

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

APPEAL CASE NO. 44 OF 2013-14

BETWEEN

**M/S CONFERENCE AND EXHIBITION
SERVICES.....APPELLANT**

AND

**CONTRACTORS REGISTRATION
BOARD.....RESPONDENT**

DECISION

CORAM:

- | | |
|--------------------------------------|----------------|
| 1. Hon. Augusta G. Bubeshi, J. (rtd) | -Chairperson |
| 2. Ms. Esther J. Manyesha | - Member |
| 3. Mr. H. S. Madoffe | -Member |
| 4. Eng. Francis T. Marmo | -Member |
| 5. Mr. Ole-Mbille Kissioki | - Ag.Secretary |

SECRETARIAT

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

FOR THE APPELLANT:

Eng. Abdul Awadh -Partner- Conference and
Exhibition Services

FOR THE RESPONDENT:

Mr. Saddy Kambona - Legal Officer -CRB

This Decision was scheduled for delivery today 27th of June, 2014, and we proceed to deliver it.

The appeal at hand was lodged by **M/s CONFERENCE AND EXHIBITION SERVICES** (hereinafter referred to as "**the Appellant**") against the **CONTRACTORS REGISTRATION BOARD** commonly known by its acronym **CRB** (hereinafter referred to as "**the Respondent**")

The said Appeal is in respect of Tender No. PA/064/2014/c/08 for Undertaking Marketing Services for the Exhibitions (hereinafter referred to as "**the tender**").

According to the documents submitted to the Public Procurement Appeals Authority (hereinafter referred to as "**the Appeals Authority**"), as well as oral submissions by the parties during the hearing, the facts of the Appeal may be summarized as follows:

On 13th March 2014, the Respondent invited three tenderers to submit their quotations for the tender under appeal.

The deadline for submission of quotations was 21st March, 2014, whereby two quotations were received from the following tenderers:

S/No.	Tenderer's Name	Quoted Percent (%)
1.	M/S Billy Benny Logistics (T) Ltd	29.9
2.	M/S Conference and Exhibitions Services	25

The tenders were subjected to one stage of evaluation namely preliminary evaluation. At this stage tenders were evaluated on the methodology, Registration status and anticipated number of exhibitors.

However, during that process of evaluation the Evaluation Committee noted there were no adequate criteria to evaluate the tender. Example; firm experience,

benchmark on percentage to be paid to the bidder and anticipated number of exhibitors.

Due to such anomalies the Evaluation Committee adopted the following evaluation criteria, namely;

- Proposal on methodology
- Registration status of the Company
- Projection/anticipation on number of exhibitors by Marketer.

After completion of the evaluation process the Evaluation Committee recommended award of the tender to M/S Billy Benny Logistics (T) Ltd at a commission of 29.9 % of the expected net profit.

The Tender Board on its meeting held on 2nd April, 2014, approved the Evaluation Committee recommendations and awarded the tender to M/S Billy Benny Logistics (T) Ltd.

On 14th April, 2014, a negotiation meeting was conducted and it was agreed that the commission price be reduced from 29.9% to 25%.

On 14th May, 2014, the Respondent vide a letter referenced CRB/P.20/8/84 notified the Appellant that their proposal was unsuccessful and that the tender had been awarded to M/S Billy Benny Logistics (T) Ltd at 25%

Being aggrieved by award of the tender, on 27th May, 2014, the Appellant lodged their Appeal before the Appeals Authority.

SUBMISSIONS BY THE APPELLANT

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

That, the Respondent did not issue a notice of intention to award the tender, contrary to Section 60(3) of the Public Procurement Act, No. 7/2011 (hereinafter referred to as "**the Act**").

That, they became surprised after receiving a notification letter which included two other new criteria namely; registration status of the Company and Projection/anticipation on number of exhibitors by the marketer which were not part of the solicitation document.

That, the Respondent negotiated with the successful tenderer to reduce price from 29.9 % to 25% contrary to Section 76 (2) (c) of the Act.

Finally the Appellant prayed for the following orders:

- i. The Appeals Authority to condemn the Respondent for not adhering to the Act when undertaking procurements especially transparency and fairness
- ii. Compensation to cover the following expenses in Tshs;
 - Appeal filling fees Ths. 120,000.00

- Time input two person days at Tshs. 500,000 = 1,000,000.00
- Costs for transport and communication Tshs. 100,000.00

iii. Any other relief this Appeals Authority deems fit to grant.

REPLIES BY THE RESPONDENT

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

It should be noted that during the hearing the Respondent adopted what they had stated in the reply Statement submitted before the Appeals Authority.

That, the evaluation criteria were known to tenderers and if not then the Appellant were supposed to complain to the Accounting Officer at the earliest stage of the tender process. Further that the said criteria were mainly three,

namely; proposal on methodology, registration status and anticipated number of exhibitors and the same were used in evaluating the tenders.

That, they did not negotiate on price as alleged by the Appellant, rather the whole service was obtained on commission basis which means payment on the basis of percentage of the sale made by an employee or agent contrary to the price which is the consideration usually in terms of money given for the purchase of goods or services.

With regard to the notice of intention to award the tender, the Respondent conceded not to comply with the law, because it is the new law and they need expertise in the whole area of public procurement.

Finally that the Appellant did not deserve the cost prayed before the Appeals Authority since they had not proven how they had incurred those costs.

ANALYSIS BY THE AUTHORITY

Having gone through the documents submitted and having heard the oral submissions from parties, the Appeals Authority framed the following issues;

- 1.0 Whether the Request for Quotations contained adequate criteria for evaluation as required by the law,**
- 2.0 Whether 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 identified the issues in dispute, the Authority proceeded to resolve them as hereunder;

1.0 Whether the Request for Quotation contained adequate criteria for evaluation as required by the law.

In resolving this issue the Authority considered the Appellant's argument during the hearing that, the Request for Quotation contained only two evaluation criteria namely; methodology and the rate of commission required. However, they were surprised to learn about the two other criteria namely; registration status of the Company and Projection/anticipation on number of exhibitors by the marketer after receiving the letter notifying them about the tender results. Thus they are complaining on the additional criteria in the evaluation of their tender.

In reply thereof the Respondent argued that, the evaluation criteria were known to bidders and if not the Appellant could have submitted those complaints to the Accounting Officer at the earliest stage as required by Section 96 of the Act before submitting them to this Authority.

To ascertain the validity of parties' arguments the Authority revisited the Request for Quotation and the letter notifying the Appellant about the tender results. In the course of doing so the Authority noted that those two documents contained paragraphs which were the purported criteria for evaluation. The said paragraphs read as follows:

"The bidder is requested to submit a proposal on the brief **methodology to undertake the assignment** and to quote **a percentage of net profit** she/he would like to be paid".(Emphasis added")

"The evaluation criteria were proposal on methodology, **registration status of the Company and Projection/anticipation on number of exhibitors by the marketer** and cost to be paid to bidder. Your score against those criteria was 33/40. The score of the winning tender obtained was 36/40".

The Authority revisited the Appellant's quotation and noted that they had shown the methodology they would use in mobilizing the exhibitors and also they had quoted a commission of 25 % to be paid to them.

In view of the above findings, the Authority agrees with the Appellant that the Request for Quotation contained only two criteria as mentioned above. The other two that is registration status of the Company and Projection/anticipation on the number of exhibitors by the marketer were new criteria which were stated for the first time to the Appellant at the time of notifying them about the tender results. Thus the Appellant could not have complained about them to the Accounting officer as contended by the Respondent, since those criteria came to their knowledge after entry into force of the procurement contract.

Their complaint on those new criteria had complied with the requirement of Section 97 (3) of the Act. The said provision of the law is reproduced herein under;

Sec. 97 (3) "A tenderer may submit a complaint or dispute directly to the Appeals Authority if the

complaint or dispute cannot be entertained under section 96 **because of entry into force of the procurement or disposal of contract, and provided that the complaint or dispute is submitted within fourteen days from the date when the tenderer submitting it became aware of the circumstances giving rise to the complaint or dispute or the time when that tenderer should have become aware of those circumstances**".

Therefore, the Respondent failed to adhere to the requirement of the Request for Quotation and they had not complied with the requirement of the law by using alien criteria which were not stated in the solicitation document contrary to Section 72 (1) (2) of the Act, which requires the basis for evaluation to be specifically stated in the tender document and the same to be quantifiable. The said Section 72 is reproduced herein under:

Sec. 72 (1) **"The basis for tender evaluation and selection of the successful tenderer**

shall be clearly specified in the tender document.

(2) The tender document shall specify factors, in addition to price, which may be taken into account in evaluating a tender and how such factors may be quantified or otherwise evaluated".

The Authority further observed that the Quotation Document issued by the Respondent was not in compliance with the standard document for Invitation for Quotation for Non- Consultant Services issued by the Public Procurement Regulatory Authority (hereinafter referred to as "**the Authority**") in June, 2008. Failure by them to use the appropriate tender document contravened Regulation 184 (3) (4) of the Public Procurement Regulations GN. No. 446 of 2013 (hereinafter referred to as GN. No.446/2013. The said provisions provides as follows:

Reg. 184 (3) "A procuring entity shall use the appropriate standard tender documents

issued by the Authority to address issues of a project in accordance with guidelines issued by the Authority.

(4) Any changes to the standard tender documents shall be introduced only through tender data sheets or through special conditions of contract”.

The Request for Quotation issued by the Respondent neither contained the Bid Data Sheet nor the Special Conditions of Contract where they could have inserted some amendments to suit their specific needs.

Accordingly; the Authority’s conclusion with regard to the first issue is that, the Request for Quotations did not contain adequate criteria for evaluation as required by the law.

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

In resolving this issue the Authority considered the Appellant’s contention during the hearing that, they had

quoted 25% as commission for their quotation. However, they were not considered for award. Instead the tender was awarded to M/S Billy Benny Logistics (T) Ltd who had quoted a higher rate than themselves of 29.9% as commission.

In order to ascertain the validity of the Appellant's argument, the Authority revisited the quotation submitted by the successful tenderer; M/S Billy Benny Logistics (T) Ltd, and observed that, they had quoted 29.9 % as a commission.

The Appeals Authority further revisited the Evaluation Report and the Minutes of the Tender Board and noted that, the successful tenderer was recommended for award and the same was approved by the Tender Board to be awarded the tender at 29.9% as commission. However, the percentage was reduced from 29.9% to 25% commission following the Accounting Officer's directive to negotiate in order to reduce the costs.

Upon being asked by Members of the Authority on why they negotiated on the percentage having in mind that the Tender Board approved award at the rate of 29.9%.

The Respondent explained that they did not negotiate on the price rather on the commission to be paid to the tenderer and that price and commission were two different animals.

The Appeals Authority does not agree with the Respondent that price does not include commission, because the commission paid by the Respondent is the price for the tenderers services.

Having established that, the commission in question is actually the price in this tender. The Appeals Authority agrees with the Appellant that, the Respondent had acted unlawful to negotiate on the same which is contrary to Section 76 (2) (c) of the Act and Regulations 225 (2) (c) of GN. No.446. For purposes of clarity the said provisions is reproduced as follows;

Sec. 76 (2) "**Negotiations shall not be
conducted:**

**(c) primarily for the purpose of
reducing prices in case of**

procurement of goods, works or services”.

Further Regulation 225 (2) (c) is in *pari-matiria* with the above cited Section.

The Appeals Authority further took cognizance of its findings under the first issue that, the Respondent used alien criteria in evaluating the tender and applied those alien criteria to award the tender to the purported successful tenderer, contrary to Regulation 203 (1) of GN. No. 446/2013, the said Regulation reads as follows;

Reg. 203 (1) **“The tender evaluation shall be consistent with the terms and conditions prescribed in the tender documents and such evaluation shall be carried out using the criteria explicitly stated in the tender documents”.**

(Emphasis added)

From the above findings the Respondent had contravened the law by negotiating on the tender price and further by using alien criteria to evaluate and award the tender.

The Appeals Authority's conclusion in respect of the second issue is that, award of the tender to the successful tenderer was not proper at law.

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

First, the Appeals Authority cannot grant the Appellant's prayer to condemn the Respondent for two reasons; firstly, the Appeals Authority has no such powers. Secondly, even if the Appeals Authority had such powers, condemnation per se has no probative legal value.

The Appeals Authority hastens to observe that condemnation may have diplomatic or political value. However, the Authority is not into politics or diplomacy.

It is regrettable however, that such a reputable professional body would breach the law on such a fundamental and obvious requirement on the excuse of an oversight. It is expected that caution and reasonable

steps will be taken by the Respondent to ensure that such anomaly do not recur.

The Appeals Authority further grants the Appellant's prayer for compensation for costs incurred in pursuit of this Appeal amounting to Tshs.1,220,000/=(one million, two hundred and twenty thousand only) whose breakdown is as follows:

- Appeal filling fees - 120,000/=
- Time input 2 persons at 500,000/= per day = 1,000,000/=
- Costs for transport and communication - 100,000/=

The decision is binding upon the parties and the Appellant has the right to execute the same in terms of Section 97(8) of PPA, 2011.

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

This Decision is delivered in the presence of the Appellant and the Respondent this 27th June, 2014.

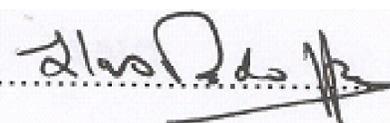

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JUDGE (rtd) A. BUBESHI

CHAIRPERSON

MEMBERS:

1. MS. E. J. MANYESHA.....

2. MR. H.S.MADOFFE 

3. ENG. F. MARMO 