

**IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY
AT DAR ES SALAAM
APPEAL NO. 5 OF 2013/14**

BETWEEN

M/S MODHAN CAR

PARKING SYSTEM.....APPELLANT

AND

TANGA CITY COUNCIL..... RESPONDENT

DECISION

CORAM:

- | | |
|---------------------------------|----------------|
| 1. Hon. A. G. Bubeshi, J. (rtd) | - Chairperson |
| 2. Mr. H. S. Madoffe | - Member |
| 3. Mr. F. T. Marmo | - Member |
| 4. Mrs. N. S. Inyangete | - Member |
| 5. Ms. F.R. Mapunda | - Ag.Secretary |

SECRETARIAT

- | | |
|----------------------|-----------------|
| 1. Mr. H.O. Tika | - Legal Officer |
| 2. Ms. V.S. Limilabo | - Legal Officer |

FOR THE APPELLANT:

1. Mr. Benjamin Mwakagamba -Advocate- BM Attorneys
2. Mr. Mohamed R. Jumbe - Managing Director
3. Mr. William D. Fujji – Legal Officer- BM Attorney
4. Alli M. Bungallah- Manager

FOR THE RESPONDENT:

1. Mkama B. Makori – Head PMU
2. Richard D. Mtelewa – Accountant

FOR THE INTERESTED PARTY

Mashaka J. Nyamasagara - Managing Director - Kirwak Supplies & Service Co. Ltd.

This decision was scheduled for delivery today 7th August, 2013, and we proceed to deliver it.

The Appeal at hand was lodged by **M/S MODHAN CAR PARKING SYSTEM** (hereinafter referred to as "**the Appellant**") against the **TANGA CITY COUNCIL** (hereinafter referred to as "**the Respondent**").

The said Appeal is in respect of Tender No. LGA/128/2013/2014/NC/01- for Revenue Collection. The said tender had twenty six Lots but the Appeal at hand is confined to Lot No. 2 which was for **Revenue Collection Outside the Bus Stand within Tanga City Council** (hereinafter referred to as "**the tender**").

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

The Respondent vide the Majira newspaper dated 22nd May 2013, invited tenderers to submit their tenders for the tender under Appeal.

The deadline for submission of the tenders was set for 21st May, 2013, and the following two tenders were submitted.

S/NO	Tenderers Name	Quoted price in Tsh. Per month
1	M/S Kirwaki Supplies and Services Co. Ltd	1,000,000/-
2	M/S Modhan Car Parking System	1,339,200/-

The said tenders were subjected to evaluation which was carried out in three stages; namely, Preliminary Evaluation, Detailed Evaluation and Financial Comparison.

During Preliminary Evaluation, tenders were checked for completeness of their bids and compliance with the Eligibility Criteria. The Evaluation Committee found both tenders to be substantially responsive.

The two tenders were then subjected to detailed evaluation whereby both tenderers qualified.

Having passed the detailed evaluation stage, the two tenders were then subjected to financial comparison whereby the tender by M/S Kirwaki Supplies and Services Co. Ltd scored 11 points and the tender by M/S Modhan Car Parking System scored 12 points.

The Evaluation Committee observed that although M/s Modhan Car Parking System had quoted the highest price and scored as above, they had not settled the conflict they had with the Respondent which related to previous contract on revenue collection at the same bus stand.

The Evaluation Committee therefore, recommended award of the tender to M/s Kirwaki Supplies and Services Co. Ltd subject to negotiations with the view to meeting the Respondent's estimates of Tshs 2, 025,000/-.

The Tender Board at its meeting held on 28th June, 2013, approved the award of the tender as recommended by the Evaluation Committee.

On 3rd July, 2013, the Respondent vide a letter referenced TCC/PMU/VOL.IV/107, dated 3rd July, 2013 informed the Appellant that their tender was unsuccessful on the ground that they were “troublesome” in the execution of their previous contract with the Respondent.

Being dissatisfied with the reason for their disqualification, the Appellant, on 17th July, 2013, lodged their Appeal before the Public Procurement Appeals Authority (hereinafter referred to as “**the Authority**”).

SUBMISSIONS BY THE APPELLANT

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

That, they are appealing against unfair disqualification of their tender, since they were the highest quoted tenderer.

That, the reason given by the Respondent for their disqualification is unfounded in law.

That, the Appellant was not told in what way they had been a difficulty character (usumbufu) to the Respondent.

That, there was a problem in the tender advertisement of the previous contract. The said tender was for revenue collection for buses in Tanga City. The Appellant was awarded the tender and signed the contract but in the execution of the contract the Appellant was told by the Respondent that their contract was for revenue collection outside the bus stand only and not for buses parking inside the main bus stand.

That, they do not have any debt with the Respondent. The contract price for the previous contract was Tshs 1,675,000/- per month and every month they paid the said amount despite the fact that they were restricted from collecting revenue for buses parking inside the main bus stand.

That, in the tender under appeal they tendered for Tshs.1,336, 200/- per month.

That, they were not troublesome as claimed by the Respondent rather they acted according to the tender advertisement and the signed contract between themselves and the Respondent.

Finally, the Appellant prayed for the following orders:

- i) The Authority review the whole tender process and annul the tender to the successful tenderer;
- ii) Alternatively this tender to be re-advertised;
- iii) Cost of the Appeal to the tune of Tshs. 2, 500,000/- inclusive of the legal fees.

SUBMISSION 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, it is true that, the Appellant quoted the highest price of Tshs 1,339,200/- However, they were not awarded the tender on the ground that they had been troublesome in executing their previous contract for the year 2012/2013. The Respondent elaborated as follows;

- They persisted to claim that they were entitled to collect revenue from both inside and outside the main bus stand.
- They did not conduct a site inspection which would have made them aware of their area of operation.
- If they were complaining that collecting Tshs. 846,000/ per month as stipulated in the previous contract was difficult, how could they possibly collect a bigger amount of Tshs. 1,336,200/- quoted in the tender under appeal on the same area of operation.

- In another tender the Appellant had demanded a compensation of Tshs. 8,000,000/- from the Respondent on apparent breach of contract for revenue collection for car parking. However, they were compensated to the tune of Tshs. 4,000,000/- only.

Finally the Respondent prayed for the dismissal of the Appeal in its entirety.

ANALYSIS BY THE AUTHORITY

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

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

In resolving this sub issue the Authority finds it proper to revisit parties' submissions so as to substantiate their contentions. To start with the Authority revisited the Appellant's contentions that;

- a) They had been unfairly disqualified from the tender process for being termed "difficult characters" in previous tenders
- b) Difficulty characters (usumbufu) was not among the criteria that was provided for in the Tender Document; hence, their disqualification was based on an alien criterion contrary to the law.
- c) They were not difficult characters as claimed by the Respondent rather they were claiming for their rights because in the previous tender they were awarded a contract for collection of revenue from buses (Daladala) at the Tanga City Council main stand. The Respondent's act of

restricting collection of revenue to buses outside the main bus stand only amounted to infringement of their contractual right and changed their scope of work. They averred that, what they did was merely to follow up on their contractual rights

- d) Despite the changes in the scope of work, they were able to remit the sum of Tshs. 1,675,500/- being monthly revenue collection as per the signed contract.
- e) In the tender under Appeal they quoted the highest price of Tshs. 1,336,200/-, hence, they deserved to be awarded the said tender. They asserted on the basis of a survey done by them the amount quoted was achievable because the number of buses in the relevant area is on the increase.

In reply to the Appellant's argument the Respondent submitted that;

It is true that, the Appellant had quoted the highest price of Tshs 1,339,200/- However, they were not awarded the tender on the ground that they were of difficult characters in executing their previous contract of 2012/2013. The Respondent elaborated as follows;

- a) They persisted to claim that they were entitled to collect revenue from both inside and outside the main bus stand.
- b) They did not conduct a site inspection which would have made them aware of their area of operation.
- c) If they were complaining that collecting Tshs. 846,000/ per month was impossible as stipulated in the previous contract how could they collect a bigger amount of Tshs. 1,336,200/- quoted in the tender under appeal on the same area of operation.
- d) In another tender the Appellant had demanded a compensation of Tshs. 8,000,000/- from the

Respondent on apparent breach of contract for revenue collection for car parking. However, they were compensated to the tune of Tshs. 4,000,000/- only.

- e) The Appellant was not awarded the tender despite of quoting the highest price of Tshs. 1,339,200/- because they were of a difficult characters in the previous tender as they were the former service providers.

In resolving the contentious arguments by parties, the Authority deemed it prudent to analyze them in two parts as hereunder;

a) Evaluation based on an alien criteria

In order to ascertain the validity of the Appellant's argument that the issue of being a difficult character was not among the evaluation criteria, the Authority finds it proper to revisit the evaluation criteria that were provided for in the Tender Document. In doing so, the Authority noted that, the Evaluation Committee was to be

guided by Clauses 2, 4 (h) and 5 of the Tender document which provide as follows:

Clause 5 “the evaluation process shall follow the criteria set out in Clauses 2 and 4(h)”

Clause 2 “Application letters shall be supported by the following explanation and exhibits:

- i. Business license,**
- ii. Certificate of incorporation or business registration,**
- iii. Application fee of Tshs 50,000/-**
- iv. Previous performed contract related to revenue collection with explanations showing experience of not less than two years.**
- v. TIN registration**
- vi. Tax clearance certificate**
- vii. The Applicant to mention the amount he is ready to pay to the City Council**

viii. The Applicant to state the means of transport that would be used.”

Clause 4 “duty of the Employee

(h) Applicant shall not have debt with the employee or others”

Considering the above evaluation criteria difficult of character was certainly not among them. It was an alien to the Tender Document.

Furthermore, the Authority noted that during the evaluation process, the Evaluators sought for a clarification from the Secretary of the Respondent’s Tender Board about the previous experience of some of the tenderers, including the Appellant. In reply to the clarification sought by the Evaluators, the Secretary of the Tender Board informed them, amongst others, that the Appellant had been working with the Respondent but they had been a difficult character since they were complaining that they were getting losses.

Based on the recommendation given by the Secretary of the Tender Board, the Evaluator's recommended the award of the tender to M/s Kirwaki Supplies and Services Co. Ltd on the reasons that, the Appellant had difficult characters although they were the highest evaluated tenderer.

From the above facts the Authority observes that, the issue of difficult characters was not among the evaluation criteria and it has been used wrongly for disqualifying the Appellant since the evaluation of tenders has to be done in accordance with the criteria set forth in the Tender Document.

The Authority finds the Respondent in this regard to have erred in law by contravening Regulation 90(4) of the Public Procurement (Goods, Works, non-Consultant Service and Disposal of Public Assets by tender) Regulation of 2005 (hereinafter referred to as **GN No. 97 of 2005**) which states as follows:

Regulation 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”

The Authority hastens to observe that, the alleged difficulty of character on the part of the Appellant as elaborated in the Respondent’s submission with due respect, do not amount to difficulty of character (usumbufu). This is because the purported difficulty of character emanated in seeking clarification on terms of the previous contract and pursuit of ones perceived rights.

Based on the above findings the Authority is of the settled view that, the disqualification of the Appellant based on the criterion of being a difficult character was not proper in the eyes of the law.

b) Pending case between the Appellant and the Respondent

The Authority considered the Respondent's argument that, the Appellant had an existing case with the Respondent; hence, they did not qualify for the award of tender in terms of Clause 4(i) of the Tender Document.

In order to ascertain the validity of the Respondent's argument, the Authority revisited Clause 4(i) of the Tender Document relied upon by the Respondent in substantiating their argument. The said clause provides as follows;

Clause 4 (i) "The Applicant shall not have any pending case against the Municipal Council (sic) in any court of law or any quasi judicial bodies".

The above quoted provision entails that, for the tenderer to be eligible for award of the tender they ought to have no pending case with the Respondent.

The Authority revisited the documents submitted and noted that none of them indicated the Appellant to have any pending case with the Respondent. During the hearing the Respondent was asked to explain what case they were referring to. In reply thereof, they explained that, they were referring to misunderstanding/dispute they had with the Appellant on the revenue collections of the previous contracts.

Based on the above facts, the Authority is of the view that, the misunderstanding between the parties cannot by any stretch of imagination amount to a case as envisaged under Clause 4(i) of the Tender Document. This is because no court of law or judicial authority has been moved to adjudicate on the purported case. Furthermore, the Appellant had never been served with any written document in this regard. The Authority observes that, the issue of pending case was raised by the Respondent during the hearing of this Appeal, but it was not mentioned in the Evaluation Report nor does it appear in the Minutes of the Tender Board.

From the above findings, the Authority is of the settled view that, there was no pending case between the Appellant and the Respondent. Thus, the Respondent's argument that there was a pending case is hereby rejected.

Therefore the Authority's conclusion on the first issue is that, the Appellant was unfairly disqualified.

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

Having resolved the issues in dispute the Authority proceeded to address prayers by parties. To start with, the Authority considered the Appellant's first prayer that, the Authority review the whole tender process and annul the award to the successful tenderer. The Authority is of the view that, the Respondent should restart the tender evaluation process in observance of the law as per Section 82 (4) (c) of the Public Procurement Act, No. 21 of 2004 (hereinafter referred to as **the Act**) which provides as follows;

Section 82 (4) **“the Public Procurement Appeals Authority may, unless it dismisses the complaint or dispute, recommend one or more of the following remedies:-**

(c) require the procuring entity that has acted or proceeded in an unlawful manner, or reached an unlawful decision, to act or to proceed in a lawful manner or to reach a lawful decision”. (Emphasis supplied)

With respect to annulment of the award of the tender to the successful tenderer, there is nothing to annul since the award of the tender to the successful tenderer was not proper in the eyes of the law.

With regard to alternative that this tender be re-advertised, the Authority finds it unnecessary to grant this prayer in view of the fact that the mischief appealed against has already been taken care of by the proceeding order.

With regard to the Appellants third prayer for compensation of Tshs 2, 500,000/-, being Appeal filing fees and legal fees; the Authority finds that the Appellant deserves to be compensated as prayed.

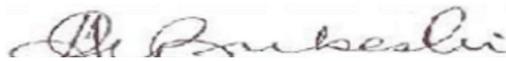
As regards to the Respondent's prayer that the Appeal be dismissed, the Authority rejects that prayer as the Appeal has merit.

On the basis of the aforesaid conclusions, the Authority upholds the Appeal and orders the Respondent to:

- **re-start the tender evaluation process afresh in observance of the law; and**
- **compensate the Appellant a sum of Tshs. Tshs. 2,500,000/- only**

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

This Decision is delivered in the presence of the Appellant and the Respondent this 7th August, 2013.



JUDGE (rtd) A. BUBESHI

CHAIRPERSON

MEMBERS:

1. MR. H. S. MADOFFE.....

2. MR. F. T. MARMO.....

3. Mrs. N. S. INYANGETE.....