

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

APPEAL CASE NO. 10 OF 2013/14

BETWEEN

M/S UNITED TALENTS

SERVICES LIMITED.....APPELLANT

AND

TANGA CITY COUNCILRESPONDENT

DECISION

CORAM

- | | |
|--------------------------------------|---------------|
| 1. Hon. Augusta G. Bubeshi, J. (rtd) | -Chairperson |
| 2. Mr. Haruni S. Madoffe | -Member |
| 3. Mrs. Rosemary A. Lulabuka | -Member |
| 4. Mr. Ole-Mbille Kissioki | -Ag.Secretary |

SECRETARIAT

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

FOR THE APPELLANT

Mr. Asanterabi Mfuko - Chief Executive Officer.

FOR THE RESPONDENT

Mr. Mkama B. Makori - Head of PMU

This decision was scheduled for delivery today 11th September, 2013 and we proceed to deliver it.

The Appeal at hand was lodged by **M/s UNITED TALENTS SERVICES LIMITED** (hereinafter referred to as "**the Appellant**") against the Tanga City Council (hereinafter referred to as "**the Respondent**").

The said Appeal is in respect of Tender No **LGA/128/2013/2014/NC/01** for Revenue Collection. The said tender had twenty six Lots but the Appeal at hand is confined to Lot No. 9 which was for **Revenue Collection on Billboards within Tanga City** (hereinafter referred to as "**the tender**").

According to the documents submitted to the 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 Majira newspaper dated 16th April, 2013, invited tenderers to submit their tenders for the tender under Appeal.

The said tender was conducted through the National Competitive Tendering Procedures specified in the Public Procurement (Goods, Works, Non- Consultant Services and Disposal of Public Assets by Tender) Regulations, 2005 (hereinafter referred to as "**the GN No. 97 of 2005**").

The deadline for submission of the tenders was set for 21st May, 2013, and three tenders were submitted from the following firms;

S/N	TENDER'S NAME	QUOTED AMOUNT (IN TSHS) PER MONTH
1.	M/s Amsterdam Marketing Co.Ltd	6,583,333.33
2.	M/s United Talents Services Limited	7,150,000.00
3.	M/s Lemita Co.Ltd.	7,430,000.00

The tenders were subjected to evaluation which was carried out in three stages; namely, Preliminary Evaluation, Detailed Evaluation and Financial Comparison.

During preliminary evaluation, tenders were checked for completeness of their Bids and compliance with the Eligibility Criteria. The Evaluation Committee found all **three** tenders to be substantially responsive.

The three tenders were then subjected to Detailed Evaluation whereby the tender by M/s United Talents Services Limited was found to have not complied with the experience criterion stipulated in the Tender Document.

The remaining two tenders were then subjected to price comparison whereby the tender by M/s Lemita Company Limited was found to be the highest evaluated tender.

The Evaluation Committee therefore recommended the award of the tender to M/s Lemita Company Limited for a contract

sum of Tshs. 7,430,000/- per month. The said amount met the Respondent's budget estimates of Tshs. 7,347,083.33 per month.

The Tender Board at its meeting held on 28th June, 2013, approved award of the tender as recommended by the Evaluation Committee.

On 28th June, 2013, the Respondent vide a letter referenced TCC/PMU/VOL I/187 communicated the award to the successful tenderer.

On 2nd July, 2013, the Appellant vide a letter referenced UTSL/OL/66 addressed to the Respondent sought to be informed about the tender results since the new contract ought to have commenced on 1st July, 2013.

Having received no response from the Respondent on the tender outcome and having learnt that the award of the tender had been communicated to another tenderer, the Appellant, on 2nd August, 2013, lodged their Appeal to the Public Procurement Appeals Authority (hereinafter referred to as "**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 are disputing the entire tender process and the award of the tender made by the Respondent to M/s Lemita Company Limited.

That, they wrote to the Respondent requesting for the tender outcome vide their letter referenced UTSL/OL/66 dated 2nd July, 2013, up to the time of this Appeal the Respondent had not responded to.

That, they learnt through the Respondent's statement of reply lodged to this Authority in Appeal case No.2 of 2013-14 that M/s Lemita Company Limited had been awarded the tender for Lot 9.

That, their tender complied better with the Public Procurement Act (hereinafter referred to as "**the Act**") than the tenders submitted by other bidders who participated in the disputed tender.

That, as established by this Authority and conceded by the Respondent in Appeal case No 2 of 2013-14, that the Evaluators were not competent, the same incompetence might have caused their disqualification in this tender.

That, the Tender Board failed to perform its review role properly by merely endorsing the Procurement Management Unit's recommendations which had a number of flaws.

That, the Tender Board communicated the award of the tender to the unsuccessful tenderers without mentioning the successful tenderer's name and the contract sum awarded.

That, the Tender Document indicated that, a successful tenderer was required to deposit an amount of money equivalent to three months collections as performance security before contract signing. The Appellant was not certain as to when the successful tenderer deposited the said amount.

The Appellant therefore prayed for the following;

- i. The Authority should review the entire tender process.
- ii. Award of the tender to the successful tenderer be nullified and the same be re-tendered.
- iii. General damages to the tune of Tshs. 1,500,000/-
- iv. Costs of this appeal as the Authority deems fit to grant.

SUBMISSIONS 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 who was M/s Lemita Company Limited.

That, the Appellant's quoted price was lower than that of the successful tenderer.

That, the Appellant had no experience in similar services as provided for in the Tender Document.

That, they communicated the tender outcome to the Appellant on 15th July, 2013 through their postal mail address indicated in their Tender Document. The said letter referenced TCC/PMU/VOL.V/14 dated 03rd July, 2013, informed the Appellant that their tender was unsuccessful.

The Respondent therefore, prayed for the dismissal of the Appeal in its entirety.

ANALYSIS BY THE AUTHORITY

Having gone through the documents submitted and having heard the oral submissions from parties, the Authority framed the following three issues:

- **Whether the Appellant was unfairly disqualified;**
- **Whether the award of tender to the successful tenderer was proper at law;**
- **To what reliefs, if any, are the parties entitled to.**

Having identified the issues in dispute, the Authority proceeded to resolve them as hereunder;

i. Whether the Appellant was unfairly disqualified.

In resolving this issue the Authority considered the Appellant's contention that the evaluators were not competent. Thus, their incompetence might have caused their disqualification. In order to ascertain the validity of the Appellant's contention in this regard, the Authority deemed it necessary to examine the oral and documentary evidence submitted vis-à-vis the applicable law and the Tender Document. In the course of doing so, the Authority observed that, the evaluation process was conducted in three stages namely, preliminary, detailed and price comparison.

The Authority observed further that, the Appellant's tender was disqualified during the detailed evaluation stage for lack of two years experience in provision of services of similar nature as required by the Tender Document.

In order to ascertain whether the Appellant's disqualification which was based on experience criterion was proper as

observed by the Evaluation Committee, the Authority deemed it necessary to revisit the Tender Document and the Appellant's tender. In so doing, the Authority noted that, the experience requirement was provided for under Clause 2(iv) of the Tender Document which required tenderers to show two years experience in provision of services of similar nature.

For purposes of clarity the Authority reproduces the said clause which reads in Kiswahili as follows;

**(2) "BARUA ZA MAOMBI ZIAMBATANISHWE
NA MAELEZO NA VIVULI VYA;-**

- iv **Maelezo ya kazi alizowahi kufanya (uzoefu wa ukusanyaji wa mapato ya ushuru) na vielelezo usiyopungua miaka miwili".**
(Emphasis added)

Literally translated as;

**(2) "APPLICATION LETTERS SHOULD BE
ACCOMPANIED WITH INFORMATION AND COPIES
OF;**

- iv **Information on contracts performed (experience in revenue collection) and supporting documents indicating a minimum of two years experience".**

Having noted that, the tenderers were required to show two years experience in provision of services of similar nature, the Authority revisited the tender submitted by the Appellant and observed that, they had indicated to have performed the following activities;

- a) Distribution of water bills –UWASA Tanga, in the years 2010, 2011 and 2012
- b) Cargo counting and inspection of container movement - Nyota Tanzania Limited, in the years 2010, 2011 and 2012
- c) Collection of Revenue on parcels delivery within and outside the country – East African Courier Ltd, in the years 2010, 2011 and 2012
- d) Distribution of Electricity bills – TANESCO – Tanga and Arusha in the year 2012.

Based on the experience listed by the Appellant, it is clear that, only one contract performed with the East African Courier Limited related to revenue collection though the said contract did not relate to Billboards' Revenue collection.

Upon being asked by Members of the Authority how the annexed contracts proved their experience, the Appellant conceded to have had no experience with regard to Billboards' Revenue Collection. They contended however, that the contract executed with the East African Courier Ltd was enough to show that they had experience in revenue collection. This would, in their view, enable them to perform the contract for the disputed tender.

The Authority is of the firm view that, the Appellant had failed to adhere to the requirements of the Tender Document and also did not meet the requirements of the law provided for under Regulation 90 (7) of GN No. 97/2005 which provide as follows;

Reg.90 (7) "A substantially responsive tender is the one which conforms to all the terms, conditions and specifications of the tender document(s) without material deviation or reservations".

(Emphasis supplied).

Based on the above findings, the Authority observe that, the Appellant failed to comply with the requirement of two years experience in provision of services of a similar nature, since

there was no evidence attached to their tender to prove the said experience as per the requirements of the Tender Document.

In view of the above, the Authority is of the settled view that, the Evaluators were fair in disqualifying the Appellant for failure to comply with the requirement of the Tender Document.

Accordingly, the Authority's conclusion with regard to this issue is that the Appellant was fairly disqualified.

ii. Whether the award of the tender to the successful tenderer was proper at law;

In resolving this issue the Authority deemed it necessary to revisit the tender submitted by the successful tenderer. In so doing, the Authority observed that, the said tender had complied with all the criteria provided for in the Tender Document. The Authority noted further that, the tender of the successful tenderer had contained sufficient evidence of their experience in the provision of services of similar nature and they had attached copies of previously performed contracts as required by the Tender Document.

The Authority observes that, the Respondent's conduct in the disputed tender process and subsequent award thereof to the successful tenderer had neither contravened the Tender Document nor the Act and its Regulations. Thus, there was no wrong doing on the part of the Respondent in relation to the award made.

Consequently, the Authority's conclusion with regard to this issue is that, the award of the tender to the successful tenderer was proper at law.

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

Having analyzed the contentious issues in dispute, the Authority finds it prudent to consider prayers by the parties.

To start with, the Authority considered the Appellant's prayer that the entire tender process be reviewed, the award of the tender to the successful tenderer be nullified and the same be re-tendered and lastly the Appellant be awarded general damages to the tune of Tshs. 1,500,000/- and costs of this Appeal as the Authority deems fit.

With regard to the prayer of nullification of the award, the Authority observes that, since it has already been established in the first and second issues that, the Appellant was fairly disqualified and that the award of the tender to the successful tenderer was properly made, the Authority rejects the Appellant's prayer.

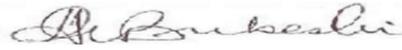
With respect to general damages and costs of this Appeal, Authority equally rejects this prayer since the Appeal has no merit.

The Authority also considered the prayer by the Respondent that the Appeal be dismissed. The Authority concurs with the Respondent and hereby dismisses the Appeal in its entirety.

On the basis of the aforesaid findings, the Authority dismisses the Appeal and orders each party to bear their own costs.

Right of Judicial Review as per Section 85 of the PPA/2004 explained to parties.

Decision delivered in the absence of the Appellant, though on notice and in the presence of the Respondent this 11th September, 2013.



JUDGE (rtd) A. BUBESHI

CHAIRPERSON

MEMBERS:

1. MR. H.S. MADOFFE 

2. MRS. R.A.LULABUKA 