

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

**APPEAL NO 19 OF 2013-14**

**BETWEEN**

**M/S EASY PAYMENTS  
LIMITED.....APPELLANT**

**AND**

**KINONDONI MUNICIPAL  
COUNCIL..... RESPONDENT**

**DECISION**

**CORAM**

- |                                      |                 |
|--------------------------------------|-----------------|
| 1. Hon. Augusta G. Bubeshi, J. (rtd) | - Chairperson   |
| 2. Mr. Kesogukewe M. Msita           | - Member        |
| 3. Ms. Esther J. Manyesha            | - Member        |
| 4. Mrs Nuru N.J. Inyangete           | - Member        |
| 5. Mr. Ole-Mbille Kisssioki          | - Ag. Secretary |

**SECRETARIAT:**

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

## **FOR THE APPELLANT**

1. Diana K. Matondane - Secretary
2. Ephraim Danford - Geo-Data Base Specialist

## **FOR THE RESPONDENT**

1. Burton Y. Mahenge - Municipal Solicitor
2. Anin Kirenga - Supplies Officer

## **FOR THE INTERESTED PARTY**

1. Ahmed Lussasi - Chief Operation Officer

This decision was scheduled for delivery today 15<sup>th</sup> day of November, 2013 and we proceed to deliver it.

The Appeal at hand was lodged by **M/S EASY PAYMENTS LIMITED** (hereinafter referred to as "**the Appellant**") against the **KINONDONI MUNICIPAL COUNCIL** (hereinafter referred to as "**the Respondent**").

The said Appeal is in respect of Tender No. LGA/017/2013/2014/NCS/01 for **Provision of Agency Services for Electronic Payment System for Taxes Collection in Kinondoni Municipal Council** (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 parties during the hearing, the facts of the Appeal may be summarized as follows:

The Respondent vide the Daily News and the Mwananchi Newspapers dated 11<sup>th</sup> July, 2013, respectively, invited tenderers to submit their tenders.

The deadline for the submission of tenders was set for 13<sup>th</sup> August, 2013; whereby three tenders were received from the following firms;

<b>S/NO</b>	<b>TENDERER</b>	<b>READ OUT PERCENT IN TSHS VAT INCLUSIVE</b>
1.	M/s Selcom Wireless Ltd	3 %
2.	M/s Easy Payment	5.5 %
3.	M/s Maxcom Africa Ltd	7.0 %

The tenders were then subjected to three stages of evaluation, namely; preliminary evaluation, detailed evaluation, and post qualification.

During the Preliminary Evaluation stage, the tender by M/s Selcom Wireless Ltd was disqualified for failure to comply with the requirements of the Tender Document.

The remaining two tenders were subjected to detailed evaluation stage; whereby, they were checked for correction of errors and price comparison before ranking.

The tenders were found to be error free and were ranked as follows;

<b>S/NO</b>	<b>TENDERERS NAME</b>	<b>READ OUT PERCENT</b>	<b>RANKING</b>
1	M/s Easy Payments Ltd	5.5 %	1 <sup>st</sup>
2	M/s Maxcom Africa Ltd	7.0 %	2 <sup>nd</sup>

Having ranked the above tenderers, the Evaluation Committee conducted post qualification to the first ranked tenderer, M/S Easy Payments Ltd; whereby, they observed that the tenderer did not qualify for the award of the tender on the grounds that;

- i. They submitted only one contract showing record of working with Government Institutions.
- ii. They failed to submit works of similar nature.
- iii. They did not meet the minimum average annual turnover of Tshs 20,000,000,000.
- iv. They conducted research in 30 wards instead of 34 available in Kinondoni Municipality.

Having disqualified the Appellant, the Evaluation Committee conducted post qualification of the second ranked tenderer, M/s Maxcom Africa Ltd, and awarded them the tender. Thus, the Evaluation Committee recommended them to be awarded the tender at the rate of 7.0 % of the collection per year, for two years on renewable basis.

The Tender Board at its meeting held on 30<sup>th</sup> August, 2013, approved the recommendation by the Evaluation Committee and awarded the tender to M/s Maxcom Africa Ltd subject to successful pre - contract negotiation.

On 2<sup>nd</sup> September, 2013, the Respondent vide a letter referenced KMC/CTB/EXP/AWD/12/2013/2014, invited the successful tenderer for negotiations.

On 4<sup>th</sup> September, 2013, the Respondent and the Successful tenderer conducted the negotiations whereby they agreed to reduce the percentage to be paid from 7% to them to 6 % annually VAT exclusive.

On 9<sup>th</sup> September, 2013, the Respondent vide a letter referenced KMC/CTB/AWD/2013/2014/7 communicated the award of the tender to the successful tenderer M/s Maxcom Africa Ltd.

On 24<sup>th</sup> September, 2013, the Respondent vide a letter referenced KMC/CTB/2013/2014/14 notified the Appellant that their tender was unsuccessful.

Being dissatisfied with the award of the tender to the successful tenderer, the Appellant on 4<sup>th</sup> October, 2013, lodged their Appeal to this 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 Respondent's rejection of their tender on the grounds that;

- a. There was political interference evidenced by the Respondent's act of convening the Finance Committee on 26<sup>th</sup> August, 2013 which required each tenderer to present its technology on electronic payment system which they were going to apply before the counsellors who were not mentioned in the Tender Document and contrary to Regulation 42 of the Public Procurement (Goods, Works, Non- Consultant Services and disposal of public assets by Tender) Regulations, 2005 (hereinafter referred to as "**GN. No 97 of 2005**") and Section 38 of the Public Procurement Act (hereinafter referred to as "**the Act**") which requires tender process to be independent.
- b. The tender had been awarded to M/S Maxcom Africa Ltd at a rate of 6 % while the Appellant quoted rate a lower rate of 5.5 %. The Respondent's act contravened Regulations 4 and 5 of G.N. No. 97 of 2005 and Section 59 of the Act.

- c. The tender was for electronic payment system for taxes which required a technical push-pull system as was offered by the Appellant. However, the tender was awarded to M/s Maxcom Africa Ltd.
- d. The document submitted by M/s Maxcom Africa was not bound; instead it was put in a box file which made it easy to tamper with, contrary to Sections 63 (1) and 69 of the Act.
- e. In tax collection system the Respondent cannot avoid Geographical Information System (hereinafter referred to "**as GIS**") based technology, which the Appellant had submitted together with GIS maps but yet they were not considered for award of the tender.
- f. "None of the tenderers had experience with Municipal taxes. Thus, the said criterion could not have been used since the computerised system (plug and play) needed no experience as it uses experience from the Respondent".

The Appellant therefore, prayed for the following orders;

- i. Nullification of the award of the tender.
- ii. Any other order 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, there was no political interference in the tender process as alleged by the Appellant. The Councilors, vide the Finance Committee wanted to know only the electronic payment system technology of the tenderers. In the course of doing so, all tenderers were called to present their technology openly and on a transparent manner. The presence of the Councilors did not affect the procurement process in any manner.

That, the Respondent's Tender Board was independent in its deliberations regarding this tender and had complied

with the law as provided for under Regulation 42 of G.N No 97 of 2005.

That, tenders were evaluated based on the criteria provided for in the Tender Document and not otherwise.

That, price was not the only criteria for the award of the tender.

That, the Appellant's disqualification was an outcome of their failure to comply with the criteria provided for in the Tender Document.

That, Regulations 4 and 5 of G.N. 97 of 2005 cited by the Appellant required the Respondent to balance between the price and best results from the tender. The Respondent adhered to these principles that's why they awarded the tender to M/S Maxcom Africa (T) Ltd, after they had considered their experience, staff, and equipment.

That, the Respondent advertised a tender for collection of taxes through electronic system and not electronic payment system as misconceived by the Appellant. The Appellant was required to tender in accordance with the specifications provided in the Tender Document, which did not contain a push-pull criterion.

That, the contention that the tender by the successful tenderer was not bound ought to have been raised during the tender opening in the presence of all tenderers and not at this stage.

That, the Respondent issued one Tender Document to all tenderers and that GIS maps were not amongst the requirements to be submitted by tenderers. Thus, evaluating tenders based on such an alien criterion could not have been proper.

That, the Respondent required an experienced firm in electronic payment system and that they did not mention

that the tenderers should have collected taxes from the Respondent.

That, tenderers were required to submit documents showing their experience from Government Institutions on electronic payments system as well as having sufficient staff and equipment. The Appellant's argument that experience was not amongst the requirement is not tenable and that it was not possible to award the tender to them.

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

## **SUBMISSIONS BY THE INTERESTED PARTY**

The Interested party'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, there was no political interference since all prospective tenderers were invited and participated in sensitizing the counsellors on the revenue collection through electronic payment system. If the Appellant was dissatisfied with the said procedure, they ought to have raised it to the Respondent before the tender had been awarded.

That, award of the tender to them complied with the requirements of Section 46 (1) of the Act.

That, apart from the tender price they had quoted, there were other criteria which were to be met by the tenderers so as to determine their responsiveness.

That, the Respondent's decision to award the tender to them complied with the criteria set provided for in the Tender Document as per Sections 65(1) and 67(1) of the Act.

That, there was no specification regarding push-pull system in the Tender Document as asserted by the

Appellant. Such criterion was alien to the Tender Document and could not have been used in evaluating the tenders.

That, the Appellant was not conversant with the requirement of Part D of the Instructions To Bidders (hereinafter referred to as "**the ITB**") on the submission of the Tender Document which provided for the minimum qualifying criteria.

That, their tender complied with the requirements provided for under Clauses 20.1, 20.2, 20.3 and 20.4 of the ITB, Sections 63 (1) (2) of the Act and Regulation 89 of GN. No. 97 of 2005. Thus, the award of the tender to them was proper.

That, Regulation 83 of GN No. 97 of 2005 provided for the information which was to be submitted by tenderers. Geographical Information System (GIS) was not amongst the required information.

That, their firm had a vast experience in tax collection and that they had demonstrated it in their Tender Document. Therefore, they had complied with the requirement of Regulation 14 of G.N. No. 97/2005.

Interested party's therefore, prayed for the dismissal of the Appeal.

### **ANALYSIS BY THE AUTHORITY.**

Having gone through the documents submitted and having heard the oral arguments from parties, the Authority observed that there are two matters raised by the Appellant namely; political interference; and that the tender by the successful tenderer was not bound.

The Authority is of the view that, these two matters were supposed to be raised when the Appellant became aware of the circumstances through the Procuring Entity or Approving Authority pursuant to the requirements of Sections 79,80 and 81 of the Act.

The Authority is of the settled view that, the said complaints cannot be entertained at this stage for want of jurisdiction as the Appellant was required to have exhausted the above named procedures before opting to this Authority.

Without prejudice to the above observations, the Authority is of the view that the Appeal is based on the following issues:

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

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

**3.0 To what reliefs, if any, are 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 resolving this issue, the Authority considered the Appellant's contentions and deemed it necessary to frame the following sub-issues.

- **Whether the push –pull system was one of the criteria in the Tender Document.**
  
- **Whether GIS based system was one of the requirement in the Tender Document.**
  
- **Whether the Appellant had the requisite qualification provided for in the Tender Document.**

Having framed the sub-issues the Authority proceeded to resolve them as follows;

- i. Whether the push –pull system was one of the criteria in the Tender Document.**

In resolving this issue, the Authority considered the Appellant's argument that the tender required a technical

push-pull system which they had submitted but yet they were not considered for the award.

The Authority revisited the Tender Document issued by the Respondent and observed that the said criterion was not amongst, the criteria provided therein.

The Authority wonders as to how could the Appellant complain on matters which were not in the Tender Document. The Authority is of the firm view that the Appellant's contention regarding this issue is baseless since the contended criterion was not provided in the Tender Document.

The Authority wishes to enlighten the Appellant that, the criteria for award of the tender are those specifically provided for in the Tender Document pursuant to Regulation 90 (4) of G.N. No. 97 of 2005 and not otherwise.

The Authority reproduces the said provision which reads as follows:

**Reg. 90 (4) “The tender evaluation shall be consistent with the terms and conditions set forth in the tender documents and such evaluation shall be carried out using the criteria explicitly stated in the tender documents”. (Emphasis Added).**

Accordingly, the Authority’s conclusion regarding this sub-issue is that the push-pull system was not one of the criteria in the Tender Document.

**ii. Whether GIS based system was one of the requirement in the Tender Document**

In resolving this sub issue, the Authority observed that the Tender Document did not contain a criterion which required tenderers to provide a GIS system technology in their tender.

Accordingly, the Authority’s conclusion with respect to this sub-issue is that the GIS based system was not one of the requirement in the Tender Document.

**iii. Whether the Appellant had the requisite experience provided for in the Tender Document.**

In resolving this sub-issue, the Authority revisited the Evaluation Report and observed that, the Appellant's tender passed the preliminary and the detailed evaluation stages and was considered for the award of the tender subject to post qualification.

During the post qualification stage, the Appellant was disqualified for lack of experience of similar nature in Electronic Payment System in the last five years and the adequacy of working capital and financial resources for the works provided in the Tender Document.

In ascertaining the Appellant's disqualification, the Authority revisited the Appellant's tender and noted that they did not submit evidence to demonstrate their experience and reports on the financial standing for the past five years.

Upon being asked by the Members of the Authority during the hearing, the Appellant conceded to have not complied with the above criteria.

Furthermore, the Authority considered the Appellant's arguments that none of the tenderers had experience on Municipal tax collection. Thus, such criterion could have not been used to evaluate the tender.

The Authority revisited the Tender Document and noted that Clause 12.5 (b) of the ITB read together with Clause 16(b) of the Bid Data Sheet required tenders to submit evidence to demonstrate their experience in electronic payment systems during the last two years, so did items 1.19 and 1.20 of the Statement of Requirements contained in the General Conditions of Contract which formed part of the tender.

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

**Clause 12.5 “To qualify for award of the Contract, Bidders shall meet the following minimum qualifying criteria:-**

**(b) “experience as prime service provider in the provision of at least two services(s) of a nature and complexity equivalent to the service(s) over the period stated in the Bid Data Sheet (hereinafter referred to as “BDS”) ( to comply with this requirement, service(s) cited should be at least 70 percent complete”);**

**Clause 16 (b) “ The experience required to be demonstrated by the bidder should include as a minimum the Bidder has executed during the last 2 years”.**

**Item 1.19 “Agent should have outlet more than 3 years and proven record working with Government Institutional”.**

**Item 1.20 “Proven experience on electronic validation during inspection”.**

Thus, the experience required was elaborated in the Tender Document.

The Authority noted further that, the Appellant did not submit an average annual turnover of Tshs. 100 billion in any of the five years.

Accordingly, the Authority's conclusion regarding this sub-issue is that the Appellant did not possess the requisite experience provided for in the Tender Document.

Accordingly, the Authority's conclusion regarding 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 considered the Appellant's contentions that none of the tenderer had experience in collection of municipal taxes and the contention that M/s Maxcom Africa Limited had been

awarded the tender contrary to Regulation 4 and 5 of GN.NO.97/2005.

In resolving this issue, the Authority firstly, observed that the tender by the successful tenderer did not contain the five years' reports on the financial standing as provided for under Clause 12.3(f) of the ITB.

The Authority observed that the successful tenderer's tender contained an Audited Financial Accounts for the year ending December, 2012 together with Bank Statements from CRDB and NBC Bank indicating their Annual turnover for the past six months.

Secondly, the Authority noted with dismay that, while the Bid validity period provided in the Tender Document was 120 days, the tender by the successful tenderer contained a bid validity period of 90 days in their Form of tender.

The Authority revisited Clause 16.1 of the ITB and Regulation 87(1) of GN.No.97 of 2005 which provide for the tender validity period and observed that, it required the Respondent to reject any tender which had a shorter period than that specified in the Tender Document. To the contrary, the Respondent did not do so to the tender by the successful tenderer.

The Authority is of the view that the Respondent contravened their own Tender Document and Regulation 87 (1) of G.N No. 97 of 2005 which read as follows;

Clause 16.1 **Bids shall remain valid for the period specified in the Bid Data Sheet** after the deadline for the bid submission specified in ITB Clause 21. **A Bid valid for a shorter period shall be rejected by the** Procuring Entity as not responsive". (Emphasis added)

Clause 21 " **The Bid Validity Period shall be 120** days after the deadline for the Bid submission specified in the BDS".

(Emphasis added)

**Reg. 87 (1) "The validity period required for tenders shall be specified in the invitation to tender. Any tender which purports to be valid for a shorter period shall be rejected by the procuring entity as being substantially non- responsive".**

In view of the above glaring anomaly, the Authority is inclined to believe that, the Respondent openly favoured the successful tenderer contrary to Section 43(b) of the Act which reads 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:-

**(a) ...**

**(b) Fairness of treatment to all parties;** (Emphasis added).

The Authority is of the view that, the Respondent ought to have rejected the tender by the successful tenderer

pursuant to Regulations 90(16) and 90(17)(c) of G.N No. 97 of 2005.

Further to the above, the Authority observed that, the tender by successful tenderer contained a proposal of 7% rate of the amount to be remitted to them by the Respondent upon collection per annum; while the award of the tender to them was at 6% rate per year.

However, during the hearing this was clarified by the Respondent that the reduction of the rate was an outcome of the pre-contract negotiations between the Respondent and the successful tenderer after the reduction of the scope of works which excluded big taxpayers who pay their taxes directly through TISS.

The Authority revisited Regulation 95 (2) (a) and (c) of G.N No. 97/2005 and observed that the provision prohibits negotiations, change of tasks or reduction of prices. For purposes of clarity the Authority reproduces the said provision as hereunder;

**Reg. 95 (2) "Negotiations shall not be conducted:**

- (a) To substantially change the specifications or details of the requirement, including tasks or responsibilities of the tenderer;**
- (b) ...**
- (c) primarily for the purpose of reducing prices in case of procurement of goods, works or services;"** (Emphasis added).

From the above provision, the Authority is of the settled view that, the Respondent erred to reduce the tendered price since the law does not allow them to do so.

In view of the above findings, the Authority's conclusion with regard to the second 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 parties entitled to.**

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

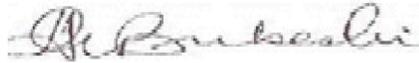
To start with, the Authority considered the Appellant's prayer that the award of tender be nullified. The Authority observes that, since it has already been established in the second issue that the award of the tender to the successful tenderer was not proper at law, the Authority accepts the Appellant's prayer and hereby nullifies the award of the tender to the purported successful tenderer.

With regard to the prayer by the Respondent that, the Appeal be dismissed, the Authority rejects this prayer since the Appeal has some merit.

Accordingly, the Authority partly up holds the Appeal and orders the Respondent to re-start the tender process afresh in observance of the law and each party is to bear their own costs.

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

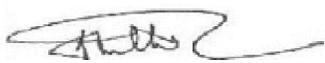
Decision delivered in the presence of the Appellant and the Respondent this 15<sup>th</sup> November, 2013.

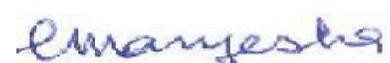


.....  
JUDGE (rtd) A. BUBESHI

**CHAIRPERSON**

**MEMBERS:**

1. MR.K.M.MSITA  .....

2. MS.E.J.MANYESHA  .....

3. MRS.N.INYANGETE  .....