

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

APPEAL CASE NO. 26 OF 2013-14.

BETWEEN

**M/S HAMMERS INCORPORATION
LIMITED.....APPELLANT**

AND

**CASHWENUT INDUSTRY DEVELOPMENT TRUST
FUND.....RESPONDENT**

DECISION

CORAM

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| 1. Hon. Augusta G. Bubeshi, J. (rtd) | -Chairperson |
| 2. Mr. Kesogukewe M.Msita | -Member |
| 3. Mrs. Nuru S.N. Inyangete | -Member |
| 4. Mr. Haruni S.Madoffe | -Member |
| 5. Mr. Ole-Mbille Kissioki | -Ag. Secretary |

SECRETARIAT

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

FOR THE APPELLANT

Mr. Haroun Maarifa - Managing Director.

FOR THE RESPONDENT

- | | |
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| 1. Mr. Suleiman A.Lewa | -Executive Secretary. |
| 2. Mr. Ramadhani A. Mmari | -Chief Accountant |
| 3. Mr. Frederick J. Shangali | -Procurement Officer |
| 4. Mr.Goodluck Peter Chuwa | -Advocate, Goodluck P.
Chuwa & Co. Advocate |

This decision was scheduled for delivery today 18th February, 2014 and we proceed to deliver it.

The Appeal at hand was lodged by **M/S HAMMERS INCORPORATION LTD** (hereinafter referred to as "**the Appellant**") against the **CASHEWNUT INDUSTRY DEVELOPMENT TRUST FUND** commonly known by its acronym **CIDTF** (hereinafter referred to as "**the Respondent**").

The said Appeal is in respect of Lot No. 1 in Tender **No. ME-12/2013/2014/CIDTF/G/01 for the Supply of Cashewnut Pesticides and Blowers** (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 Habari Leo and the Guardian Newspapers of 5th November, 2013, invited tenderers to submit tenders for the tender under appeal.

The tender was to be conducted through National competitive tendering procedures specified in Public Procurement (goods, works, non-consultant Services and disposal of public assets by

Tender Government Notice No. 97) (hereinafter referred to as **GN. No. 97 of 2005**).

The deadline for the submission of tenders was set for 4th December, 2013, whereby seven tenders were received from the following firms;

S/N O	Tenderers Name	Quoted price in Tshs
1.	M/s CS Agrovat (T) Ltd.	2,400,000,000.00
2.	M/s Abbas Export Ltd.	2,240,000,000.00
3.	M/s GreenLot	1,990,000,000.00
4.	M/s Bambana General Vetagro Ltd.	2,500,000,000.00
5.	M/s Export Trading Co. Ltd	1,947,000,000.00
6.	M/s Positive International Ltd	1,430,000,000.00
7.	M/s Hammers Incorporation Ltd.	2,560,000,000.00

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

At the preliminary evaluation stage, tenders were examined to determine if they had met eligibility criteria provided for in the Tender Document whereby, the tender by M/s Export Trading Company Limited was found to be non-responsive for failure to attach Manufacturer's Authorization.

The remaining six tenders were found to be substantially responsive and were therefore subjected to technical evaluation. The Evaluation Committee found all six tenderers to be substantially responsive and were therefore subjected to detailed evaluation.

During detailed evaluation, the Evaluation Committee did arithmetic correction of errors to the tenders and found them to be free from errors.

Having found no errors, the Evaluation Committee further assessed the financial and technical capability of all tenderers and their experience. In that process, four tenders by M/s CS Agrovet (T) Ltd, M/s GreenLot, M/s Bambana General Vetagro Ltd and M/s Positive International Ltd were found to be non responsive to the Tender Document. The remaining two tenders by the Appellant and the one by M/s Abbas Export Ltd were found to be substantially responsive to the Tender Document and were ranked as below;

S/ N	Tenderer's name	Required quantity (MT)	Quantity offered (MT)	Unit price in Tshs.	Total tender price in Tshs.	Rank
1.	Abbasi Export Ltd	5,000	2,000	28,000	2,240,000,000	1 st
2.	M/s Hammers incorporation Ltd.	5,000	2,000	32,000	2,560,000,000	2 nd

Having ranked tenderers as above, the Evaluation Committee did post qualification for both two tenderers and found them to be responsive and therefore recommended the award of the tender to them at a contract price of Tshs. 2,240,000,000 for M/s Abbasi Export Ltd and Tshs. 2,560,000,000 for Hammers Incorporation Ltd respectively.

The Respondent's Tender Board during its meeting held on 13th and 14th December, 2013, approved the recommendations by Evaluation Committee save for the Appellant's tender on the following grounds;

- i. That, the Appellant did not disclose the commercial case they had with the Respondent before the High Court of

Tanzania in their tender. The Tender Board was of the view that, the Appellant's failure to disclose the pending litigation the Appellant had, denied the Evaluation Committee mandate to consider that item in their evaluation.

- ii. That, the Appellant did not attach a Bank statement in their tender. Therefore, it was difficult for the Respondent to ascertain their financial capability for the execution of the contract.
- iii. That, the Appellant delayed to supply sulphur for 2012/2013 and 2013/2014 seasons.
- iv. That, some of the sulphur bags supplied by the Appellant were below the required weight.
- v. That, the Appellant failed to deliver 693 tonnes of sulphur powder for the 2012/2013 season, while they were fully paid for the same.

The Tender Board therefore, ordered the Respondent to re-advertise the remaining tonnage of the tender through restricted tendering procedures in order to be on time for the season which will commence in April 2014.

Having received no information about the tender result, the Appellant vide a letter referenced HIL/CIDTF/CORR/15114/01 dated 15th January, 2014, requested for the status of the tender from the Respondent. They also wanted to know the reasons for being unsuccessful in case the tender was not awarded to them. On the same date, the Respondent vide a letter referenced CIDTF/TENDER/2014/ informed the Appellant that their tender was unsuccessful because the tender by other tenderers were determined to be lowest evaluated.

Being dissatisfied with the reason given by the Respondent, the Appellant on 20th January, 2014, lodged their Appeal to this Authority.

SUBMISSIONS BY THE APPELLANT

The Appellant's documentary, oral submissions as well as responses from the questions raised by the Members of the Authority may be summarized as follows;

That, the tender process was not fair and lacked transparency as the law requires under Section 43 (a) and (b).

That, the reasons given by the Respondent regarding their disqualification were unclear and contradictory.

That, some of the tenderers who participated in the tender for Lot No. 1 were not registered by the Tropical Pesticides and Research Institute (hereinafter referred to "**as TPRI**") for supply of Sulphur 99% dust. Therefore the Respondent ought to have disqualified them from the start of the tender process for non compliance. Thus, only three tenderers deserved to be considered for award of the tender.

That, the Tender Document provided for a maximum number of 2000 tonnes which a tenderer had to tender. Since, the number of tones required by the Respondent was 5,000 tonnes, then, it was not proper for the Respondent to award the tender to only one tenderer while their desire was to procure various tenderers for Lot 1.

That, since the lowest price of a tender is determined after the said tender has passed preliminary and detailed evaluation stages; their tender was determined to be substantially responsive deserving the award of the tender. The reason given by the Respondent to the effect that other tenderers were determined to be the lowest does not hold water since it was not possible for all tenderers to have quoted the same prices.

That, the Respondent unfairly and without due reasons discriminated them to participate in the ongoing procurement

process for the remaining three thousand tonnes of Sulphur 99% Dust

That, based on the requirement of the Tender Document above, the reason given by the Respondent for their disqualification was untenable.

Finally, the Appellant prayed for the following;

- a. Review of the entire tender process conducted by the Respondent and establish whether or not the process was legally justifiable and instruct the Respondent to comply with the law.
- b. Suspend the ongoing single source procurement process currently being carried out by the Respondent to get suppliers of the remaining 3,000 tonnes since it contravenes the law and creates suspicion of ill motive on the part of the Respondent.
- c. Payment of Tshs.120,000/- being Appeal filing fees.
- d. Payment of Tshs. 300,000/- being cost for preparation of documents.

e. Payment of Tshs. 500,000/- being amount spent for purchase of the Tender Document.

f. Costs of the Appeal.

g. Any other relief(s) this Authority may deem just and fit to grant.

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 Appellant seems to have inner knowledge of records of other tenderers which they were not entitled to know. The Appellant therefore took unfair advantage in the tendering process. The above reason in itself suffices for this Authority to consider the Appellant to have disqualified themselves.

The Tender Document allowed tenderers to tender a minimum of 1,000 tones and a maximum of 2,000 tonnes. Only one tenderer was determined to be responsive to the set criteria and was awarded 2,000 tonnes out of 5,000 tonnes.

The Appellant's tender was not responsive to the Tender Document and they were duly availed with the reasons for the rejection of their tender through a letter dated 15th January, 2014.

That, the tender process was conducted in accordance with the law and that, the tender was open to all reputable and reliable tenderers who obtained registration for supply of pesticides and blowers from **TPRI**.

That, the evaluation of tenders was done in conformity with the criteria set forth in the Tender Document.

That, the Respondent has used restricted tendering methods for the remaining 3000 tonnes and not single source as alleged by the Appellant. Through this method all registered tenderers for Sulphur 99% Dust were obtained except the Appellant due to their conduct in previous dealings with the Respondent including failure to declare the pending litigation instituted against the Respondent.

That, the Appellant wants to frustrate the already awarded contracts through their ill motivated appeal lodged before this Authority. Further, the records with the Respondent indicate that they have throughout failed to perform the contracts awarded to them.

That, the tender involves an urgent procurement of pesticides for cashewnut farmers in the country and delivery of the same should be completed before the end of March 2014. The remaining time would not enable the Respondent to call for another tender if the tender is suspended.

That, the cashewnut stakeholders who are the financiers of the project will suffer an irreparable loss for non performance of the signed contracts if the procurement process for the tender is suspended.

That, the Appellant will suffer no loss if the awarded contracts are executed compared to the loss the Respondent might suffer.

That, since business is based on mutual relationship and goodwill, the Appellant had lost the goodwill to the Respondent by underperforming.

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

ANALYSIS BY THE AUTHORITY

It should be noted from the outset that, according to the documents submitted before this Authority, as well as the

Appellant's oral submissions during the hearing, the Appellant is moving this Authority on two issues; that is, the tender in which there was a partial award of 2000 tonnes out of 5,000 tonnes of Sulphur 99% Dust following advertisement of the same in the newspapers, and the restricted tender for the balance of 3000 tonnes which is currently on going.

The Authority hastens to observe that, it has no powers to entertain the complaint arising from the restricted tender process. This is because the said procurement process is still ongoing; thus, any complaint arising therefrom ought to have been referred to the Accounting Officer before appealing to this Authority in terms of Section 96 of the Act no 7 of 2011.

Accordingly, the Authority shall confine itself to the Appellant's disqualification in the awarded portion of 2000 tonnes.

Having said so, the Authority is of the view that the Appeal is centred on the following three issues;

1. Whether the tender process was conducted in compliance with the law.

2. Whether the disqualification of the Appellant's tender was justified.

3. To what reliefs, if any, are parties entitled to?

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

1. Whether the tender process was conducted in compliance with the law.

In resolving this issue, the Authority considered the Appellant's contentions that the tender process was not conducted fairly and the same lacked transparency. The Authority further considered the prayer by the Appellant that this Authority be pleased to review the entire tender process and ascertain whether their disqualification was justified.

In the course of doing so, the Authority revisited the Evaluation Report and the Tender Document vis-a-vis the applicable law and observed the following;

The Evaluation process for the tender had to undergo four stages namely; preliminary, detailed, technical and post qualification.

That, at the preliminary evaluation stage, the Authority noted the following anomalies;

Firstly, the Evaluation Committee waived some of the major criteria in the Tender Document without assigning reasons thereof. The Authority observed for instance that, Clause 13.3(d) (ii) of the BDS required tenderers to be free from any litigation. However, the Evaluation Committee did not evaluate this criterion.

Secondly, the Tender Document under Clause 13.3(d) (iii) required a tenderer to submit evidence of liquid asset/cash at the bank set aside for the contract. The Authority revisited the Evaluation Report and observed that the Evaluation Committee found the Appellant to have not submitted evidence to that effect. However, they did not disqualify them contrary to Clause 28.3 of the Instructions To Bidders and Regulation 90(7) of GN.NO. 97 of 2004. The Authority reproduces the said provisions as hereunder;

“Clause 28.3 the procuring entity will confirm that the document and information specified under ITB Clause 11, ITB Clause 12 and ITB Clause 13 have been provided in the Bid. **If any of these documents or information is missing, or is not provided in**

accordance with Instruction to Bidder, the bid shall be rejected”

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

Rather, the Evaluation Committee referred the Appellant’s tender to the next stage of evaluation and recommended them for award of the tender subject to submission of the said evidence later on contrary to Regulation 90(16) of GN.NO. 97 of 2004 which reads as follows;

Reg. 90(16) “if a tender is not responsive to the tender document, it shall be rejected by the procuring entity, and may not subsequently be made responsive by correction or withdrawal of the deviation or reservation”.

Thirdly, the Respondent conducted post qualification of two tenderers during detailed evaluation contrary to Regulation 94(5) of GN. NO.97 of 2004 and Clauses 34 and 35 of Tender Document. The Tender Document under Clause 34 provided categorically that only one tender was to be determined as the

lowest evaluated for the same to be awarded the contract. Furthermore, Regulation 94(5) of GN.NO 97 of 2004 provide clearly that post qualification is to be undertaken to only one tenderer who has been determined to be the lowest evaluated.

The Authority reproduces the said provisions as hereunder;

Clause 34" **the bid** with the lowest evaluated price, from among those which are eligible, compliant and substantially responsive **shall be the lowest evaluated bid"**.

Reg.94 (5) **"post-qualification shall be undertaken for the lowest evaluated tenderer only"**.

(Emphasis Added)

Fourthly, the Evaluation Committee recommended award of the tender to two tenderers with different prices contrary to Clause 36.1 of the ITB.

Fifthly, some of the reasons availed to the Appellant by the Respondent were different from what were contained in the Evaluation Report and the requirement of the law.

The Authority observed for instance that, the Appellant was availed with two sets of reasons for their disqualification. The first were contained in the Respondent's letter referenced CIDTF/TENDER/2014/009 dated 15th January, 2014 in which they informed the Appellant that their tender was unsuccessful since other bidders were determined to be the lowest evaluated. The second set was contained in the Respondent's reply to the Statement of Appeal filed before this Authority to include the following;

- i. That, the Appellant did not disclose the commercial case they had with the Respondent, thus curtailed the Evaluation Committee powers to consider this criterion in the evaluation process.
- ii. That, the Appellant did not attach a Bank Statement in their tender, therefore it was impossible for the Respondent to ascertain the financial capability of the Appellant for execution of the contract.

However, in the Tender Board meetings held on 13th and 14th December, 2013, three other reasons were discussed and formed the basis for Appellant's disqualification to include;

- i. That, the Appellant delayed to supply Sulphur 99% Dust for 2012/2013 season.

- ii. That, some of the Sulphur bags supplied by the Appellant in the said seasons were below the required weight of 25kg.
- iii. That, the Appellant failed to deliver 693 tonnes of Sulphur 99% Dust for the season 2012/2013 season while they were fully paid for.

The Authority revisited, Regulation 97(14) (d) of GN.NO.97 of 2005 which requires Accounting Officers to avail reasons for tenderer's disqualification as deliberated and contained in minutes of the Tender Board and observed that the Respondent's reasons to the Appellant were generic and some were not in conformity with what was deliberated by the Tender Board. The Authority observed for instance that, the Tender Document did not contain any criterion which required tenderers to show history of their past performed contracts which would have connection with some of the Respondent's reasons.

The Authority is of the settled view that, since the law under Regulations 90 (4) and (15) of GN.NO.97 of 2004 categorically provide that the basis for tenders responsiveness is the criteria set forth in the Tender Document, some of the reasons

advanced by the Respondent like, the Appellant's delay to supply Sulphur 99% Dust for 2012/2013 seasons, under bagging of some of the Sulphur bags supplied by the Appellant and their failure to deliver 693 tones of Sulphur 99% Dust; all for the 2012/2013 season while they were fully paid were alien to the Tender Document .

For purposes of clarity, the Authority reproduces the said provisions as hereunder;

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 using criteria explicitly stated in the tender documents."**

Reg.90 (15) **"the procuring entity's determination of a tender's responsiveness shall be based on the contents of the tender itself without recourse to extrinsic evidence."**

In view of the above findings, the Authority's conclusion with regard to the first issue is that the tender process was not conducted in compliance with the law in some respects.

However, the Authority hastens to observe that, the non compliance found in this Appeal does not affect the legality of the award to the successful tenderer.

2. Whether the disqualification of the Appellant's tender was justified.

In resolving this issue, the Authority took cognizance of its findings in the first issue and also considered the reasons availed to the Appellant for their disqualification and observed the following;

That, since, the Respondent waived the litigation criterion for all tenderers during the evaluation, the use of the same to disqualify the Appellant was not proper.

That, since some of the reasons given to the Appellant were not in conformity with what was contained in the Evaluation Report and what the law requires, the same could not justify the Appellant's disqualification.

That, since the Appellant did not submit evidence of liquid asset/cash at the bank set aside for the contract; and since the said criterion was contained in the Evaluation Report and

Tender Board's deliberation, their disqualification based on this criterion was justified.

That, even if the Appellant's tender was substantially responsive, the tenderer would not have qualified for award since their tender was not the lowest evaluated pursuant to Clause 36 of the ITB.

Accordingly, the Authority's conclusion with regard to the second issue is that, the Appellant's disqualification was justified.

3. To what reliefs, if any, are parties entitled to?

Having resolved the contentious issues, the Authority revisited the Appellant's prayers as hereunder:

- With regard to the prayer for the Authority to review the entire tender process carried by the Respondent and establishes whether or not the process was legally justifiable, the Authority observes that, the tender process for the tender was not conducted in compliance with the law in some respects. However, the non compliance found

in this Appeal does not affect the legality of the award to the successful tenderer.

- With regard to the prayer for suspension of the ongoing restricted tendering process by the Respondent for the remaining 3000 tones of Sulphur 99% Dust, the Authority cannot grant such prayer for lack of jurisdiction.
- With regard to the prayer for compensation of costs incurred for the Appeal and purchase of the Tender Document to the tune of Tshs. 920,000/-, the Authority observes that the Appellant does not deserve the said amount since the Appeal has no merits.

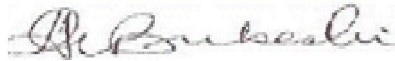
The Authority also considered the Respondent's prayer that, the Appeal be dismissed with costs for lack of merits. The Authority agrees with the Respondent and hereby dismisses the Appeal as the submissions made by the Appellant have no merits.

With regard to the prayer for costs, the Authority cannot grant the same since the Act does not confer powers to the Authority to award costs to the procuring entities.

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 101 of the PPA/2011 explained to parties.



Decision delivered in the presence of the Appellant and in the Respondent this 18th February, 2014.



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

CHAIRPERSON

MEMBERS:

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