

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

**APPEAL NO. 17 OF 2013-14**

**BETWEEN**

**M/S BUILDERS PAINTS & GENERAL**

**ENTERPRISES..... APPELLANTS**

**AND**

**TANZANIA AIRPORTS**

**AUTHORITY.....RESPONDENT**

**DECISION**

**CORAM:**

- |                              |                 |
|------------------------------|-----------------|
| 1. Mr. Kesogukewe M. Msita   | - Chairperson   |
| 2. Mr. Haruni S. Madoffe     | - Member        |
| 3. Mrs. Rosemary A. Lulabuka | - Member        |
| 4. Ms. Esther J. Manyesha    | - Member        |
| 5. Mr. Ole-Mbille Kissioki   | - Ag. Secretary |

**SECRETARIAT:**

- |                           |                 |
|---------------------------|-----------------|
| 1. Mr. Hamisi O. Tika     | - Legal Officer |
| 2. Ms. Violet S. Limilabo | - Legal Officer |

**FOR THE APPELLANT:**

1. Isaka A. Gidamala -Managing Director

**FOR THE RESPONDENT:**

1. Joachim E. Maambo - Legal Officer
2. Daniel B. Ruta - Assistant Head of Procurement  
Management Unit
3. Christian Christopher -Member of Evaluation  
Committee

**FOR THE OBSERVER:**

1. Fadhil R. Maeda -Managing Director- Cross Point  
Investment
2. Kinavyari R. Mathias - Legal Officer

This Decision was scheduled for delivery today 31<sup>st</sup> of October, 2013, and we proceed to deliver it.

The Appeal at hand was lodged by **M/S BUILDERS PAINTS & GENERAL ENTERPRISES** (hereinafter referred to as "**the Appellant**") against the **TANZANIA AIRPORTS AUTHORITY** commonly known by its acronym as TAA (hereinafter referred to as "**the Respondent**").

The said Appeal is in respect of Tender No. AE-027/2012-13/HQ/N/58 for **Grass Cutting Works at Julius Nyerere International Airport** (hereinafter referred to as "**JNIA**"); (hereinafter referred to as "**the tender**").

According to the documents submitted to the Public Procurement Appeals Authority (hereinafter referred to as "**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 following newspapers, namely; the Guardian dated 5<sup>th</sup> June, 2013, Majira dated 6<sup>th</sup> June, 2013 and Mwananchi dated 7<sup>th</sup> June, 2013, invited tenderers to submit tenders.

The deadline for submission of the tenders was set for 9<sup>th</sup> July, 2013; whereby, fourteen tenders were received from the following firms;

<b>S/NO</b>	<b>TENDERER'S NAME</b>	<b>PRICE QUOTED IN TSHS VAT INCLUSIVE</b>	<b>DURATION</b>
1.	M/s Suberp Business Services Ltd	688,414,954.00	1 year
2.	M/s Dove Construction Partners Co. Ltd	307,764,224.00	1 year
3.	M/s Builders Paints and General Enterprises	430,813,455.80	2 years
4.	M/s Betar Investment Ltd	407,273,688.00	2 years
5.	M/s Cross Point Investment Ltd	577,342,300.00	2 years
6.	M/s Wimbe Consult Ltd	4,002,758,169.20	2 years
7.	M/s Environmental Work Association	578,298,434.60	2 years
8.	M/s Giraf Investment Ltd	874,855,322.30	1 year
9.	M/s Flower Centre Company Ltd	443,496,993.76	2 years
10.	M/s Sancol Investment	997,534,209.40	2 years
11.	M/s Business Circle Co. Ltd	9,543,593,026.00	18 months
12.	M/s Sound Contractors (T) Ltd	462,064,794.59	2 years
13.	M/s Jonenac Construction Ltd	1,146,647,111.20	2 years
14.	M/s Serico Co. Ltd	1,104,159,689.00	2 years

The tenders were then subjected to four stages of evaluation, namely; preliminary examination, detailed evaluation I, detailed evaluation II and financial comparison.

During the Preliminary Evaluation stage, seven tenders were disqualified for failure to comply with the requirements of the Tender Document.

The remaining seven tenders were then subjected to detailed evaluation I, whereby five tenders including that of the Appellant were disqualified for failure to comply with the requirements of Clause 12.3 (b)(c) and (i) of the Tender Document.

The Appellant's tender was disqualified for three reasons, namely;

- i. They submitted only one project of similar nature instead of two projects as required.

- ii. Their tender document did not contain Curriculum Vitae (hereinafter referred to as **the CV**) of key staff; and
- iii. They did not submit recommendation letters from previous employers. To the contrary, they submitted letters of award and certificates of completion.

The remaining two tenders by M/s Cross Point Investment Ltd and M/s Flower Centre Company Ltd were then subjected to detailed evaluation II; whereby, they were checked for Work plan, Methodology and Approach, availability of essential tools and the cost break down.

Both tenders passed the detailed evaluation II stage and were then subjected to financial evaluation that included arithmetic corrections. Thereafter, they were ranked as follows;

<b>S/NO</b>	<b>TENDERER'S NAME</b>	<b>CORRECTED PRICE IN TSHS</b>	<b>RANKING</b>
1.	M/s Cross Point Investment Ltd	557,342,300.00	1 <sup>st</sup>
2.	M/s Flower Centre Company Ltd	4,749,139,166.26	2 <sup>nd</sup>

The Evaluation Committee having ranked the above named tenderers, recommended award of the tender to the first ranked tenderer M/s Cross Point Investment Ltd for a contract price of Tshs 557,342,300/= for two consecutive years.

The Tender Board at its meeting held on 21<sup>st</sup> August, 2013, approved the recommendations by the Evaluation Committee and awarded the tender to M/s Cross Point Investment Ltd.

On 26<sup>th</sup> August, 2013, the Respondent vide a letter referenced CED.32/208/06B/66 communicated the award of the tender to the successful tenderer.

However, notification of the award was not communicated to the unsuccessful tenderers.

The Appellant having discovered that the tender had already been awarded to another tenderer but the results were yet to be communicated to them; and believing that they deserved to be awarded the said tender, on 7<sup>th</sup> October, 2013, lodged this Appeal to 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 dissatisfied with the whole process of awarding the tender since they were ranked as the "second winner" but the same had been awarded to the "fifth winner" without reasonable explanation.

That, the whole tender process did not consider value for money since the price for the tender increased every year while the tender area decreased as a result of a number of buildings being erected therein.

That, there was undue influence in the tender process by one official of the Tender Board resulting in, harassment by police and Prevention and Combating of Corruption Bureau (Hereinafter referred to as "PCCB"), tarnishing of their name and their ultimate unfair disqualification and a discriminatory award.

Finally, the Appellant prayed for the following orders:

- i. Nullification of the entire tender process.
- ii. The Respondent to restart the tender process afresh.
- iii. The Respondent to pay them general damages amounting to 10 % of their tender price.

## **SUBMISSIONS BY THE RESPONDENT**

The Respondent's documentary, oral submissions as well as responses from questions raised by Members of the Authority during the hearing may be summarized as follows:

That, the award decision of the tender was made by the Tender Board on 21<sup>st</sup> August, 2013, and not 29<sup>th</sup> September, 2013, as alleged by the Appellant.

That, the tender process was properly done and that, out of fourteen firms which participated in the tender process only two tenders by M/s Cross Point Investment Ltd and M/s Flower Centre Company Ltd complied with the requirements of the Tender Document.

That, the Appellant had submitted only one project in their tender to indicate their experience while the

Tender Document required two projects executed in the last three years as evidence of experience in works of similar nature.

That, the Appellant did not submit Curriculum Vitae of proposed staff contrary to the requirement of the Tender Document.

That, the Appellant submitted certificates of completion and letters of award while the Tender Document required tenderers to submit at least two recommendation letters from previous employers.

That, the Appellant's tender was justifiably and fairly rejected pursuant to Regulation 90 (16) of the Public Procurement (Goods, Works, Non-Consultant Services and Disposal of Public Assets by Tender) hereinafter referred to as ("**GN No. 97 of 2005**") for being non responsive.

That, the evaluation process of the tender was fairly done in compliance with the Public Procurement Act,

No. 21 of 2004 (hereinafter referred to as “the Act”) and Regulation 90 (16) of GN No. 97 of 2005. Thus, there was no interference as alleged by the Appellant.

That, the Appellant made serious allegations against the Respondent without any evidence to support the same. Furthermore, the alleged action by the PCCB and the police did not necessarily mean that those organs had anything against him personally or his firm. These organs involvements could as well have a completely different target.

That, the Appellant seemed widely uninformed and ignorant of the procurement law and practice.

Finally, the Respondent prayed for dismissal of the Appeal with costs.

## **ANALYSIS BY THE AUTHORITY**

Having gone through the documents submitted and having heard the oral submissions by parties, the Authority is of the view that the Appeal is centered on the following three issues:

- **Whether the Appellant was unfairly disqualified.**
- **Whether the award of the 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;

### **1.0 Whether the Appellant was unfairly disqualified.**

In ascertaining whether the Appellant's disqualification was justified, the Authority revisited the issued Tender Document, the Evaluation Report and the Appellant's tender vis-à-vis the Applicable law. In the course of doing so, the Authority noted that, Clause 12.3 of the Instructions To Bidders (hereinafter referred to as "**the ITB**") provided for a list of documents to be submitted by tenderers in order to establish their eligibility and qualifications. The said Clause reads as follows;

“12.3 If the procuring entity has not undertaken pre-qualifications of potential Bidders, all Bidders shall include the following information and documents with their bids in section 9, unless otherwise stated in the Bid Data Sheet:

- a. ....
- b. ....
- c. Experience in services of a similar nature and size for each of the last five years , and details of services underway or contractually committed; and clients who may be contacted for further information and those contracts;**
- d. Major items of equipment ....
- e. Qualifications and experience of key management and technical personnel proposed to carry out the contracts”.**

The Authority revisited further the Bid Data Sheet referred under clause 12.3 of the ITB above and observed that Clause 12.3 was modified by Clause 30

of the Bid Data Sheet (hereinafter referred to as "**the BDS**"). The said Clause 30 of the BDS, required tenderers to indicate amongst other things the following information;

a)“...

b) Experience as prime contractor in works of similar nature and complexity performed over the last 3 years (at least 2 projects must be submitted)

c) Qualification and experience of key Personnel (Project Manager and Site Foreman) with a minimum of three years experience in works of similar nature and qualification of not less than Form IV and relevant Certificate/ Diploma (FTC-Civil or Diploma-Civil) from a recognized College/Institution (Signed CVs and Certified Photocopies to be submitted....)

d)....

e).....

(i) Reliability of the Company (Submission of at least two recommendation letters from the previous Employer: For Companies which

worked/ are working with us, one of their recommendations must come from TAA)

**Note: TAA will liaise directly with the referred Organizations to verify the information submitted”.**

Having noted the above requirements of the Tender Document; the Authority revisited the Evaluation Report and observed that the Appellant was disqualified at Detailed Evaluation I stage for failure to comply with the above quoted criteria.

The Authority revisited the Appellant’s tender and observed that, they had attached only one project of similar nature from the Respondent.

Upon being asked by the Members of the Authority of such default, the Appellant contended that they had executed about ten projects with various employers including the Respondent though they did not attach their recommendation letters. The Appellant submitted further that the said criterion was not important since the duties to be performed under the tender process

did not need any expertise; and that even class seven leavers could have done it.

With regard to the requirement of attaching the Curriculum Vitae of their Key Personnel, the Appellant conceded to have not attached them.

The Appellant conceded further that they did not attach the recommendation letters from previous employers since they had worked with the Respondent in several projects and that the Respondent knew them and their capability to execute the assigned tasks was undoubted.

From the above findings, the Authority is of the view that, the Appellant's explanations are not legally tenable. Indeed, the Appellant did not comply with the requirements of the Tender Document as specified under Clause 12.3 of the ITB as modified by Clause 30 of the BDS. The Authority is of the further settled view that the Respondent's act to disqualify the Appellant was in conformity with the requirement of Regulations 90 (16) and 90(17) (c) of GN No.97 of 2005 which read as follows;

Reg.90 (16) **“If a tenderer is not responsive to the tender document, it shall be rejected by the procuring entity”**.

(Emphasis added)

Reg.90 (17) “A procuring entity shall not accept a tender:

a)...

b)...

c) If a tender is not responsive”

The Authority further concurs with the Respondent’s assertions that there are elements of ignorance on the part of the Appellant on procurement practice and law. For example, to assert that he was the second winner and yet the tender was awarded to the fifth winner is clearly a misnomer. The Appellant could as well have confused the tender process with a beauty contest or soccer league outcome. In a soccer league or a beauty contest, there are invariably first, second and third winners. In the tender parlance there is only one winner.

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

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

In resolving this issue the Authority took cognizance of the Appellant's contention that, the tender was awarded to the "fifth winner" instead of them who were the "second winner"; thus there was bias in awarding the tender to them.

In order to ascertain the Appellant's contention in this regard, the Authority revisited the tender process as articulated from page three of this decision. Furthermore, the Authority scrutinized the successful tenderer's tender against the requirements of the Tender Document and the applicable law.

The Authority hastens to conclude that the tender procedures and the law were dully observed by the Respondent. Furthermore, the successful tenderer's

tender was substantially responsive and was the lowest evaluated.

Additionally, the successful tenderer was eligible and qualified to perform the contract satisfactorily as per the ITB.

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

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

Having analyzed the contentious issues in dispute, the Authority proceeded to consider prayers by the parties.

To start with, the Authority considered the Appellant's prayer that the entire tender be nullified and the Respondent be ordered to restart the tender process afresh.

The Authority observes that, since it has 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 this prayer.

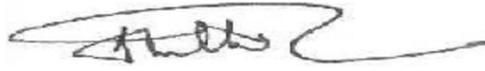
With regard to the prayer for compensation of 10% of the Appellant's tender price as general damages, the Authority equally rejects it since the Appeal has no iota of merit. Furthermore, the Authority cannot grant that order since it has no jurisdiction to do so.

The Authority also considered the prayer by the Respondent that, the Appeal be dismissed with costs. The Authority accepts the first prayer and hereby dismisses the Appeal in its entirety. As for the second prayer, the Authority cannot grant it because the law does not allow unsuccessful Appellants to pay costs of the Appeal.

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 presence of the Appellant and the Respondent this 31<sup>st</sup> October, 2013.



.....  
**MR. KESOGUKEWELE M. MSITA**  
**CHAIRPERSON**

**MEMBERS:**

1. MR. HARUNI S. MADOFFE..... 
2. MRS. ROSEMARY A. LULABUKA..... 
3. MS. ESTHER J. MANYESHA..... 