tender Document.

That, the Successful Tenderer was awarded the contract for collection of revenue for the Year 2009/2010 at Tshs. 43,000,000/-per month but they failed to remit the required amount. Hence it is obvious that, they will not be able to remit Tshs. 56,813,720/- per month under the disputed tender.

That, Didas Agency Ltd were not equally qualified as they had debts with Morogoro Municipal Council and Mbeya City Council; even though they ranked second. Also Econ Consultants Ltd were not qualified to be awarded the tender as they submitted a defective power of Attorney, which was noted during the tender opening. Hence, the Appellant was the only tenderer qualified to be awarded the tender as they had no debt with any council and have the required experience.



That, the Appellant prayed to the Authority for the following reliefs:

- a) The tender award be nullified and the same be awarded to the Appellant as they had complied with all the requirements.
- b) General damages to the tune of Tshs 200,000,000/-.
- c) Costs of this Appeal.
- d) Any other relief this Authority may deem fit to grant.

## **REPLIES BY THE RESPONDENT**

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 Respondent did not notify unsuccessful tenderers about the tender results as the same had to be done after the Performance Security had been submitted. Hence, notifying them before submission of the Performance Security would have been contrary to the requirements of the Tender Document.

That, the Appellant's claim that the tender results were obtained through telephone is disputed as that was not the proper mode of communicating tender results. However, the same might have been done by the Respondent's officials who did not observe the proper modes of communication from public offices.

That, the Successful Tenderer had no debt with the Council; as their contract started four months late hence they were to collect revenues for eight months instead of twelve months. The Council's Municipal Director negotiated with the Successful Tenderer on how to make up for the difference of four months collection. Emanating from these negotiations the contract was signed whereby the Successful Tenderer was to remit Tshs. 58,000,000/-

per month instead of Tshs. 43,000,000/- per month. Hence, at the time of this tender process, the Successful Tenderer had remitted Tshs. 364,000,000/- instead of Tshs. 344,000,000/- which was to be remitted for the whole period of one year based on a monthly collection of Tshs 43,000,000/. Thus, the Successful Tenderer had no debt with the Council. However, based on the need to remit Tshs. 58,000,000/- as per the signed contract, the Successful Tenderer appeared to have a debt of about Tshs. 175,000,000/-.

That, the power of Attorney of Econ Consultants Ltd was not defective as alleged by the Appellant as the Evaluation Report did not indicate so.

That, Item 6 on page 6 of the Tender Document requires tenderers to have no debt with Arusha Municipal Council. Hence, the Appellant's claim that Didas Agency Ltd had debts with other councils was not relevant to the tender under Appeal.

That, the Appellant was disqualified due to their failure to meet the tender requirements.

That, the Appellant's grounds of Appeal are misconceived and vexatious.

The Respondent therefore prayed for the following reliefs:

- a) Dismissal of the Appeal with costs.
- b) General and punitive damages to the tune of Tshs. 5,000,000,000/-.
- c) Any other relief as this Authority deems just to grant.

### **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 based on the following issues:

- **Whether the Successful Tenderer had a debt with the Respondent under the previous contract for the Year 2009/2010**
- **Whether the award of the tender to the Successful Tenderer was proper at law**
- **Whether the Respondent's failure to notify unsuccessful tenderers of the tender results contravened the law**
- **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 Successful Tenderer had a debt with the Respondent under the previous contract for the Year 2009/2010**

In its endeavour to resolve this issue, the Authority reviewed the documents submitted and the contesting oral submissions by parties. In the course of doing so, the Authority revisited arguments by parties' on this point.

The Authority revisited the Appellant's submissions that, at the time of this tender process the Successful Tenderer had a debt of Tshs. 195,284,400/- with the Respondent as evidenced by the Respondent's Trial Balance as at 30<sup>th</sup> June, 2010. Thus, the act of the Respondent of awarding the tender to the Successful Tenderer contravened Item 6 on page 6 of the Tender Document which clearly states that a tenderer should not have any debt with the Council.

The Appellant submitted further that, Item 12 on page 6 of the Tender Document provides clearly that, any

tenderer who fails to comply with the requirements of the Tender Document would automatically be excluded from the process. Hence the Successful Tenderer ought to have been disqualified for failure to comply with Item 6 on page 6 of the Tender Document.

In response thereto, the Respondent submitted that, the Successful Tenderer had no debt with the Council since at the time of this tender process they had remitted Tshs. 364,000,000/- from collections of Tshs. 43,000,000/- per month while the required amount was Tshs. 344,000,000/- per year. As submitted earlier on by the Respondent, the issue of debt is an outcome of the 2009/2010 signed contract which required the Successful Tenderer to remit Tshs. 58,000,000/- per month instead of Tshs. 43,000,000/- per month.

In order to ascertain the validity of the arguments by parties', the Authority revisited Items 6 and 12 on page 6 of the Tender Document which were relied upon by the Appellant in substantiating that, the award to the Successful Tenderer was contrary to the requirements

provided for in the Tender Document. The said Clauses are reproduced hereunder;

**“6. Mwombaji asiwe na deni lolote analodaiwa na Halmashauri ya Manispaa ya Arusha”**

(Emphasis supplied)

The Authority’s translation is as follows;

“The applicant should not have any debt with Arusha Municipal Council”.

**“12.Mwombaji yeyote atakayeshindwa masharti hayo ya zabuni atakuwa amejiondoa mwenyewe katika ushindani”** (Emphasis added).

Literally translated the said Item reads:

“Any applicant who fails to comply with the requirements of the tender shall be automatically excluded from the tender process.”



The Authority observes that these are mandatory provisions to be complied with by the tenderers. The Authority further revisited the documents submitted in order to ascertain if the Successful Tenderer had a debt with the Council. In so doing, the Authority noted that the Successful Tenderer was awarded the tender for Revenue Collection for the Year 2009/2010 *vide* letter referenced AMC/CTB/AWD/146 dated 25<sup>th</sup> August, 2009, at the contract price of **Tshs. 43,000,000/-** per month. However, the contract which was signed on 8<sup>th</sup> December, 2009 indicated that the Successful Tenderer was required to remit **Tshs. 58,000,000/-** per month.

The Authority noted further that, while the Tender Board awarded the tender at **Tshs. 43,000,000/-** per month the Municipal Director signed the contract for a monthly remission of **Tshs. 58,000,000/-**. During the hearing it was submitted by the Respondent that, the variation was the result of the negotiations held between the Municipal Director and the Successful Tenderer, to remit Tshs. 58,000,000/- per month instead of Tshs. 43,000,000/-

per month as awarded, so as to enable the Council to meet the expected collections for that particular year.

The explanation given by the Respondent during the hearing indicates that much as remissions are on a monthly basis the nature of collection are not equally on monthly basis. It was further indicated by the Respondent that, collections are onetime events from any particular billboard, poster and hoarding. Thus, such collections can be made in the first half of the year or the latter half; implying that the total collection can be achieved within a shorter period of say six months or a longer duration of twelve months. Accordingly, the Municipal Director's action of requiring the amount earmarked for 12 months to be made in eight months was not unreasonable. However, the manner in which the said Director did so contravened the law in the following respects:

- Changing the contract price after award communication was contrary to Section 55(5) and (7) of the Public Procurement Act of 2004, (Cap.

410) (hereinafter to be referred to as "**the Act**") which provides as follows;

**"S.55(5) A formal contract shall be in such form and shall contain such terms, conditions and provisions as contained in the solicitation document, request for proposal or tender dossier.**

**(7) The procurement contract shall enter into force when a written acceptance of the tender has been communicated to the successful supplier, contractor or consultant."**

(Emphasis added)

- The Municipal Director being the Accounting Officer of the Respondent had no legal authority to change the decision of the Tender Board, in that, the Tender Board had awarded a sum Tshs. 43,000,000/- per month whereas the contract signed was for Tshs. 58,000,000/- per month. The Municipal Director's

obligations under Section 33(f),(h) and (k) of the Act, are to communicate the Tender Boards' award decisions, to sign contracts on behalf of the procuring entity and to ensure implementation of the awarded contracts. The said provisions state as follows:

“S. 33. The Accounting Officer or Chief Executive of a procuring entity shall have the overall responsibility for the execution of the procurement process in the procuring entity, and in particular, shall be responsible for:-

- (f) communicating award decisions;
- (h) signing contracts for the procurement activities on behalf of the procuring entity;
- (k) ensuring that the implementation of the awarded contract is in accordance with the terms and conditions of the award.”

- The Municipal Director's act of negotiating with the Successful Tenderer and later on changing the agreed terms of the contract amounted to usurpation of powers of the Tender Board as per Section 30(b) of the Act which states as follows;

**"A tender board shall be responsible for:-**

- (b) review all applications for variations, addenda or amendments to ongoing contracts."**

(Emphasis supplied)

The Authority further observes that, the actions of the Municipal Director were equally contrary to Section 31(1)(b) and (2) of the Act which read as follows:

**"31(1) Notwithstanding any other enactment, no public body shall:-**

- (b) award any contract unless the award has been approved by the appropriate tender board.**

- (2) No person or firm shall sign a contract with any public body **unless the award has been approved by the appropriate tender board.**"  
(Emphasis supplied)

In view of the above findings, the Authority is of the view that, the proper amount to be remitted monthly for the contract of 2009/2010 was Tshs. 43,000,000/-. The Authority also accepts the Respondent's submission that at the end of the contract the Successful Tenderer had remitted Tshs. 364,000,000/- as opposed to the estimated Tshs. 344,000,000/- which was to be remitted per year. Hence, the Authority is satisfied that, at the time of the tender process pertaining to the tender under appeal, the Successful Tenderer had no debt with the Respondent.

In view of the foregoing, the Authority concludes that the Successful Tenderer had no debt with the Respondent under the previous contract for the Year 2009/2010.

## **2.0 Whether the award of the tender to the Successful Tenderer was proper at law**

Having resolved the Appellant's main issue in dispute, by establishing that the Successful Tenderer had no debt with the Respondent for the previous contract of Year 2009/2010, the Authority is of the considered view that, the Successful Tenderer qualified for award of the tender under Appeal. Accordingly, the award of the Tender in favour of the Successful Tenderer was proper at law.

## **3.0 Whether the Respondent's failure to notify unsuccessful tenderers of the tender results contravened the law**

In resolving this issue the Authority revisited submissions by the parties' *vis-a-vis* the Tender Document and the applicable law in order to establish whether the Respondent's failure to notify unsuccessful tenderers contravened the law.

To start with the Authority revisited the Appellant's submission that the Municipal Director has a tendency of not informing unsuccessful tenderers about the tender results in writing even if official inquiries are made. Thus, the Appellant became aware of the tender results through telephone inquiries from the Respondent.

In reply the Respondent submitted that, the tender results were not given to unsuccessful tenderers because the same had to be done after the submission of the Performance Security. Hence, notifying them before submission of the Performance Security would have been contrary to the requirements of the Tender Document.

The Respondent submitted further that, the Appellant's claim that the tender results were obtained through telephone is disputed as that was not the proper mode of communicating the tender results. However, the same might have been done by the Respondent's officers who did not observe the proper modes of communication from Government offices.



In order to ascertain the validity of arguments by parties' the Authority revisited the documents submitted and noted that the letter of award was communicated to the Successful Tenderer, on 15<sup>th</sup> October, 2010. Item 4 on page 11 of the Tender Document require the notice to unsuccessful tenderers be communicated after the Performance Security had been submitted. The said Item 4 is reproduced in Kiswahili as hereunder:

**“Baada ya mzabuni kuleta dhamana ya Mkataba/kazi, Manispaa itawajulisha wazabuni wengine wote walioshindwa, kwa barua na kuwaelekeza waje wachukuwe dhamana zao za zabuni (Bid security).”** (Emphasis added)

Literally translated the said Item 4 reads:

“After the Performance Security has been submitted by the Successful Tenderer, the Council shall notify in writing the unsuccessful tenderers of the tender results and direct them to collect their Bid Security”.

The Authority noted further that, on 2<sup>nd</sup> November, 2010, the Successful Tenderer submitted the Performance Security. However, up to the time of filing this Appeal that is 12<sup>th</sup> November, 2010, the tender results have not been communicated to unsuccessful tenderers, the Appellant inclusive. Hence the Authority finds the Respondent's act to have contravened Item 4 on page 11 of the Tender Document as quoted above as well as Regulation 97(11) of GN No. 97/2005 which provides as hereunder;

**“Upon entry into force of the procurement or disposal contract, and if required, the provision by the supplier, service provider, contractor or assets buyer of a security for the performance of the contract, notice of procurement or disposal contract shall be given, to other supplier, service provider, contractor or asset buyer, specifying the name of the supplier, service provider, contractor or asset buyer that has entered into the contract and the contract price”.** (Emphasis supplied)

The Authority further noted that, on 26<sup>th</sup> October, 2010, that is, 11 days after award was communicated to the Successful Tenderer, the Respondent wrote a letter informing their clients that the revenue collector for the Year 2010/2011 was New Metro Merchandise Company Ltd; while the Performance Security was received on 2<sup>nd</sup> November, 2010. The Authority observes that, the Respondent's act equally contravened Item 4 on page 11 of the Tender Document and Regulation 97(11) of GN No. 97/2005 as quoted herein above.

In the light of the above findings, the Authority is of the firm view that, the Respondent's failure to notify unsuccessful tenderers of the tender results contravened the law. However, that failure did not prejudice the Appellant.

#### **4.0 To what reliefs, if any, are the parties entitled to**

Having analyzed the contentious issues in dispute, the Authority considered prayers by the parties.

## **a) Appellant's Prayers**

- (i) The tender award be nullified and the same be awarded to the Appellant as they complied with all the requirements. The Authority rejects this prayer as there are no justifiable reasons to warrant annulment of the contract.
  
- (ii) With regard to the prayer for general damages to the tune of Tshs. 200,000,000/-, the Authority rejects this prayer for want of jurisdiction.
  
- (iii) The Authority also considered the Appellant's prayer for costs of the Appeal and finds that the Appellant is only entitled to be compensated Appeal filing fees of Tshs. 120,000/- as the Appeal has some merit.

## **(b) The Respondent's prayer:**

The Authority rejects the Respondent's prayer for dismissal of the Appeal for lack of merit, as the Appeal has some merit.

Further, with regard to the Respondent's prayer for compensation of Tshs. 5,000,000,000/-, the Authority rejects the prayer as procuring entities are not covered under Section 82(4) of the Act when it comes to issues of compensation.

## **Other matters that caught the attention of the Authority:**

In the course of handling this Appeal the Authority came across some pertinent matters which are worth mentioning as hereunder:

- a) The Authority noted with concern that, the date of commencement of the contract was **1<sup>st</sup> November, 2010**, while the Performance Security

was submitted **on 2<sup>nd</sup> November, 2010**. The Authority could not understand how the contract could commence before submission of the Performance Security.

b)The Authority observed that the Tender Evaluation Report was not comprehensive enough, in that, a number of conclusions reached were not backed with necessary details. For example, it did not show in detail how the conclusions reached were arrived at. This defeats the principle of transparency. It was equally disappointing that the head of the PMU who is also the Secretary of the Tender Board could not provide satisfactory explanations on how conclusions were reached as reflected in the Tender Evaluation Report; when he was asked to do so by the members of the Authority. The Authority therefore is of the firm view that, the Tender Board has a duty of ensuring that the basic principles of procurement are observed during tender process.

c) The Authority is of the view that the fee of Tshs. 100,000/- charged on the Tender Document was on the high side and hence contrary to Regulation 82(3) of GN. No. 97/2005.


Having considered all facts and evidence, the Authority concludes that, the award to the Successful Tenderer was proper at law and the Respondent's failure to notify the unsuccessful tenderers contravened the law, although it did not prejudice the Appellant.

On the basis of the aforesaid findings, the Authority partially upholds the Appeal and orders the Respondent;

- **To compensate the Appellant a sum of Tshs. 120,000/= being Appeal filing fees.**

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 17<sup>th</sup> December, 2010.



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

**MEMBERS:**

- 1. MR. K.M. MSITA  .....
- 2. MR. M. R. NABURI  .....
- 3. MRS. R. MANG'ENYA  .....