

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

APPEAL CASE NO. 9 OF 2013-14

BETWEEN

M/S DAMO GENERAL ENTERPRISES.....APPELLANT

AND

SERENGETI DISTRICT COUNCIL.....RESPONDENT

DECISION

CORAM:

- | | |
|--------------------------------------|----------------|
| 1. Hon. Augusta G. Bubeshi, J. (rtd) | - Chairperson |
| 2. Mr. Kesogukewe M Msita | - Member |
| 3. Mr. Haruni S. Madoffe | - Member |
| 5. Mrs. Nuru S.N. Inyangete | - Member |
| 6. Mr. Ole-Mbille Kissioki | - Ag.Secretary |

SECRETARIAT:

1. Ms. Florida R. Mapunda - Legal Officer
2. Mr. Hamisi O. Tika - Legal Officer
3. Ms. Violet S. Limilabo - Legal Officer

FOR THE APPELLANT:

1. Mr. David Katikiro - Managing Director.

FOR THE RESPONDENT

1. Ms. Goody K. Pamba - District Executive Director.

2. Mr. Tumaini P. Nyamhokya - Legal Officer

3. Dr. Salum A. Manyatta - Chairman, Evaluation Committee.

4. Mr. Sekro Mmbaga - Ag Head PMU

5. Mr. Narcisius Z. Massamauri - Accountant

6. Ms. Restituta Mniko - Procurement Officer

This decision was scheduled for delivery today 28th August, 2013, and we proceed to deliver it.

The Appeal at hand was lodged by **M/s DAMO GENERAL ENTERPRISES** (hereinafter referred to as **“the Appellant”**) against the **SERENGETI DISTRICT COUNCIL** (hereinafter referred to as **“the Respondent”**).

The said Appeal is in respect of Tender **No. LA 063/2/2013/2014/NC/31 for Revenue Collection with respect to Billboards (Ushuru wa Mabango)** in Serengeti District (hereinafter referred to as **“the tender”**).

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

On 25th April, 2013, the Respondent posted on their Notice Board a tender advertisement which invited tenders for the tender under appeal.

The deadline for submission of tenders was set for 27th May, 2013 whereby four tenders were received from the following firms;

S/N O	Tenderer's Name	Quoted Price in Tshs per Month
1.	M/s Denis Machera General Investments 1991	180,000/-
2.	M/s Kajala Auction Mart	330,000/-
3.	M/s Damo General Enterprises	350,000/-
4.	M/s Passion Farm Investments	141,666/-

The tenders were then subjected to evaluation, whereby the Evaluators examined if tenders had met the eligibility criteria, they had been properly signed, they were generally in order and lastly whether they were substantially responsive to the Tender Document.

In that process of evaluation, three tenders submitted by M/s Denis Machera General Investments 1991, M/s Passion Farm Investments and that by the Appellant were found to be substantially non responsive to the Tender Document.

The said tenders were disqualified on the grounds that M/s Denis Machera General Investments 1991 lacked

the requisite experience and Business License related to the tender under Appeal. M/s Passion Farm Investment was disqualified on the grounds that their tender price was low and they had no Tax Identification Number (hereinafter referred to as "**the TIN Number**"). The tender by the Appellant was disqualified for lack of experience.

Having completed the evaluation process, the Evaluation Committee recommended the award of the tender to M/s Kajala Auction Mart at a contract price of Tshs. 330,000/-.

The Respondent's Procurement Management Unit forwarded the recommendations of the Evaluation Committee to the Tender Board for approval.

The Respondent's Tender Board at its meeting held on 21st June, 2013, approved the recommendations of the Evaluation Committee.

On 24th June, 2013, the Respondent vide a letter referenced SDC/PMU.1/WKL/23 communicated the award of tender to the Successful Tenderer.

Having learnt from undisclosed sources that M/s Kajala Auction Mart had been awarded the tender, while the results were yet to be communicated to them, the Appellant vide a letter referenced DGE/MUS/VOL.9/2013, dated 8th July, 2013 sought for administrative review by the Respondent on the ground that, their tender had higher price than that of the successful tenderer. The Appellant contended further that, the award to the successful tenderer was in contravention of the law since its proprietor owns another firm which also participated in the disputed tender. Lastly, the Appellant submitted that the award was made in favour of the successful tenderer after they had offered bribes to the Evaluators and the Secretary of the Tender Board.

Having realised that the procurement contract had entered into force, the Appellant on 17th July, 2013, lodged their Appeal to the Public Procurement Appeals Authority (hereinafter referred to as "**the 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, they were among the tenderers who participated in the tender under Appeal.

That, they were dissatisfied with the disqualification of their tender since they quoted the highest amount.

That, since they were the tenderer with the highest quotation, the Respondent ought to have awarded the tender to them.

That, the proprietor of the successful tenderer owns another firm called Passion Farm which also participated in the disputed tender.

That, it was not proper for two firms owned by one person to tender using different names in one tender.

That, the Respondent tampered with their document. That, during tender opening ceremony, the Respondent deliberately hid their tender. It was until they complained about its absence that it was brought up for opening; contending that, it had been mistakenly

forgotten in another office of the Respondent. The Respondent's act indicated that they had a secret agenda on who should be awarded the tender.

That, the quotation of the successful tenderer was deliberately tampered with by the Respondent after the opening ceremony by increasing it from Tshs 178,000/- that was read out during the opening ceremony to Tshs. 330,000/- per month to justify the award to them.

That, the Respondent did not inform them on the outcome of the tender while other tenderers had been duly informed.

That, despite several follow ups they made to the Respondent, up to the time of this Appeal, they had not received any official communication of the tender results.

Finally, the Appellant prayed for the following orders;

- a) The Authority to reverse the Respondent's award of tender and the same be awarded to them.

b) The Appellant be awarded costs of this Appeal to the tune of Tshs. **16,763,820/-** as per the following breakdown.

- i. Purchase of the Tender Document Tshs. 50,000/-
- ii. Transport costs before the Appeal Tshs.2,403,250/-
- iii. Feasibility study Tshs. 6,110,000/-
- iv. Appeal filing fees Tshs.120,000/-
- v. Communication Tshs.50,000/-
- vi. Expenses incurred for his employees Tshs.1,300,000/-
- vii. Air ticket(Return) Tshs.422,000/-
- viii. Transport costs after Appeal Tshs. 568,570/-
- ix. Living costs in Dar es salaam and its incidentals Tshs. 360,000/-
- x. General damages Tshs. 5,000,000/-

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 award of tender was made to the highest evaluated tenderer and not the highest tenderer as contended by the Appellant.

That M/s Kajala Auction Mart was the highest evaluated tenderer and their quoted price of Tshs 330,000/- per month exceeded the Respondent's estimate which was Tshs.320,000/-.

That, the Appellant's tender was disqualified for lack of experience of similar works with similar nature with the tender under Appeal as provided for under the Tender Document.

That, they have experienced many problems by working with tenderers who lack experience. Thus, it was not proper for them to award the tender to a tenderer who had no experience.

That, it is not true that the Appellant's tender document was tampered with or hidden during the tender opening

ceremony as contended by the Appellant. The person appearing for the Appellant in this Appeal, that is, Mr. David Katikiro was not present during tender opening ceremony, instead the Appellant was represented during the tender opening by another person. That being the case, he had no sufficient information of what transpired during the tender opening ceremony.

That, the successful tenderer was awarded this tender after the Respondent's Tender Board approval, based on the recommendations by the Procurement Management Unit.

That, the Appellant was informed of the tender results by letter through their Postal address indicated in their Tender Document.

That, it is not true that one tenderer submitted two tenders using two different names.

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

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 centred on the following issues;

- 1. Whether the Appellant was unfairly disqualified**
- 2. Whether the award of the tender to the successful tenderer was proper at law**
- 3. 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 Appellant was unfairly disqualified.

In resolving this issue the Authority considered the Appellant's contention that, they were the highest quoted tenderers, thus they ought to have been awarded this tender as the law requires, that is, the tenderer with the highest quotation is the one who

should be awarded the tender. However, the Appellant admitted that they had no experience which was required for this tender.

Having heard the Appellant's self admission, the Authority is of the considered view that, the Appellant did not meet the experience criterion provided for under the Tender Document. The Tender Document required tenderers to show at least two contracts of similar nature recently executed. Thus, it was proper for their tender to be disqualified by the Respondent.

With regard to the Appellant's argument that, they were not informed about the tender results the Authority reviewed the documents submitted and observes that, there was no proof which indicates that, the Appellant was informed about the tender results. The Authority wishes to enlighten the Respondent that, it is the requirement of law that, whether the tenderer has been successful or not, the procuring entity owes a duty to notify them of the tender outcome. Failure by the Respondent to communicate the tender results to the Appellant was in contravention of Regulation 97(11) of the Public Procurement (Goods, Works, Non-Consultant Services and disposal of public assets by

Tender) Regulations, 2005 (hereinafter referred to as **“the GN 97 of 2005”**).

For purposes of clarity the Authority reproduces the said Regulation as hereunder;

Reg.97(11) **“Upon entry into force of the procurement or disposal contract and, if required, the provision by the supplier, service provider, contractor or asset buyer of the security for the performance of the contract, notice of the procurement or disposal contract shall be given to other supplier, service provider, contractor or assets buyer, specifying the name and address of the supplier, service provider, contractor or asset buyer that has entered into the contract and the contract price”**. (Emphasis added)

That said, the Authority’s conclusion with regard to issue number one is that, the Appellant’s disqualification was justified for lack of experience.

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

In order to resolve this issue, the Authority revisited arguments by parties, the Tender Document and the Evaluation Report.

To start with, the Authority revisited the Appellant's arguments that, the award of tender to the successful tenderer was biased since they quoted the highest price and deserved to be awarded the tender. The Appellant contended further that, the proprietor of the successful tenderer owns another firm called M/s Passion Farm which also participated in the disputed tender, contrary to the law. Furthermore, the Appellant suspected that corruption could have influenced the Respondent's decision in favour of the successful tenderer.

In reply thereof, the Respondent submitted that, the award of tender was made in accordance with the law since the successful tenderer was the highest evaluated tenderer. Furthermore, they contended that, it is not true that the proprietor of Kajala Auction Mart is one and the same person who owns Passion Farm Investment.

In expounding it further, the Respondent submitted that M/s Kajala Auction Mart is owned by one Shabani Wambura Kajala while Passion Farm Investment is owned by one Shabani Kajala Wambura. Therefore, they are different and distinct persons.

In order to ascertain the validity of the contentious arguments by parties, the Authority revisited the Evaluation Report, the Respondent's Tender Document and the tenders submitted by tenderers in respect of the tender under Appeal.

In so doing the Authority started by considering the Appellant's contention relating to one proprietor owning two distinct firms and observed that, the extract from the register of the Registrar of the Business Names indicates that, the proprietor of M/s Kajala Auction Mart is Mr. Shabani Kajala, P.O.Box 579, Mkendo Street, Plot No. 10, Block A, Musoma while the TIN number of the same firm indicates that the proprietor is one Shaban Wambura Kajala. The Authority noted further that, the proprietor of M/s Passion Farm Investment is one Shabani Kajala Wambura of P.O Box 1297, Plot No.

216, Maziwa Street, Musoma. No TIN number was included in their tender.

From the above facts, the Authority failed to ascertain whether the said names belong to one and the same person though they resemble. The Authority is of the considered view that, it was the duty of the Appellant to prove their assertions that the said firms belong to one person like the old legal adage says "*he who alleges must prove*". The Authority noted that, the Appellant relied much on hearsay from one of the Respondent's employees when they were at the PCCB's office. Hence, it is difficult for the Authority to ascertain the Appellant's assertion in this regard in absence of any proof thereof.

With regard to the issue of the successful tenderers' price being tampered with from Tshs.178, 000/- to Tshs 330,000/-, the Authority observes that, the tender quotation form of the successful tenderer contained the price of Tshs. 330,000/ and was duly signed by the tenderer's representatives during the tender opening. The Authority is of the considered view that, the signatures mentioned herein above prove that, the price of the successful tenderer was not tampered with.

Furthermore, the Authority reviewed the Evaluation Report and observed that, the successful tenderer had been indicated to have the required experience. However, information in respect of recently executed contracts to support their experience was neither included in their tender document nor was it provided during the hearing of this Appeal. Upon being asked by the Members of the Authority as to how did the evaluators ascertained the experience of the successful tenderer, the Respondent insisted that, the said documents were submitted by the successful tenderer but since various documents for the disputed tender were in the custody of Prevention and Combating of Corruption Bureau (hereinafter referred to as "**the PCCB**"), they might have been lost in the process of exchanging documents as they have been passing in several hands. The Respondent submitted in the alternative that, the said documents might have been tampered with by one of their employees who has taken sides with the Appellant.

Having considered the parties' submissions above, the Authority does not agree with the Respondent in this

regard, since, the only proof which were to be used by the Authority to ascertain the successful tenderer's experience was their Tender Document. Lack of the said proof on experience, makes it impossible to concur with the submissions by the Respondent. The Authority is of the further view that, if Respondent's employee has tampered with the tender document submitted by the successful tenderer's as contended by themselves, then, they are the ones to blame. Accordingly, the Authority is of the considered view that, the successful tenderer did not meet also the experience criterion provided for in the Tender Document.

The Authority hastens to say that, the successful tenderer ought to have equally been disqualified from the beginning. The Authority finds the Respondent to have favoured the successful tenderer by awarding them a tender which they did not deserve. The Authority finds the Respondent to have contravened Section 43(b) of the Public Procurement Act (herein after to be referred to as "**the Act**") which requires procuring entities to be fair in execution of their duties. For purposes of clarity the said provision is reproduced as follows;

“S. 43 In the execution of their duties, tender boards and procuring entities shall strive to achieve the highest standards of equity, taking into account:-

(b)fairness of treatment to all parties”

The above observation notwithstanding, the Authority’s conclusion with regard to this issue is that, the award of the tender to the successful tenderer was not proper at law.

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

Having resolved the contentious issues, the Authority revisited the Appellant’s prayers that, the Authority award the tender to them and also award the costs to the tune of Tshs.**16,763,820/=** being general damages, costs incurred before tendering, for surveying the tender area, transport and living costs in Musoma, Mwanza and Dar es salaam and lastly Appeal filing fees before this Authority.

With regard to the prayer to award them the tender, the Authority cannot grant that as the same is outside its powers. Further, as established under the first issue, the Appellant was fairly disqualified.

As for the second prayer of costs, the Authority observes that the prayers were divided into two parts, namely, direct costs and general damages. The Authority orders the Respondent to pay the Appellant the sum of Tshs. **1,182,000/=** being direct costs incurred in this Appeal as per the following break down;

- i. Appeal filing fees Tshs.120,000/-
- ii. Communication costs Tshs. 50,000/-
- iii. Transport Mwanza – Musoma – Mwanza Tshs. 230,000/-(Return)
- iv. Air ticket Tshs. 422,000/-
- v. Living costs in Dar es salaam for four days Tshs. 360,000/-

TOTAL Tshs. 1,182,000/=

With regard to the general damages, the Authority cannot grant that prayer for want of jurisdiction.

The Authority also considered the Respondent's prayer that, the Appeal be dismissed with costs. The Authority does not agree with the Respondent as the submissions made by the Appellant have some merit.

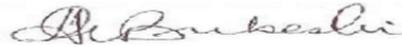
Accordingly, the Authority partly upholds the Appeal and orders the Respondent to;

- **re-start the tender process afresh in observance of the law; and**
- **to compensate the Appellant the sum of Tshs. 1,182,000/= only**

Lastly, the Authority wishes to commend the District Executive Director for personally leading the team of senior officials from her council to appear before this Authority. Such conduct is highly appreciated.

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 28th August, 2013.



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JUDGE (rtd) A. BUBESHI
CHAIRPERSON

MEMBERS:

1. MR. K.M.MSITA 
2. Mr. H.S. MADOFFE 
3. MRS. N.S. INYANGETE 