

**IN THE  
PUBLIC PROCUREMENT APPEALS AUTHORITY  
AT DAR ES SALAAM  
CONSOLIDATED APPEAL CASES NO. 37 AND 40 OF 2013-14  
BETWEEN  
M/S WEB FONTAINE  
GROUP FZ-LLC..... 1<sup>ST</sup> APPELLANT  
AND  
JOINT VENTURE OF INTERTEK  
INTERNATIONAL LIMITED AND WIA COMPANY  
LIMITED.....2<sup>ND</sup> APPELLANT  
VERSUS  
TANZANIA PORTS AUTHORITY.....RESPONDENT**

**DECISION**

**CORAM**

- |                                      |              |
|--------------------------------------|--------------|
| 1. Hon. Augusta G. Bubeshi, J. (rtd) | -Chairperson |
| 2. Ms. Esther J. Manyesha            | -Member      |
| 3. Mr. Haruni S.Madoffe              | -Member      |
| 4. Mrs. Rosemary A. Lulabuka         | -Member      |

5. Mrs. Toni S. Mbilinyi -Ag. Secretary

## **SECRETARIAT**

1. Mr. Hamisi O. Tika - Legal Officer

2. Ms. Violet S. Limilabo -Legal Officer

## **FOR THE 1<sup>ST</sup> APPELLANT**

1. Mr. Satish Upadhyay - Representative

2. Mr. Michael Chahe - Attorney

3. Mr. **Inuocavith** Kweka - Legal Officer

## **FOR THE 2<sup>ND</sup> APPELLANT**

1. Mr. Thomas Nsimbillah - Head of Operations

2. Mr. Odhiambo Kobas - Advocate- Crest Attorney

## **FOR THE OBSERVER**

1. Mr. Salim Abbas Khatri -Managing Director. ERP

Software Tech.

## **FOR THE RESPONDENT**

1. Mr. Alex Seneu - Legal Officer
2. Mr. Plasduce Mbossa - Legal Officer
3. Mr. Erik Mlambo - Legal Officer

This decision was scheduled for delivery today 13<sup>th</sup> June, 2014, and we proceed to deliver it.

The appeal at hand was lodged by M/s **WEB FONTAINE GROUP FZ-LLC** and the **JOINT VENTURE** of M/s **INTERTEK INTERNATIONAL LIMITED** and **WIA COMPANY LTD** (hereinafter referred to as "**the Appellants**") against the **TANZANIA PORTS AUTHORITY** commonly known by its acronym **TPA** (hereinafter referred to as "**the Respondent**").

The Appeal is in respect of Tender No. AE/016/2013-14/CTB/G/51 for Supply, Installation, Training and Commissioning of Electronic Single Window System (eSWS) (hereinafter referred to as "**the tender**").

According to the documents submitted to the Public Procurement Appeals Authority (hereinafter referred to as "**the Authority**"), the facts of the Appeal may be summarized as follows:

The Appellants were among the nine (9) tenderers who had submitted their tenders in response to an invitation made by the Respondent through the International Competitive Bidding Procedures provided in 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”).** The invitation to tender was vide the Daily News Paper dated 21<sup>st</sup> October, 2013.

A total of nine (9) tenders were received by 5<sup>th</sup> December, 2013 and their respective read out prices at the tender opening ceremony were as follows;

<b>S/N</b>	<b>Tenderer's Name</b>	<b>Quoted price in USD</b>	<b>Quoted price in Euros</b>
1.	M/s Web Fontaine	5,219,424.90 (VAT Exclusive)	
2.	M/s Phaeros group BVBA		5,041,533.00 (VAT Exclusive)
3.	M/s Soget - TechnoBrain	11,090,863.08 (VAT Inclusive)	
4.	M/s Inovation Strategies	4,748,000.00 (VAT Exclusive)	
5.	M/s Imatic	12,506,796.00	

	Technologies Ltd	(VAT Inclusive)	
6.	M/s Biz - Logic	1, 181,240.00 (VAT Inclusive)	
7.	M/s SGS	18,991,000.00 (VAT Exclusive)	
8.	M/s Intertek	8,900,000.00 (VAT Exclusive)	
9.	M/s PWC Technologies for Computers	9,990,000.00 (VAT Exclusive)	

The tenders were then subjected to evaluation which was conducted in three (3) stages namely; preliminary, technical and financial evaluation.

At the preliminary stage, eligibility of tenderers was verified. As a result three tenderers namely; the Joint Venture of Innovation Strategies, Infoport Valencia S.A, KPMG Limited & ERP Software Technologies PLC, M/S Biz – Logic and M/s PWC Technologies

Computers were disqualified for being non responsive to the Tender requirements.

During the technical evaluation, all the six tenders were found to be substantially responsive by scoring above the minimum scores set. The total score marks for technical requirements were 80 points and the pass mark was at least 50 out of 80 points. That was met by all the six tenderers, hence qualified to proceed to the financial evaluation stage.

Financial evaluation was done, by making corrections of arithmetic errors from each tenderer's quoted price before combining the technical and financial scores. The total scores set for the financial aspect was 20 points and it was fully given to the lowest quoted bid while scores for other bids were calculated accordingly. The bidders' scores were combined and ranked in accordance with the highest scored marks as follows;

<b>S/N</b>	<b>Tenderer's Name</b>	<b>Technical Scores</b>	<b>Financial Scores</b>	<b>Total Scores</b>	<b>Ranking</b>
1.	M/s Web Fontaine	69.38	20.00	89.38	<b>2<sup>nd</sup></b>
2.	M/s Phaeros group BVBA	76.02	14.72	90.73 (sic)	<b>1<sup>st</sup></b>
3.	M/s Soget TechnoBrain	70.07	10.58	80.65	<b>4<sup>th</sup></b>
4.	M/S Imatic Technologies Ltd	55.17	10.18	65.35	<b>6<sup>th</sup></b>
5.	M/S SGS	69.75	5.50	75.25	<b>5<sup>th</sup></b>
6.	M/S Intertek	72.20	11.73	83.93	<b>3<sup>rd</sup></b>

Having ranked the tenderers as above, the Evaluation Committee recommended M/s Phaeros group BVBA who was ranked the first for award of the tender.

On 27<sup>th</sup> December, 2013 the Respondent's Tender Board approved the Evaluation Committee's recommendation, and awarded the tender to M/s Phaeros Group BVBA at a contract price of Euro 5,041,533 exclusive of VAT.

On 23<sup>rd</sup> January, 2014 vide a letter referenced PMU/2013 - 14/G51, M/s Phaeros Group BVBA was notified of the award of the tender by the Respondent.

Aggrieved by non notification of tender results by the Respondent, one tenderer namely the Joint Venture of Innovation Strategies (**et al**) appealed to the Authority through Appeal Case No. 31 of 2013/14. The Appeal was heard on the 16<sup>th</sup> and decision was given on the 17<sup>th</sup> day of April, 2014.

It is through Appeal Case No. 31 of 2013/14 that the Appellants in this case came to know that the tender process in respect of the tender was finalised and that the tender was awarded to M/s Phaeros Group BVB. Specifically the 1<sup>st</sup> Appellant knew of that fact on 26<sup>th</sup> April, 2014, while the 2<sup>nd</sup> Appellant knew about it on the 16<sup>th</sup> April, 2014 when Appeal Case No. 31 of 2013/14 came for hearing.

The Appellants, being aggrieved by the award of the tender and not being notified of the same, appealed to the Public Procurement Appeals Authority (hereinafter referred to as "**the Authority**") on 7<sup>th</sup> May, 2014 and 29 April, 2014 respectively on a number of grounds.

### **SUBMISSIONS BY THE 1<sup>ST</sup> APPELLANT**

The 1<sup>st</sup> Appellant's arguments as deduced from documents availed to this Authority, as well as oral submissions and responses to questions raised by Members of the Authority during the hearing, may be summarized as follows;

That, the Respondent contravened Regulation 17 (3) of GN. 97 of 2005, which requires a procuring entity to give notice of their decisions to award a tender to all tenderers without discrimination. That, the Respondent discriminated them, since to date, they have not been given the notice to that effect.

That, the Respondent did not comply with Section 65 of the Public Procurement Act No. 21 of 2004 (hereinafter referred to as "**the Act**" ) that requires a procuring entity to clearly specify the basis for tender evaluation and selection of the lowest evaluated tender.

That, the Respondent has contravened Regulation 90(4) of GN 97/2005 by giving a weight of 20% on the financial requirement. Thus, the Respondent's act amounted to "changing the goal post" as it were in selecting the lowest evaluated bid in the tender process.

That, since the tender evaluation process does not depend on usage, rather on the criteria provided in the Tender Document, the Respondent ought not to have applied the score weight to determine the successful tenderer.

That, during a pre-bid meeting between the Respondent and the tenderers, they sought for clarification on the criteria to be used for evaluation; and the Respondent assured all tenderers that the criteria that will be used for evaluation are those provided for under Clause 21 of the BDS. To their surprise, the Respondent did not apply the same.

That, the telephone communication purported to have been used by the Respondent was not in the form required under Regulation 17(1) of GN.NO.97 of 2005, and that they do not have proof to substantiate that they communicated with them.

That, usually, the Respondent communicated with the Appellant through the e-mail addresses availed to them during tendering. They wondered as to why they did not use the said e-mails to communicate to them on the outcome of the tender.

That, the Respondent's introduction of the new criteria connotes bad faith, to wit, corruption on their part.

That, since they scored full 20% marks for financial scores; the Appellant ought to have been declared the successful tenderer in terms of ITB Clauses 35(1) and 37 read together with Regulation 90(18) of GN.NO.97 of 2005, as their price was the lowest evaluated by the Respondent.

On the basis of the foregoing, the Appellant's prayers before the Authority are as follows;

- a. The Authority to annul the Respondent's decision to award the tender.
- b. To order the Respondent to cancel the contract with Phaeros Group BVB.

- c. To order the Respondent to restart the tender process and to evaluate the tenders basing on the criteria stated in the bidding document.
- d. To be compensated the amount of USD 1,910, 856.00 as per the following breakdown;
  - i. Compensation USD. 1,904,856.00 being 25% of their contract price.
  - ii. USD. 6,000/- being compensation of the loss of the potential increase in company's reputation that would have occurred had they been awarded the tender.

### **SUBMISSIONS BY THE 2<sup>ND</sup> APPELLANT**

The 2<sup>nd</sup> Appellant's arguments as deduced from documents availed to this Authority, as well as oral submissions and responses to questions raised by Members of the Authority during the hearing, may be summarized as follows;

That, to date, the Respondent has not informed them of the results of the tender. The Respondent's act curtailed their right to inquire on the reasons for their disqualification.

That, the successful tenderer was not compliant in a number of arrears (**sic**).

That, they have been discriminated by the Respondent for not being given the notification of award of the tender and were also not given the notification of Appeal Case No. 31 of 2013/14 lodged before the Authority.

That, they were not informed of the reasons as to why they lost the tender; and why the successful bidder was awarded the same.

Therefore, the Appellant's prayers before the Authority are as follows;

- a. A review of the tender award and evaluation procedures.
- b. Suspension of the implementation of the contract awarded.
- c. Payment of damages and costs to the tune of USD 50,000.  
Without breakdown and Advocates fees amounting to USD.  
7,080.00

d. Any other costs or relief(s) the Authority may deem proper to award.

## **RESPONDENT'S REPLIES TO THE 1<sup>ST</sup> APPELLANT**

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

That, they complied with the requirements of Regulation 17 (3) of GN. 97/2005 and that no tenderer was discriminated by them.

That, on 10<sup>th</sup> February, 2014, the Respondent called the 1<sup>st</sup> Appellant through their phone No. +971 444 953 372 to go to the Respondent's office and collect their bid securities. Therefore, they performed their duty imposed by the law and the Appellant was aware of the tender results.

That, the criteria of 80 % and 20% for technical and financial scores respectively, was applied accordingly due to the sensitivity of the project and relative materiality of the technical aspects of the projects vis-à-vis the financial requirements of the project. Furthermore, according to Regulation 90 of GN 97, the successful tenderer was the lowest evaluated tenderer.

That, the basis for the tender evaluation of the tender was in conformity with Section 67 (1) of the Act; and that the Appellant's price being the lowest quoted does not mean the same thing as the lowest evaluated tender.

That, the evaluation of the tender did not consider the terms provided in Tender No. AE/016/2011 – 12/CTB/G/34 (which was cancelled prior to this tender) as pointed out by the Appellant.

### **RESPONDENT'S REPLIES TO THE 2<sup>ND</sup> APPELLANT**

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

That, the 2<sup>nd</sup> Appellant failed to cite the law which has been contravened by the Respondent. Furthermore, on 10<sup>th</sup> February, 2014, all unsuccessful tenderers were called to collect their bid securities through telephone numbers provided in their tender documents whereby the 2<sup>nd</sup> Appellant was called through No. +200005321500.

That, the 2<sup>nd</sup> Appellant failed to state on which areas the successful bidder did not comply with the law and how they become aware of the same while they were not privy to the evaluation process. Thus, this ground is merely speculative with no legal basis. In the alternative, it entails that they had access to the information of tender evaluation contrary to the law.

That, notification of the award of the tender was given to all tenderers who responded to the phone calls which invited them to collect their bid security. Moreover, the Act does not provide the mode in which the notification of award should be communicated to other bidders.

That, the contract between the successful bidder and the Respondent was signed on 4<sup>th</sup> February, 2014 while the 2<sup>nd</sup> Appellant lodged their Notice of Intention to Appeal on 17<sup>th</sup> April, 2014.

That, the Respondent is not duty bound to disclose the Tenderers for the reasons of their non responsiveness unless requested to do so.

Finally the Respondent prayed for dismissal of the appeals for lack of merits.

### **ANALYSIS BY THE AUTHORITY**

Having gone through the documents submitted and having heard the oral submissions from parties, the Authority is of the view that, this Appeal is centred on the following issues;

**1. Whether there was proper communication of the tender results to the unsuccessful tenderers.**

**2. Whether disqualification of the Appellants was justified.**

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

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

Having framed the above issues, the Authority proceeded to resolve them as follows;

**1. Whether there was proper communication of the tender results to the unsuccessful tenderers.**

In resolving this issue, the Authority revisited Regulation 97(11) of GN.NO.97 of 2005 and observed that, the law requires the procuring entities to notify all unsuccessful tenderers of the results of the tender upon entry into force of a procurement contract. Regulation 17 (1) of GN.NO 97 requires that the communication between tenderers and the procuring entities should be in a form that provides for a record of the content of the same. For purposes of clarity the Authority reproduces the said provisions as hereunder;

**Reg. 17(1)** subject to provisions of these regulations communication between suppliers, contractors, service providers or buyers and the procuring entity **shall be in a form that provides a record of the content of the communication”.**

**Reg.97 (11)** upon entry into force of the procurement or disposal contract and, if required , the provision by the supplier, service provider, contractor or asset buyer of a security for the performance of the contract, **notice of the procurement or disposal contract shall be given to other supplier, service provider, contractor or asset buyer, specifying the name and the address of the supplier, service provider, contractor or asset buyer that has entered into the contract and the contract price".**  
(Emphasis Added).

The Authority examined the availed documents and observed that, the Respondent did not communicate the tender outcome pursuant to the above requirements. Rather, they contended to have communicated the result of the tender to all tenderers through their availed telephone numbers. The Authority revisited the Appellants' tender document and observed that, the telephone numbers the Respondent contended to have used to communicate with the Appellants were not similar to the numbers contained in their tenders. For example, while the Respondent used telephone number +200005321500 to communicate with

the 1<sup>st</sup> Appellant, the telephone number contained in the 1<sup>st</sup> Appellant's bid document was +41796417920 and +41792639513 respectively.

When asked by the Members of the Authority to explain on such a fundamental anomaly, the Respondent adamantly insisted to have communicated with the Appellants using the telephone numbers they had. However, they conceded to have not complied with the requirements of the law cited above.

The importance of timely communication of tender outcome as dictated by the law is quite obvious. It underlines the tenderer's right of information relevant to their bid. Furthermore, it gives them the basis to complain or appeal. Without such information, they would have no basis to seek redress if aggrieved.

In view of the above and the Respondent's own concession to have not complied with the law, the Authority is of the settled view that, the Respondent did not comply with the law.

Accordingly, the Authority's conclusion with regard to the first issue is that there was no proper communication of the tender results to the unsuccessful tenderers.

## **2. Whether disqualification of the Appellants was justified.**

In resolving this issue, the Authority revisited the Evaluation Report, the Tender Document vis –a- vis the applicable law. In the course of doing so, the Authority noted that, the tender process had to undergo amongst other stages, three main stages of evaluation namely; preliminary, detailed and post qualification as provided for under Clauses 29, 30 and 36 of the Instructions To Bidders (hereinafter referred to as "**the ITB**").

The Authority observed that, at the preliminary evaluation stage, eligibility of tenderer's and general responsiveness was determined, while at the detailed evaluation stage, tenders were tested as to whether they met the technical specifications provided for in the Tender Document, before determination of the lowest evaluated tender. The Tender Document provided further that, the proposed successful tenderer's tender was to be subjected to post qualification. For purposes of clarity, the Authority reproduces the said provisions as hereunder;

**Clause 29.1** Prior to the detailed evaluation of bids, the PE will determine whether each bid

- a) Meets the eligibility criteria defined in ITB Clauses 3 and 4;
- b) Has been properly signed;
- c) Is accompanied by the required securities ; and
- d) Is substantially responsive to the requirements of the bidding documents

**The PE's determination of the bid's responsiveness will be based on the contents of the bid itself."**

**Clause 30.1.** "The PE will carry out a detailed evaluation of the bids previously determined to be substantially responsive in order to determine whether the technical aspects are **in accordance with requirements set forth in the bidding documents. In order to reach such a determination, the PE will examine and compare the technical aspects of the bids on the basis of the information supplied by the bidders,** taking into account the following factors:

- a)** Overall completeness and compliance with the Technical Requirements; deviations from the

Technical Requirements as identified in Attachment 6 to the bid and those deviations not so identified; suitability of the system offered in relation to the environmental and climatic conditions prevailing at the site; and quality, function and operation of any process control concept included in the bid. **The bid that does not meet minimum acceptable standards of completeness, consistency and detail will be rejected for non responsiveness.**

**b)** The detailed bid evaluation using the same standards for compliance determination as listed in ITB Clauses 29.4 and 29.5 confirms that the bids are commercially responsive, and **include the hard ware, software, related equipment, products, Materials , and other goods and services components of the information system in substantially the full required quantities for the entire Information System.**

The Authority observed that, during the preliminary evaluation, the Evaluation Committee observed the evaluation criteria provided for in the Tender Document. However, during the detailed evaluation, the Evaluation Committee did not use the evaluation criteria provided for under part VI of the Tender Document to determine tenderer's responsiveness as required. Rather, they invented criteria not stipulated in the Tender Document which they called strengths and weaknesses as determining factors, before awarding scores to each tender, which was 80% and 20% for technical and financial proposals respectively. The Authority revisited the Tender Document and observed that, this criterion was clearly not stated in the Tender Document and was alien thereto. When asked by the Members of the Authority, to show where in the Tender Document such criteria was to be found, the Respondent could not do so. Rather, they conceded that, they had intended to provide the said criteria in the re-tendering process because of the relative materiality of the technical requirements to the financial ones but inadvertently failed to do so.

The Authority is of the considered view that, the Respondent act was contrary to Section 65(1) and (2) of the Act and Regulation

14 (5) and 90 (4) of GN No.97 of 2005”) which provide as follows;

S.65 (1) “The basis for tender evaluation and selection of the lowest evaluated tender **shall be clearly specified in the instructions to tenderers or in the specifications to the required goods or works.**

(2) The Tender Document **shall specify any factor**, in addition to the price, **which may be taken into account in evaluating a tender** and how such factors may be quantified or otherwise evaluated.” (Emphasis Added).

Reg. 14(5) “The procuring entity shall evaluate the qualification of suppliers, contractors, service providers or buyers in accordance with the qualification criteria **and the procedures set forth in the pre-qualification documents**, if any, **and in the solicitation documents or other documents for solicitation of proposals , offers or quotations”**

Furthermore Regulation 90(4) of GN.NO.97 of 2005 provides that;

**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).

The Authority further revisited the Evaluation Report and observed that, while Clause 35 of the ITB and Clause 25 of the BDS required the Respondent to do post qualification to the tender by the successful tenderer, they did not comply with such a mandatory requirement and proceeded to award the tender as they deemed fit.

The provisions read as follows;

**Clause 35.** "if specified in the BDS Post qualification **shall be** undertaken".

**Clause 25, BDS** "Post qualification **will be** undertaken".

In view of the above findings, the Authority is of the considered view that, it was not proper for the Respondent to award or disqualify the tenders based on the terms which were not provided for in the Tender Document.

Accordingly, the Authority's conclusion with regard to the second issue is that, the Appellants' disqualifications were not proper at law.

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

In resolving this issue, the Authority took cognizance of its findings on the second issue above and observed that since the tender evaluation was not conducted in accordance with the law, the Authority hastens to conclude that the subsequent award of the tender to the purported successful tenderer was not proper at law.

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

Having resolved the issues in dispute, the Authority considered the prayers by the parties.

To start with, the Authority considered the prayers by the Appellants cited above and observed that, since the contract between the Respondent and the “successful tenderer” was for seven months, and since over 60 per cent of the contract according to the Respondent has been executed, it will be irrational for the Authority to nullify the award of the tender as prayed by the Appellants. However, taking into consideration that the Appeals have merit and that the tenderer on site is a winner by default, the Authority accepts the Appellants’ prayers for costs and hereby grants the Appellants as follows;

1<sup>st</sup> Appellant Tshs. 20,000,000/-

2<sup>nd</sup> Appellant Tshs. 20,000,000/-

With regard to the prayers by the Respondent that, the Appeal be dismissed for lack of merits, the Authority does not agree with them as the Appeals clearly have merits.

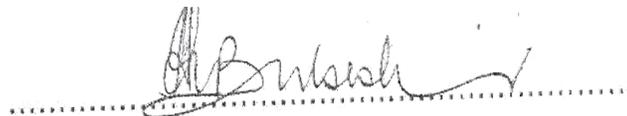
Last but not least, it is the ardent wish of the Authority that, the Respondent’s Accounting Officer shall take administrative action

to safeguard its integrity, the tenderers' interests in particular and that of the public in general.

On the basis of the aforesaid findings, the Authority upholds the Appeals and orders the Respondent to pay the Appellants a sum of Tshs. 40,000,000/- in total.

Right of Judicial Review as per Section 101 of the PPA/2011 explained to parties.

Decision delivered in the presence of the Appellants and the Respondent this 13<sup>th</sup> June, 2014.



JUDGE (rtd) A. BUBESHI

**CHAIRPERSON**

**MEMBERS:**

1. MS. E. J.MANYESHA 
2. MR. H.S.MADOFFE 
3. MRS. R.A LULABUKA 