

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

APPEAL CASE NO. 10 OF 2014-15

BETWEEN

M/S JOBLEX TANZANIA LTD.....APPELLANT

AND

**KISARAWA DISTRICT
COUNCIL.....RESPONDENT**

M/S MOGWA COMPANY LTD.....INTERESTED PARTY

DECISION

CORAM

- | | |
|----------------------------|----------------|
| 1. Mr. Haruni S. Madoffe | - Chairman |
| 2. Ms. Esther J. Manyesha | -Member |
| 3. Mrs. Nuru N. Inyangete | -Member |
| 4. Mr. Francis T. Marmo | -Member |
| 5. Mr. Ole-Mbille Kissioki | -Ag. Secretary |

SECRETARIAT

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

FOR THE APPELLANT

1. Mr. Alex Devis -Managing Director
2. Mr. Crispin Mwebesa -Advocate

FOR THE RESPONDENT

1. Mr. Godfrey P. Mbena -Ag. District Executive Director.
2. Mrs. Anna Mwandiga - Head, Procurement Management Unit.
3. Mr. Lucas Lucas -Solicitor.
4. Mr. Majid A. Miti -District Water Engineer and the member of the Tender Board

FOR THE INTERESTED PARTY

1. Mr. Nwandumi Mwangosi –Managing Director- M/s Mogwa Company Limited.
2. Mr. Lazaro C. Albetus - Manager.
3. Mr. Onesmo Butoke -Worker
4. Mr. Enock Peter - Worker

This decision was scheduled for delivery today 26th September, 2014 and we proceed to deliver it.

The Appeal at hand was lodged by **M/s JOBLEX TANZANIA LTD** (hereinafter referred to as "**the Appellant**") against the **KISARAWA DISTRICT COUNCIL** (hereinafter referred to as "**the Respondent**").

The said Appeal is in respect of Tender **No. KDC/GD&SERV/009/2014/2015/2.3** for Revenue Collection on Agricultural Products in Kisarawe District Council (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:

On 19th May, 2014, the Respondent vide the Daily Newspapers invited eligible tenderers to submit their tenders for the tender under appeal.

The deadline for the submission of tenders was set for 9th June, 2014 whereby two tenders were received from two firms namely M/s Joblex (T) Limited and M/s Mogwa Company Limited.

The read out prices were as follows;

S/N O	Tenderer's Name	Quoted price in Tshs.
1.	M/s Joblex (T) Limited	2,500,000/- per month
2.	M/s Mogwa Company Limited	3,600,000/- per month.

The tenders were then subjected to evaluation which was conducted in three stages namely; Preliminary, detailed and post qualification.

Both two tenders were found to be substantially responsive during the preliminary evaluation and were therefore subjected to detailed evaluation.

During detailed evaluation, the Evaluation Committee did arithmetic correction of errors to both tenders and found them to be errors free. The Evaluation Committee therefore ranked the tenderers as hereunder.

S/NO	TENDERERS NAME	QUOTED PRICE IN TSHS.	RANKI NG
1.	M/s Joblex (T) Ltd	2,500,000/-	2 nd
2.	M/s Mogwa Company Limited	3,600,000/-	1 st

Having ranked the tenderers as above, the Evaluation Committee conducted post qualification of the tender by M/s Mogwa Company Limited who was ranked the first and found them to be capable to execute the contract. The Evaluation Committee therefore recommended the award of the tender to M/s Mogwa Company Limited.

The Respondent's Tender Board at its meeting held on 26th June, 2014, approved the recommendations by the Evaluation Committee and awarded a contract to M/s Mogwa Company Limited at a contract price of Tshs. 3,600,000/- per month.

On 5th August, 2014, the Respondent vide a letter referenced KDC/SC.46/VOL.II/147 communicated the award of the tender to the Successful Tenderer.

Having learnt that their tender was unsuccessful and having learnt that the award of the contract had been preferred to M/s Mogwa Company Limited, on 13th August, 2014, the Appellant lodged their Appeal to the Appeals Authority.

SUBMISSIONS BY THE APPELLANT

The Appellant's arguments as deduced from documents availed to the Appeals 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 two tenderers who participated in the tender.

That, award of tender to the successful tenderer was made beyond 30 days bid validity period provided in the Tender Document and no extension of time was sought by the Respondent to them, rather extension was sought to the successful tenderer only.

That, while the tender opening ceremony took place on 9th June, 2014, the award of the tender was made on 7th August, 2014, which is almost 58 days from the tender opening date.

That, the award of the contract had been made to a tenderer who did not meet the required minimum annual volume of services provided in the Tender Document, namely Tshs. 100,000,000/- in any of the last two years as specified under Clause 12.5(b) of the Instructions To Bidders (hereinafter referred to as "**the ITB**").

That, since the successful tenderer was registered on 24th December, 2013, it is not possible for them to have made the above annual turnover. Thus, the award of the tender to them has contravened the law.

That, the successful tenderer M/s Mogwa Company Limited does not have two years experience provided under Clause 12.5(b) of the ITB, since they have been registered within past

six months from the date of the tender opening. That is 12th December, 2013. Therefore, they could not meet the criterion.

That, the tender process and the award thereof was tainted by unequal treatment to tenderers who participated in the tender.

That, they discovered after the award of the tender that, the contract has been awarded to a tenderer who had a conflict of interest in this tender process contrary to Clause 3.4 of the ITB, since a director of the successful tenderer one Moses Peter Mwakabenga was the Appellant's manager and had fully participated in the preparation, pricing and submission of the Appellant's tender. Furthermore, he attended in the tender opening ceremony representing the Appellant.

That, since Mr. Moses Peter Mwakabenga owns 400 shares of Mogwa Company Limited, there is no doubt that he also participated in the preparation and pricing of his firm while knowing how much has been tendered by the Appellant.

That, in terms of Clause 3.4 of the ITB, the successful tenderer's tender ought to have been disqualified for the conflict of interest.

Finally, the Appellant prayed for the following orders;

- i. Nullification of award of tender to the successful tenderer.
- ii. The successful tenderer be blacklisted for period of not less than five years.

- iii. Award of the tender be made to them as they were the second lowest evaluated tenderers.
- iv. Costs of this Appeal and salary of five employees employed for the execution of this tender as per the following breakdown;
 - Damages and salaries Tshs. 10,000,000/-
 - Advocates fees Tshs. 10,000,000/-
- v. Any other relief(s), the Appeals Authority may deem just and fit to grant.

REPLIES BY THE RESPONDENT

The Respondent's arguments as deduced from the documents availed to the Appeals Authority may be summarized as follows:

That, the Respondent delayed to award the tender based on instructions by their Council's finance committee which demanded a survey to be done on accurate data of revenue collection for the lots. Therefore, extension of time was occasioned by the above exceptional circumstance.

That, the lowest evaluated tenderer who has been awarded the tender is the one who had to complain about expiry of the bid validity period and not the Appellant. Furthermore, the Appellant together with all other lowest evaluated tenderers in respective lots were invited for negotiation, however, they did not show up on reasons best known to them.

That, neither the Tender advertisement nor the BDS required company experience or total annual volume of Tshs. 100,000,000/-. The ITB provided that, tenderer's experience was to be submitted and the same would have only added advantage to tenderers after considering prices and other requirements as clearly stated in the BDS.

That, tenderers were required to read both the ITB and the Bid Data Sheet (hereinafter referred to as "**the BDS**") since other instructions were amended by BDS.

That, even the Appellant was awarded a contract for revenue collection of bus stand way back in 2010 while having no experience of the same.

That, allegation pertaining to conflict of interest is not applicable in this matter taking into consideration that the Respondent in this tender was dealing with Mogwa Company Limited as a corporate firm and not as a natural person.

That, in the submitted tender for Mogwa Company Limited, the names Moses Peter Mwakabenga does not appear in all documents. Therefore, it was difficult for the Respondent to discover anything in conflict between the parties, if any. However, the Respondent put the Appellant to strict proof of the contention.

That, if at all the conflict of interest had existed, the Appellant ought to have sued the person they deem to have a conflict with and not the Respondent.

That, it is not proper for the Appellant to be awarded damages since, a tenderer may win or lose in the tender process.

Finally, the Respondent prayed for dismissal of the Appeal and any other relief(s) the Authority may deem fit and just.

Upon service of notice of Appeal to the tenderers who participated in the tender under appeal, M/s Mogwa Company Limited opted to join as an interested party.

SUBMISSIONS BY THE INTERESTED PARTY.

The Interested party's arguments as deduced from the documents availed to the Appeals Authority as well as responses to the questions raised by the members of the Appeals Authority may be summarized as follows:

That, the Tender Document provided for 60 days bid validity period and not 30 days. Therefore, they have no case to answer on the Appellant's assertions regarding this matter.

That, they dispute Appellant's assertions regarding experience and annual volume of Tshs. 100,000,000/- and they put them to strict proof of the assertions.

That, Mr. Moses Peter Mwakabenga was a Managing Director of the company when it was incorporated in December, 2013. However, he resigned his position in February, 2014 by selling his shares to Mr. Fred Peter Samson. From that moment, their firm has no knowledge of the whereabouts of the said person.

That, the Appellant should provide evidence of the existing relationship between their company and Mr. Moses Peter Mwakabenga which shows that he is their manager.

That, Mr. Moses Peter Mwakabenga was not involved in any way in pricing the interested party's tender as alleged by the Appellant.

Finally, the interested party prayed for the dismissal of the Appeal for lack of merits.

ANALYSIS BY THE APPEALS AUTHORITY

Upon studying the written submissions of the parties, the Appeals Authority had framed the following issues;

- **Whether award of the tender to the successful tenderer was within the bid validity period**

- **Whether the award of the tender to the successful tenderer was proper at law.**
- **Whether there was a conflict of interest between the Appellant and the successful tenderer's Managing Director.**
- **To what relief, if any, are the parties entitled to.**

However, during the hearing of the Appeal, the Appeals Authority observed that it is quite apparent that the Appellant and the Respondent relied upon two different Tender Documents in support of their arguments.

The Appeals Authority noted that, while the Appellant relied upon a Tender Document containing 30 days bid validity period, 100 Tshs million minimum required annual turn over volume of services and 2 years minimum experience criteria under Clauses 16 (a) (b), (d) and 20 of the BDS respectively, the Respondent and the Interested Party relied upon a Tender Document which contained no such criteria. The Respondent and the Interested Party's Tender Documents provided for 60 days Bid validity period with no specified experience and the minimum required annual volume of services. Clauses 7 and 8 of the BDS to that effect.

When asked by Members of Appeals Authority regarding such a controversy, the Appellant told the Appeals Authority that, the

Tender Document they had, was the genuine one and that they bought it from the Respondent. In substantiating their arguments, the Appellant submitted further that, if at all the Tender Document they had was not from the Respondent, why would they insert a large monetary volume in the Tender Document, an amount which could have made their tender not to meet that criterion and which would be detrimental to them. On the other hand, the Respondent submitted that, the Tender Document the Appellant had, was not theirs and may be the Appellant had used downloaded and edited standard Tender Document by PPRA. They therefore, maintained their position that their tender document was the proper one and genuine one and not that by the Appellant.

Having heard arguments by the parties regarding this matter, the Appeals Authority hastens to say that, indeed, there is a controversy on which tender document was authentic. The Appeals Authority could not conclusively determine the appropriate Tender Document since determination of the framed issues in this case depends entirely on the authenticity of the Tender Document now under controversy, then, the Appeals Authority cannot proceed to determine them.

The Appeals Authority is of the considered view that, much as the only way tenderers could be assessed in the tender is based on a proper Tender Document, and since there is no proof of

the authentic Tender Document issued in this tender, it deems necessary to nullify the proceedings of the tender made under such circumstances.

Last but not least, the Appeals Authority is of the settled view that, it is not possible under the circumstances of this Appeals to have two different Tender Documents for the same tender. It is our urdent wish that, appropriate oversight body, to wit, Public Procurement Regulatory Authority (PPRA) may conduct thorough investigation and take appropriate action on the matter against respective officials and individuals involved in the controversy of this Appeal pursuant to Section 9 (h) (i) (ii), 10 (1) and 99 (4) of the Public Procurement Act.

In view of the above, the Appeals Authority hereby nullifies the award of the tender to the successful tenderer and orders the Respondent to re-start tender process afresh. In so doing the Appeals Authority orders the Respondent to prepare and issue a new fresh Tender Document.

The prayer for damages and advocates fees cannot be granted since the Appeals Authority did not establish the fault of the parties. However, the Appeals Authority takes legal note of the Appellant's withdrawal of prayers for damages which however

was not submitted on time, that was, before 10.00 am of 25th September, 2014.

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 PPA/2011.

Rights of Judicial review as per section 101 of PPA/ 2011 explained to parties.

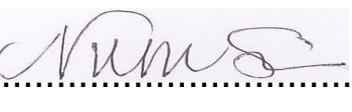
Decision is delivered in the presence of the Appellant and the Respondent this 26th day of September, 2014.



MR. H. S. MADOFFE

CHAIRMAN

MEMBERS:

1. MS. E. J. MANYESHA.....
2. MRS. N. A. INYANGETTE.....
3. ENG. F.T. MARMO