

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

**APPEAL CASE NO. 65 OF 2010**

**BETWEEN**

**M/S ROCKTRONIC LTD.....APPELLANT**

**AND**

**MOSHI MUNICIPAL COUNCIL.....RESPONDENT**

**DECISION**

**CORAM:**

- |                                |               |
|--------------------------------|---------------|
| 1. Hon. A.G. Bubeshi, J. (rtd) | - Chairperson |
| 2. Hon. V.K. Mwambalasa (MP)   | - Member      |
| 3. Mr. K.M. Msita              | - Member      |
| 4. Mrs. N.S.N. Inyangete       | - Member      |
| 5. Ms B.G. Malambugi           | - Secretary   |

**SECRETARIAT:**

- |                       |                          |
|-----------------------|--------------------------|
| 1. Ms. E.V.A. Nyagawa | -Principal Legal Officer |
| 2. Ms. F. Mapunda     | - Legal Officer          |

**FOR THE APPELLANT:**

Mr. Bernard Kavishe – Director

**FOR THE RESPONDENT**

1. Mr. Neville D. Msaki – Ag. HODW & F
2. Ms. Slyvia P. Shayo – Municipal Solicitor
3. Mr. Alphonse P. Temba – Supplies Officer

This decision was scheduled for delivery today 30<sup>th</sup> March, 2010, and we proceed to deliver it.

The Appeal at hand was lodged by **M/s ROCKTRONIC LTD** (hereinafter to be referred to as "**the Appellant**") against **MOSHI MUNICIPAL COUNCIL** (hereinafter to be referred to as "**the Respondent**").

The said Appeal is in respect of Tender No.LGA/045/2009-10/MSH/GWND/01 for Periodic Maintenance of Airport, Khambaita Phase III and Mbeya Roads in Moshi Municipality (hereinafter to be referred to as "**the Tender**").

According to the documents submitted to the Authority as well as oral submissions by parties, the facts of the Appeal may be summarized as follows:

The Respondent invited tenders for Periodic Maintenance of Airport, Khambaita Phase III and Mbeya Roads in Moshi Municipality.

The tender opening took place on 8<sup>th</sup> December, 2009, whereby three tenderers submitted their tenders as follows:

<b>S/ No.</b>	<b>Name of a Tenderer</b>	<b>Price Quoted Tshs.</b>
1.	M/s Hari Singh & Sons Ltd	498,295,000/=
2.	M/s Befra Construction Co. Ltd	524,583,000/=
3.	M/s Rocktronic Ltd	460,174,500/=

The said tenders were evaluated and award approved to M/s Hari Singh & Sons Ltd at the quoted tender price of Tshs. 498,295,000/=.

Having seen the successful tenderer executing the works while they were not informed on the tender results, the Appellant sought for administrative review to the Accounting Officer *vide* letter referenced ROC/MMC/052/10 on 1<sup>st</sup> February, 2010. The said letter was copied to the Public Procurement Regulatory Authority (hereinafter to be referred to as "**PPRA**").

The Respondent communicated the tender results to the Appellant *vide* letter with reference number MMC/BZ/WK/2009/10/VOL1/105 dated **3<sup>rd</sup> January, 2010**. However, the said letter was posted on **12<sup>th</sup>**

**February, 2010** and received by the Appellant on **15<sup>th</sup> February, 2010**.

The Appellant's application for review was tabled before the Tender Board which deliberated the same on 5<sup>th</sup> February, 2010. The Board resolved that, the Appellant be informed that they were disqualified for failure to sign the priced Bill of Quantities (hereinafter to be referred to as "**BoQ**")

Having received a copy of the application for review, PPRA wrote to the Respondent a letter referenced PPRA/LGA/045/10 dated 9<sup>th</sup> February, 2010, urging them to observe the law in the following areas:

- (a) Once a procurement contract has entered into force the powers of the accounting officer to entertain a complaint are estopped and the complainant should be advised to lodge an appeal with the Public Procurement Appeals Authority (hereinafter to be referred to as "**the Authority**").

- (b) Upon entry into force of a procurement contract, the unsuccessful tenderers must be informed on the name and address of the successful tenderer as well as the contract price in accordance with Regulation 97(11) and (14) of GN. No. 97 of 2005.

They were therefore advised to inform M/s Rocktronic Ltd on the reasons for their disqualification.

On 15<sup>th</sup> February, 2010, the Appellant acknowledged receipt of the Respondent's letter communicating the tender results and insisted that the Respondent should implement PPRA's advise, by providing the Appellant with the name of the successful tenderer as well as the reasons for their disqualification. This letter was also copied to the PPRA.

On 16<sup>th</sup> February, 2010, the Respondent sent by fax a letter referenced MMC/R40/I.VOLXII/116 dated 15<sup>th</sup> February, 2010, responding to the Appellant's application

for review. However the said response neither disclosed the name and address of the successful tenderer nor the contract price as advised by PPRA.

On 22<sup>nd</sup> February, 2010, the Appellant wrote a letter referenced ROC/MMC/080/10 seeking for administrative review from PPRA.

PPRA replied on 24<sup>th</sup> February, 2010, vide letter referenced PPRA/LGA/045/15 advising the Appellant to submit their appeal to the Authority as the procurement contract had already entered into force.

On 25<sup>th</sup> February, 2010, the Appellant lodged an appeal with this Authority vide letter referenced ROC/MMC/086/10.

## **SUBMISSIONS BY THE APPELLANT**

The Appellant's documentary, oral submissions as well as responses from questions raised by the Members of the Authority during the hearing were as follows:

That, the Respondent did not heed to PPRA's directive contained in the letter referenced PPRA/LGA/045/10 dated 9<sup>th</sup> January, 2010.

That, they were dissatisfied with the decision of the Accounting Officer made on their application for administrative review.

That, the Respondent contravened Clause 37.2 of the Instructions To Tenderers (hereinafter to be referred to as "**ITT**") which required them to promptly communicate the rejection and not after the Appellant had queried the tender process.

That, by the date of the hearing the Respondent had not informed the Appellant as to who won the tender and at what price as advised by PPRA.

That, the contradictions (which were pointed out in the Appellant's letter dated 15<sup>th</sup> February, 2010) contained in the Respondent's letter referenced MMC/BZ/WK/2009/10/VOL1/105 of 3<sup>rd</sup> January, 2010, cemented the Appellant's suspicions that the procurement process was flawed.

That, the Appellant was aggrieved by the Respondent's decision to disqualify them for failure to sign the BoQ as it was not a material deviation under the ITT. Failure by the Respondent to provide satisfactory responses thereto has forced the Appellant to lodge this Appeal.

That, the Appellant being a Contractor Class 3 has been denied equal opportunity and deprived of earnings together with consequential loss to the Government.

The Appellant therefore prays for the following:

- (a) Damages for contempt of the procurement process by the Respondent as deemed fit by the Authority.
- (b) Substantial damages being fair and adequate compensation for loss of profit at 9% had the tender been awarded to them.
- (c) Loss of interest at 18% p.a. on earnings deprived of and computed under item (b) above.
- (d) Respondent be ordered to pay for cost of this Review amounting to **Tshs. 3,820,000/=** as per the following breakdown:

	<b>Expenditure</b>	<b>Tshs.</b>
1.	Review fee to PPRA	<b>10,000/=</b>
2.	Appeal filling fees – PPAA	<b>120,000/=</b>
3.	Legal consultation, drafting, preparing and dispatching 5 letters @ Tshs. 300,000/=	<b>1,500,000/=</b>
4.	Preparation and registering Special Power of Attorney	<b>315,000/=</b>

5.	Legal consultation, drafting and submission of the Appeal	<b>750,000/=</b>
6.	Return air fare (25/03/2010) and incidental expenses thereof	<b>600,000/=</b>
7.	Extended stay in Dar es salaam to await for determination of the Appeal (26/03/2010 - 31/03/2010) inclusive (6 days @ Tshs. 80,000/=)	<b>480,000/=</b>
8.	Stationeries, postage, photocopy and fax	<b>60,000/=</b>
9.	Local transport for consultations	<b>45,000/=</b>
	<b>TOTAL</b>	<b>3,820,000/=</b>

(e) Any other remedy as deemed fit by the Authority.

### **THE RESPONDENT'S REPLIES**

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

That, the Appellant has no cause of action since the evaluation was done in accordance with the Act.

That, the evaluation was done using Standard Bid Evaluation Guidelines issued by PPRA as well as the Act and GN. No. 97 of 2005.

That, during Preliminary Examination, the evaluation of bids was undertaken to verify the validity of each bid, eligibility of bidders, tender securing declaration, completeness of the bids and responsiveness.

That, the Appellant's tender was not valid as they submitted priced BoQ that was not signed by the person duly authorized to sign as per Clause 20.2 of the ITT. Therefore their tender did not qualify for detailed examination as per Clause 28.2 of the ITT as it was non responsive and hence rejected.

That, the Appeal be dismissed for lack of merit.

### **ANALYSIS BY THE AUTHORITY**

Having gone through the documents submitted and having heard the oral arguments from the parties, the

Authority is of the view that the Appeal is based on the following issues:

- **Whether the Evaluation process was conducted in accordance with the law.**
- **Whether the disqualification of the Appellant was justified.**
- **Whether the award of the tender in favour of M/s Hari Singh & Sons Ltd was proper at law.**
- **To what reliefs, if any, are the parties entitled to.**

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

## **1.0 Whether the Evaluation process was conducted in accordance with the law**

In its endeavour to ascertain whether the evaluation process was properly done, the Authority, reviewed the documents submitted and the contesting oral submissions by parties *vis-a-vis* the applicable law. In so doing, the Authority examined the evaluation process in its entirety to establish whether procedural requirements were adhered to in accordance with the Law and the Tender Document.

The Authority observes that, the evaluation process of any tender is required to be conducted in accordance with the law as well as the criteria set forth in the tender document. Having perused the Tender Document, the Authority is satisfied that it contained the basic elements required for evaluation including the criteria. The Authority further examined if the Evaluation Committee had applied the said criteria in accordance with the law.

The Authority reviewed the Evaluation Report and noted that the evaluation process was done in three stages, namely; Preliminary Evaluation, Detailed Evaluation and Post-qualification.

During the Preliminary Evaluation two tenders were found to be substantially responsive while that of the Appellant was disqualified for failure to sign the BoQ. Since this ground forms the basis of this Appeal, the Authority deems it prudent to make a thorough analysis thereof by revisiting submissions by parties *vis-a-vis* the applicable law and the ITT.

It is not disputed that, the Appellant did not sign the BoQ, but their main contention is that, this omission should have been treated as a minor deviation as it did not fall within the description of a material deviation under Clause 28.2 of the ITT. The Respondent on the other part, contended that failure to sign the BoQ was a material deviation and therefore their tender was rightly rejected for non conformity with the requirements of the Tender Document.

In order to resolve the contending arguments by parties on this particular point, viz., whether the omission was a minor or material deviation, the Authority revisited the provisions of the ITT which set forth, amongst others, the requirement relating to signing of the tenders. Moreover, Clause 20.2 of the ITT specified the manner in which the tender should be signed as it partly states as hereunder:

**“...All pages of the Tender except for un-amended printed literature, shall be initialled by the person or persons signing the Tender.”**

(Emphasis supplied)

The Authority observes that, according to Clause 20.2 of the ITT, all the documents were required to be initialled save for the un-amended printed literature which were to be signed. In other words, all documents were required to be either signed or initialled depending on their status.

The Authority observes that, the requirement to sign a BoQ was mandatory and not discretionary. The

Appellant's failure to sign the BoQ equally contravened the requirements of Clause 28.3 of the ITT which states:

"The Procuring Entity will confirm that the documents and information specified under **ITT Clause 11** and ITT Clause 12 have been provided in the Tender. If any of these documents or information is missing, or **is not provided in accordance with the Instructions to Tenderers, the Tender shall be rejected.**"

In view of the above, the Appellant's failure to sign the BoQ was a clear contravention of Clauses 20.2 and 28.3 of the ITT and therefore rendered the tender to be substantially non responsive. Therefore it was proper that it was not subjected to Detailed Evaluation .

The Authority proceeded to review the next stage of evaluation process, namely, Detailed Evaluation and found that it was done in accordance with the law.

Upon review of Post-qualification, the Authority noted that, Clause 34.3 of the ITT guides as to the manner in which Post-qualification will be carried out as follows:

“The determination will take into account the Tenderer’s financial, technical, and production capabilities. It will be based upon an examination of the documentary evidence of the Tenderer’s qualifications submitted by the Tenderer, pursuant to sub-clause 12.3, as well as such other information as the Procuring Entity deems necessary and appropriate. **Factors not included in these Tendering documents shall not be used in the evaluation of the Tenderers’ qualifications.**”

(Emphasis added)

According to the Evaluation Report, M/s Befra Construction Co. Ltd was the lowest evaluated tenderer and was therefore subjected to Post-qualification. The said tenderer was disqualified for lack of experience in performing contracts of similar nature as well as lack of essential equipment such as asphalt plant. During the

hearing it was evident that, Post-qualification was done by way of physical visitation whereby the Evaluation Committee inspected one of the roads forming part of the tenderer's past experience as well as visiting the contractor from whom the tenderer had intended to hire asphalt plant. The Authority detected the following shortfalls in the manner in which the Post-qualification was conducted:

- The Tender Documents do not indicate that physical visitations will form part of a post-qualification process. This is contrary to Regulation 94(2) of GN. No. 97 of 2005 which requires the criteria thereof to be contained in the solicitation documents.
- The Evaluation Committee inquired verbally from the Contractor from whom the post-qualified tenderer indicated he would hire asphalt plant. The Authority was unable to confirm that the said inquiry did take place as there was no documentary proof of the Contractor's responses. Moreover, it was evident during the hearing that, the Evaluation Committee

had inquired through telephone from the Babati Executive Director on the standard of the roads previously constructed by M/s Befra Construction Co. Ltd in Babati District. The Authority opines that, it was proper for the Respondent to make the said inquiries as per Regulation 94(3) of GN 97. However, the said telephone conversation should have been followed by a written confirmation as provided under Regulation 17(2) of GN 97 of 2005.

- The Evaluation Report neither indicates the manner in which Post-qualification was done nor how the conclusions thereof were reached.

The Authority further discovered that, having disqualified M/s Befra Construction Co. Ltd, the Evaluation Committee went on to Post-qualify the second lowest evaluated tenderer namely, M/s Hari Singh & Sons Ltd who was eventually awarded the tender. The Authority observes that, by so doing the Evaluation Committee contravened Regulation 94(7) of GN. No. 97 of 2005 which requires approval to be obtained from the Tender Board, as it states that:

**“The procurement management unit shall obtain approval from the tender board prior to rejecting any tender or undertaking an additional post-qualification on any other tenderer”** (Emphasis supplied)

During the hearing, the Respondent conceded that Post-qualification in respect of the second lowest tenderer namely, M/s Hari Singh & Sons Ltd was not done by physical visitation as it was the case for M/s Befra Construction Co. Ltd. The Post-qualification of M/s Hari Singh & Sons Ltd was solely based on documents submitted by the said tenderer.

The Authority observes that, post-qualifying M/s Befra Construction Co. Ltd through physical visitation is a clear breach of Clause 34.3 of the ITT which required it to be based on the documents submitted by the tenderer. Moreover, had the Respondent wanted to use **‘any other information’** which is allowed under Clause 34.3 of the ITT, the same should have been explicitly provided for in

the Tender Documents. The Authority observes that, the manner in which M/s Befra Construction Co. Ltd was Post-qualified differed with that used to post-qualify M/s Hari Singh & Sons Ltd thereby offending the spirit of Section 43 of the Act which provides as hereunder:

- “ In the execution of their duties, tender boards and procuring entities shall strive to achieve highest standards of equity taking into account**
- (a) equality of opportunity to all prospective suppliers, contractors , or consultants**
  - (b) fairness of treatment to all parties; and**
  - (c) the need to obtain the best value for money in terms of price, quality and delivery having regard to set specifications and criteria.” (Emphasis added)**

The Authority therefore finds that, the Post-qualification done in respect of M/s Hari Singh & Sons Ltd was equally

faulty for failure to obtain prior approval of the Tender Board.

In view of the above findings, the Authority's conclusion in respect of the first issue is that, the evaluation process was not conducted in accordance with the law.

## **2.0 Whether the Appellant was unfairly disqualified**

Having analysed the first issue and found, among other things, that the Appellant's failure to sign the BoQ was a material deviation, the Authority concludes that, their disqualification was justified.

## **3.0 Whether the award of the tender in favour of M/s Hari Singh & Sons Ltd was proper at law**

In resolving this issue, the Authority took cognizance of the findings in the first issues that, the Post-qualification of M/s Hari Singh & Sons Ltd contravened the law. It goes without saying therefore that, the award of the tender in favour of M/s Hari Singh & Sons Ltd was not proper at law.

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

Having analysed the issues in dispute, the Authority is of the considered view that, the fact that the Appellant's disqualification was justified does not render the Appeal to lack merit. To the contrary, the Appeal has been an eye opener in that it has enabled the Authority to detect a number of shortfalls committed by the Respondent in the Tender process. The Authority therefore finds that, the Appeal has some merit and therefore the Appellant is entitled to a certain amount of compensation for costs incurred in pursuit of this Appeal.

The Authority considered the Appellant's request for compensation and orders the Respondent to pay the Appellant a sum of **Tshs. 1,680,000/=** for the following costs:

	<b>Expenditure</b>	<b>Tshs.</b>
1.	Review fee to PPRA -	<b>10,000/=</b>
2.	Appeal filling fees – PPAA -	<b>120,000/=</b>
3.	Legal consultation fee	<b>750,000/=</b>
4.	Return air fare and incidental expenses thereof	<b>400,000/=</b>

5.	Extended stay in Dar es salaam to await for determination of the Appeal) Tshs. 80,000/= x 5 days	<b>400,000/=</b>
	<b>TOTAL</b>	<b>1,680,000/=</b>

With regard to the Appellant's request for payment of damages, loss of profits of 9% and interest thereof, the Authority cannot grant them for want of jurisdiction.

The Authority considered the Respondent's prayer that the Appeal be dismissed for lack of merit and observes that, the Appeal has merit and therefore the Respondent's prayer is rejected.

### **Other matters that caught the attention of the Authority**

In course of handling this Appeal the Authority came across other pertinent matters which are worth mentioning as hereunder:

- (a) During the hearing it was evident that, the Evaluation Committee consisted of a Cooperative Officer, an Engineer and an Education Officer. Given

the designations of the said members and the oral submissions by the Respondent during the hearing, the Authority is of the view that, only one of the Evaluators had adequate knowledge with respect to the tender being evaluated. Moreover, the Respondent's explanation that the other two Evaluators were experienced in the evaluation of tenders is contradicted by the obvious procedural errors contained in the Evaluation Report.

(b) The Authority observes that, the PMU did not do their job diligently in advising the Tender Board on the shortfalls in the Evaluation Report, particularly with respect to Post-qualification.

(c) The Tender Board did not perform their duties diligently as evidenced by its failure to detect various anomalies contained in the Evaluation Report.

(d) The Respondent's letter to the Appellant referenced MMC/BZ/WK/2009/10/VOL1/105 dated 3<sup>rd</sup> January,

2010, was posted on 12<sup>th</sup> February, 2010 (as per the postal stamp) and received by the addressee on 15<sup>th</sup> February, 2010. The Authority observes that, this is contrary to the principles of Good Governance as it took 40 days for it to be posted. Moreover, the Respondent failed to give a reasonable explanation as to why the said letter was written on 3<sup>rd</sup> January, 2010, which happened to be a Sunday.

(e) The letter communicating tender results to the Appellant, referenced MMC/BZ/WK/2009/10/VOL1/108 of 12<sup>th</sup> February, 2010, wrongly indicated that the tender document was opened on **15<sup>th</sup> December, 2010**, instead of **8<sup>th</sup> December, 2009**. The Authority wishes to remind the Respondent that, any official communication is expected to relay the correct information to the recipient and not otherwise.

(f) During the hearing, the Appellant contended that he did not receive the Respondent's letter referenced MMC/BZ/WK/2009/10/VOL1/108 dated 12<sup>th</sup>

February, 2010, which communicated the name of the successful tenderer, address and the contract sum. In their reply thereof, the Respondent claimed to have posted the said letter vide Ordinary Mail Service. The Authority is inclined to give the Appellant the benefit of doubt since the Respondent could not justify the practice to use postal services while they could have used physical delivery and ensured faster transmission of the information given that the Appellant's offices are within Moshi Municipality. The Authority is further of the view that, if there was a dire need to use postal services, such an important letter would have been sent by way of Registered Mail instead of Ordinary Mail.

(g) The Authority noted that, the Appellant's application for review was tabled, deliberated upon and decision thereof made by the Tender Board which is against the principles of natural justice, i.e the rule against bias as they were being judges in their own cause. Moreover, the jurisdiction to review such an

application is vested into the accounting officer and not the tender board.

(h) In response to the Appellant's application for review, the Respondent *vide* letter referenced MMC/R40/I.VOL XII/116 dated 15<sup>th</sup> February, 2010, erroneously cited Clause 37.2 of the ITT as the basis for the Appellant's disqualification instead of Clause 28.2. For purposes of clarity, the said Clauses are reproduced hereunder:

"37.2 Notice of the rejection of all tenders shall be given promptly to all Contractors that have submitted tenders.

28.3 The Procuring Entity will confirm that the documents and information under ITT Clause 11 and ITT Clause 12 have been provided in the Tender. **If any of these documents or information is missing, or is not provided in accordance with the Instructions to Tenderers, the Tender shall be rejected.**" (Emphasis added)

The Authority wishes to enlighten the Respondent that, the difference between the above-quoted Clauses is that, Clause 37.2 of the ITT applies where the procuring entity rejects all tenders while Clause 28.3 applies where a tender has failed to comply with mandatory requirements of the tender document.

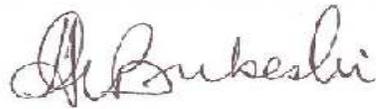
Having considered all facts and evidence, the Authority concludes that, the award of the tender to M/s Hari Singh & Sons Ltd contravened the law and was therefore a nullity.

On the basis of the aforesaid findings, the Authority partly upholds the Appeal and orders the Respondent to do the following:

- **Re-start the tender process afresh in observance of the law.**
- **Compensate the Appellant a sum of Tshs. 1,680,000/= being appeal costs.**

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

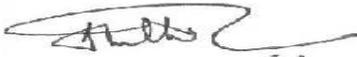
Decision delivered in the presence of the Appellant and in absence of the Respondent, who was duly notified, this 30<sup>th</sup> day of March, 2010.



.....  
JUDGE (rtd) A. G. BUBESHI  
**CHAIRPERSON**

**MEMBERS:**

1. HON. V. MWAMBALASWA (MP).....  


2. MR. K. M. MSITA .....  


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