

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

APPEAL CASE NO. 132 OF 2012

BETWEEN

M/S SIMBANET TANZANIA LTD.....APPELLANT

AND

**INSTITUTE OF FINANCE
MANAGEMENT.....RESPONDENT**

DECISION

CORAM:

- | | |
|---------------------------------|---------------|
| 1. Hon. A. G. Bubeshi, J. (rtd) | - Chairperson |
| 2. Mr. F. T. Marmo | - Member |
| 3. Mrs. N. S. N. Inyangete | - Member |
| 4. Ms. E. J. Manyesha | - Member |
| 5. Ms. B.G. Malambugi | - Secretary |

SECRETARIAT

- | | |
|-----------------------|---------------------------|
| 1. Ms. E.V.A. Nyagawa | - Principal Legal Officer |
| 2. Ms. F. R. Mapunda | - Legal Officer |
| 3. Ms. V. S. Limilabo | - Legal Officer |

FOR THE APPELLANT

1. Eng. James Dotto -Business Development Manager
2. Ms. Ruby Malugu - Sales Coordinator
3. Mr. Julius Mbuna -Sales Account Manager

FOR THE RESPONDENT

1. Mr. John Nzunda - Ag. Legal Secretary
2. Mr. Iman Mhagama - Ag. Head PMU
3. Mr. Didas M. Nzuki - Head ICT Infrastructure
4. Mr. Sebastian Maduhu - Academic Officer

This decision was scheduled for delivery today 31st day of October, 2012, and we proceed to deliver it.

The appeal at hand was lodged by M/s **Simbanet Tanzania Limited** (hereinafter to be referred to as "**the Appellant**") against the **Institute of Finance Management** commonly known by its acronym IFM (hereinafter to be referred to as "**the Respondent**")

The said Appeal is in respect of Tender No. PA/016/2011-2012/NCS/09 for provision of Internet Services to the Respondent (hereinafter to be referred to as "**the tender**").

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

The Respondent invited tenders for Provision of Internet Services through competitive tendering whereby seven tenderers bought Tender Documents.

The tender opening took place on 3rd August, 2012, whereby the following four tenderers submitted their tenders:

S/ No	Tenderer's Name	Quoted price Tshs.
1	M/s Zanzibar Telecom Ltd	192,000,000/= VAT exclusive
2	M/s SimbaNet (T) Ltd	114,830,000/= VAT inclusive
3	M/s SatCom Networks Africa Ltd	138,654,720/ VAT inclusive
4	M/s Cats-Net Ltd	203,904,000/= VAT inclusive

The tenders were subjected to preliminary evaluation whereby three out of the four tenders were found to be substantially non responsive for failure to comply with the requirements of the Tender Document. The tenders disqualified at the preliminary evaluation stage were:

- M/s Zanzibar Telecom Ltd;
- M/s SimbaNet (T) Ltd; and
- M/s Cats-Net Ltd.

The tender submitted by M/s SatCom Networks Africa Ltd was found to be substantially responsive therefore

qualified for detailed evaluation. Having subjected the said tender to detailed evaluation, the Evaluation Committee recommended the award be made to them at a contract price of Tshs. 138,654,720/= VAT inclusive.

The Tender Board at its meeting held on 22nd August, 2012, approved the award to M/s SatCom Networks Africa Ltd subject to successful negotiations.

On 6th September, 2012, the Respondent communicated the award of the tender to M/s SatCom Networks Africa Ltd vide a letter referenced IFM/FINC/26/VOL.II. On the same date the unsuccessful tenderers were notified of the tender results vide letter referenced IFM/FINC/26.

Being dissatisfied with the tender results, the Appellant sought for administrative review to the Accounting Officer vide a letter referenced SN-IFM/1109/2012/01 dated 11th September, 2012.

The Respondent vide a letter referenced IFM/FINC/26/VOL.II dated 19th September, 2012, informed the Appellant that, they were disqualified for failure to submit Audited Financial Reports of the last five years contrary to the requirements set out in the Tender Document. Additionally, the Respondent informed the Appellant that the tender was awarded to the lowest evaluated tender and not to the lowest quoted price.

The Appellant vide a letter dated 24th September, 2012, referenced SN-IFM/2009/2012/02 clarified on the Audited Financial Statements they had attached to their tender. However, while awaiting a reply from the Respondent, they received a letter referenced PPRA/PA/016/129 from the Public Procurement Regulatory Authority (hereinafter to be referred to as the "**PPRA**") dated 28th September, 2012, advising them to submit their complaint to the Public Procurement Appeals Authority (hereinafter to be referred to as "**the Authority**"). PPRA further informed the Appellant that, the Respondent did not have powers to entertain their complaint as the procurement contract

had already entered into force by virtue of Section 55(7) of the Public Procurement Act (hereinafter to be referred to as "**the Act**").

On 3rd October, 2012, the Appellant filed their Appeal to this Authority.

SUBMISSIONS BY THE APPELLANT

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

That, during the tender opening the Successful Tenderer's quoted price was Tshs. 138,654,720/= while the read out price for the Appellant was Tshs. 114,830,000/=. They were surprised that despite the huge price difference of Tshs. 23,000,000/=, the tender was awarded to M/s SatCom Networks Africa Ltd.

That, they were informed that their disqualification was due to failure to submit Audited Financial Statements of

the last five years. They disagreed with the reason given as they had submitted Financial Statements for five years as required. However, they stated that it was possible that the Respondent misunderstood the Audited Financial Statements submitted for the year ended 31st March 2009 since there was no statement for the year ended Dec 2008. This was due to the changes in financial year from December to March. Therefore, the financial statements in respect of year 2008 were shown as part of the 15 months Statement for the year ended 31st March, 2009.

That, their application for review was not caused by the fact that they did not win the tender but rather to ensure that there is a fair decision in awarding the tender to the successful tenderer.

Finally the Appellant prayed for the Authority to:

- (a) annul the Respondent's decision to disqualify the Appellant's tender; and

(b) order the Respondent to award the tender to the tenderer with the lowest price.

REPLIES BY THE RESPONDENT

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

That, the Appellant was among the four tenderers who tendered to provide internet services to the Respondent.

That, the Audited Financial Statements of the last five years were among the documents to be submitted by the tenderers.

That, the Appellant submitted Audited Financial Statements of three years ended 31st March, 2010; 31st March, 2009, and 31st December, 2007. Hence, they did not meet the requirements of Clause 15(b) of the Bid Data Sheet (hereinafter to be referred to as "**BDS**")

That, the Appellant was therefore disqualified for failure to meet the requirements of the Tender Document despite submitting the lowest quoted price.

The Respondent therefore prayed that the Appeal be dismissed for lack of merit.

ANALYSIS BY THE AUTHORITY

Having gone through the documents and having heard the oral arguments from parties, the Authority is of the view that the Appeal is centered on four issues, namely:

- **whether the Appellant's tender had complied with the requirement to submit Audited Financial Reports of the last five years;**
- **whether the Respondent should have awarded the tender to the Appellant who had quoted the lowest price;**

- **whether it was proper for the Respondent to continue with the tender process while the Appellant's complaints were still pending; and**
- **to what reliefs, if any, are the parties entitled to.**

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

1.0 Whether the Appellant's tender had complied with the requirement to submit Audited Financial Statements of the last five years

According to the documents submitted to this Authority as well as oral submissions by parties during the hearing, it is not disputed that the Appeal was triggered by the Respondent's reason for disqualifying the Appellant's tender, to wit, failure to submit Audited Financial Reports of the last five years. The parties are in agreement that the said criterion was a mandatory requirement. That said, the Authority deems it pertinent

to ascertain if the Appellant's tender had indeed complied with the said requirement or not.

To start with, the Authority revisited the conflicting submissions by parties on this issue. In their Written Statement of Reply as well as oral submissions the Respondent contended that the Appellant did not comply with the requirement in question as they had submitted Audited Financial Reports of the last three years, instead of five years. The said Reports were for the period ended 31st March, 2010; 31st March, 2009 and 31st December, 2007, respectively. This contention is supported by the Appellant's original tender, which was availed to the Authority by the Respondent.

The Appellant, on their part, disputed the Respondent's contention by stating that, they had complied with the said requirement, in that, their tender which was submitted to the Respondent contained, amongst other attachments, Audited Financial Reports of the last five years as indicated herein below:

S/ No.	YEAR	PERIOD
1.	2007	12 months (1 st January – 31 st December, 2007)
2.	2009	15 months (1 st January, 2008 – 31 st March, 2009)
3.	2010	12 months (1 st April, 2009 – 31 st March, 2010)
4.	2010	9 months (1 st April, 2010 – 31 st December, 2010)
5.	2011	12 months (1 st January – 31 st December, 2011)

During the hearing, the Appellant produced a copy of their tender which contained, inter alia, Audited Financial Reports for the periods indicated in the Table above. They further argued that, there is no way they could have submitted Audited Financial Reports for three years, in that, assuming they had misconstrued the intended period to be three years, they would have submitted reports from 2009 to 2011 and not from 2007 to 2010.

In order to ascertain the authenticity of the copy of the tender which was produced by the Appellant during the hearing, the Members of the Authority requested the Appellant to explain if the said document was a

photocopy of their original tender. In reply thereof the Appellant submitted that, the said document was not a photocopy of their original tender but rather, it was a print out from their computer where office copies of such documents are stored.

In analyzing the validity of arguments by parties, the Authority deems it pertinent to resolve a question of fact, namely, whether the Appellant had attached Audited Financial Reports of the last five years as claimed by themselves or they attached the same for three years only as contended by the Respondent. In its endeavor to do so the Authority noted that, the submissions by parties in their entirety do not offer much assistance in determining whose submissions are true, as the Appellant's contention is corroborated by their copy of the tender produced at the hearing, while the Respondent's argument is equally supported by the Appellant's original tender and a copy thereof both of which were submitted to them during tendering. However, the Authority considered the Appellant's admission that the purported copy of the tender which

they produced at the hearing was not a photocopy of the original tender they had submitted to the Respondent. In this case there is no conclusive evidence that the print out is a replica of the original tender, as the former was made after the Appellant had been informed of the reason for the disqualification of their tender. The Authority observes that, had the numbering of the pages in their tender been consistent, it could have assisted, to a certain extent, to ascertain whether the document had been tampered with or otherwise.

The Authority may have considered the possibility of accepting the Appellant's contention, if the said document had been a photocopy of their original tender because the assumption is that a photocopy is a reproduction of the original document in its entirety and therefore it would have represented the exact documents contained therein. Additionally, in photocopying it would have been difficult not to reproduce Audited Financial Reports for two years, which were missing in the Appellant's tender, as they involve a number of pages.

Furthermore, during the hearing apart from insisting that they had submitted the said documents the Appellant did not claim that their tender had been tampered with, even when they were asked by the Members of the Authority to comment on the missing Audited Financial Reports for two years, from their original tender submitted to this Authority by the Respondent. In the absence of any other independent evidence to the contrary, the Authority is inclined to accept the Respondent's contention that the Appellant submitted Audited Financial Reports for three years only instead of the required five years.

Notwithstanding the above analysis, the Authority observes that neither the Act and its Regulations nor the standard tendering documents and guidelines issued by PPRA, provide for a mechanism through which the authenticity of a tenderer's original tender may be ascertained where there is a dispute such as in the Appeal at hand. The Authority urges PPRA to provide guidance which will address the concerns by tenderers relating to "disappearance" of some documents in the tenders while in the hands of procuring entities; such a

mechanism would also assist this Authority to protect the integrity of procuring entities where such concerns are unfounded.

Having concurred with the Respondent's arguments on the contentious issue, the Authority is of the firm view that, by submitting Audited Financial Reports for three years instead of the required five years, the Appellant's tender was substantially non responsive and the consequence thereof was rejection of their tender pursuant to Clause 27.3 of the Instructions to Bidders (hereinafter to be referred to as "**ITB**"). The said provision states as follows:

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

Based on the above quoted provision the Authority observes that, the Respondent rightly rejected the Appellant's tender as submission of Audited Financial Reports for the last five years was one of the requirements under Clause 12.3(f) of the ITB, read together with Item 15 of the BDS. The Authority emphasizes that it was the duty of the Appellant to ensure that they had submitted all the required documents or information as per Clause 7.5 of the ITB which provides as follows:

“The Bidder is expected to examine all instructions, forms, terms and specifications in the bidding documents. Failure to furnish all information required by the bidding documents or to submit a bid not substantially responsive to the bidding documents in every respect will be at the bidders risk and may result in the rejection of the tender....” (Emphasis supplied)

In view of the foregoing, the Authority is of the settled view that the Appellant's tender did not comply with the

requirement to submit Audited Financial Statements for the last five years.

2.0 Whether the Respondent should have awarded the tender to the Appellant who had quoted the lowest price

In their Statement of Appeal the Appellant had contended, *inter alia*, that the Respondent had awarded the tender to M/s SatCom Networks Africa Ltd despite the fact that their read out price at the tender opening was higher by Tshs. 23,000,000/= compared to the Appellant's read out price. The Respondent's reply thereof was that, the award of the tender had complied with the requirements of the law as it required an award to be made to the lowest evaluated tender and not the lowest quoted price as argued by the Appellant.

The Authority concurs with the Respondent that, the law is quite explicit as to who should be awarded the tender, in that, Regulation 90(18)(b)(i) of GN. No. 97 of 2005 provides guidance in the following words:

“The successful tender shall be:

- (i) the tender with lowest evaluated tender price in case of goods, works or services, or the highest evaluated tender price in case of disposal of assets, but not necessarily the lowest or highest submitted price, subject to any margin of preference applied”. (Emphasis supplied)**

For the benefit of the Appellant, the Authority reproduces the definition of the lowest evaluated tender as provided for under Section 3 of the Act which states as follows:

“lowest evaluated cost” means the price offered by a supplier, contractor, or consultant that is found to be the lowest after consideration of all relevant factors and the calculation of any weighing for these factors, provided that such factors have been specified in the Tender Document”. (Emphasis added)

Based on the above quoted definition, the Authority observes that the relevance of the price quoted comes into play after all the other requirements have been considered, save for those relating to post-qualification. Had the Appellant's tender been substantially responsive it would have qualified for detailed evaluation and thereby subjected to price comparison and ranking. However, since their tender was disqualified at the preliminary stage; thus the issue of their price being the lowest submitted price did not arise.

With regard to the Appellant's contention that the Government would have saved money if the tender had been awarded to the lowest quoted price, the Authority emphasizes that observance of the applicable law is of paramount importance and cannot be disregarded on the pretext of saving money. This is because the provisions in the applicable law were purposely enacted after due consideration of many factors to ensure, among others, practicability and enforceability of the law.

In view of the above findings, the Authority's conclusion in the second issue is that, the Respondent could not have awarded the tender to the Appellant even though they had quoted the lowest price.

3.0 Whether it was proper for the Respondent to continue with the tender process while the Appellant's complaints were still pending

In resolving this issue the Authority considered the Appellant's contention that it was wrong for the Respondent to proceed with the signing of the contract with the Successful Tenderer while they were aware of the Appellant's pending complaints. They also submitted that while they were waiting for the Respondent to make a decision pertaining to their application for administrative review, they were surprised to receive a letter from PPRA advising them to lodge an appeal to this Authority given that the Respondent had no mandate to review the same. The Authority decided to address the two matters raised by the Appellant together as they

depict ignorance of the law on their part. That said, the matters are analyzed as follows:

(a) The Respondent's act of proceeding with the contract signing while the Appellant's complaints were still pending

The Authority wishes to enlighten the Appellant that, Section 84(1) of the Act provides for suspension of procurement proceedings for a period of seven days only upon fulfillment of certain conditions. The said provision states as follows:

"The timely submission of a complaint or dispute under Sections 80, 81, and 82 shall **suspend the procurement proceedings for a period of seven days, provided the complaint or dispute is not frivolous** and contains **a declaration** the contents of which, if proven, demonstrate that the supplier, contractor, or consultant will suffer **irreparable injury in the absence of suspension** and shows that it is probable that the complaint **or dispute will succeed**

and the granting of the suspension **would not cause disproportionate harm to the procuring entity** or to the suppliers, contractors, or consultants”

The Authority observes that, for the above quoted provision to come into play, the complainant has to satisfy the following four conditions:

- show that the complaint is not frivolous;
- demonstrate that he will suffer irreparable injury if the procurement process is not suspended;
- prove that there is a possibility of his complaint succeeding; and
- if the suspension is granted it would not cause disproportionate harm to the procuring entity or tenderers.

This means the aggrieved tenderer has to put the system into motion by submitting a declaration in fulfillment of the above listed conditions. In addition, Regulation 112(1) of GN. No. 97 of 2005 applies in situations where **“continuation of the proceedings might result in an**

incorrect contract award decision or making worse any damage already done”. Furthermore, Section 84(4) of the Act allows a procuring entity not to suspend the procurement process where public interest so demands. In view of the foregoing, the Appellant’s assertion that the Respondent was obliged to suspend the tender process pending determination of the Appellant’s complaints is a misconception.

(b) PPRA’s advice to the Appellant to lodge the Appeal to this Authority

The Authority noted that the Appellant was concerned with PPRA’s advice that they should appeal to this Authority while they were waiting for the Respondent’s decision on their complaints. The Authority observes that, the Appellant is not conversant with the dispute resolution mechanisms provided for in the Tender Document as well as in the Act. Had they read the Tender Document carefully they would have realized that the same was covered under Clauses 45 to 51 of the ITB. The Authority further observes that, PPRA’s advice was

based on Sections 80(3) and 82(2) of the Act which bar the procuring entity from entertaining procurement disputes once a procurement contract has entered into force as such disputes should be submitted directly to this Authority. The said provisions are similar to Clauses 47.3 and 51.1 of the ITB which are reproduced hereunder:

Clause 47.3 “The head of a Procuring Entity shall not entertain a complaint or dispute or continue to do so after the procurement Contract has entered into force.”

Clause 51.1 “The Bidder not satisfied with the decision of the Public Procurement Regulatory Authority or whose complaint cannot be entertained by the Head of the Procuring Entity or Public Procurement Regulatory Authority shall appeal to the Public Procurement Appeals Authority (PPAA).” (Emphasis added)

For the benefit of the Appellant, the above quoted clauses reiterate, in part, the dispute settlement mechanisms provided for under Sections 80(3) and 82(2) of the Act. Furthermore, the coming into force of a procurement contract envisaged in the above quoted clauses is provided for under Section 55(7) of the Act, which reads:

“The procurement contract shall enter into force when a written acceptance of a tender has been communicated to the successful supplier, contractor or consultant.”

Relating the above quoted provision to the tender under Appeal, the Authority observes that when the Appellant received the tender results from the Respondent, the procurement contract had already entered into force. That is to say, the contract entered into force on 6th September, 2012, when the award letter was sent to the Successful Tenderer. It goes without saying therefore that, PPRA’s advice to the Appellant was correct.

Accordingly, the Authority's conclusion on the third issue is that, it was proper for the Respondent to continue with the tender process while the Appellant's complaints were still pending.

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

Having resolved the issues in dispute and having satisfied itself that the Appellant was fairly disqualified; the Authority is of the firm view that the Appellant is not entitled to any relief. That said, the Authority rejects the Appellant's prayers in their entirety.

Other Matters that Caught the Attention of the Authority

In the course of determining this Appeal, the Authority discovered some shortfalls in the tender process which are worth mentioning; these are:

(a) According to the documents availed to this Authority by the Respondent, there is a contradiction as to when the tender opening took place. The Authority noted that, while the invitation to tender as well as paragraphs 1.2.1 and 1.2.2 of the Evaluation Report indicate the tender opening date to be **30th July, 2012**; the Minutes of the Tender Opening dated 3rd August, 2012 and the Tender Opening Attendance Register indicate that the said event took place on **3rd August, 2012**.

(b) The Authority also detected the following shortfalls in the evaluation process:

- There was a repetition of the evaluation criteria used during preliminary examination which raises doubt as to the competence of the Evaluators. For instance, in verifying the documents the Evaluators checked the delivery period and the price schedule, and the same criteria were again checked under completeness of bids. Additionally, the Power of Attorney and

Anti-bribery policy were checked under eligibility as well as under completeness of tenders.

- According to the Evaluation Report, the tender submitted by the successful tenderer was the only one whose Technical Specifications were checked as the Appellant and the other two tenderers were disqualified at the first stage of preliminary evaluation, namely, commercial responsiveness. However, Table 4 indicates that all the four tenders were subjected to technical evaluation.

- For unknown reasons, the following evaluation criteria provided for under Item 16 of the BDS were not evaluated during the evaluation process:
 - (i) the minimum required annual volume of services for the successful tenderer in any of the last five years shall not be less than 100 million;

- (ii) the minimum experience in the provision of the same services over the past five years;
 - (iii) the minimum experience of the Manager shall be five years in services of an equivalent nature and volume; and
 - (iv) the minimum amount of liquid assets and/or credit facilities net of other contractual commitments of the successful tenderer shall be Tshs. 100,000,000/=.
- The Evaluation Report does not clearly explain the shortfalls found in the tenders which were disqualified. For instance, Table 4 on page 5 thereof indicates that the three, out of the four, tenders were non responsive but does not show the actual shortfalls thereof. The Authority noted that, the actual reason for the disqualification of the Appellant's tender was submitting Audited Financial Reports for three years instead of the required five years. However, the information

contained in the Evaluation Report on the shortfall in the Appellant's tender, is simply stated as follows:

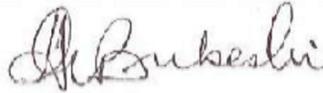
“Audited financial report for the last five years - NO”.

- Post-qualification was not conducted contrary to Section 48 of the Act.

On the basis of the aforesaid findings and conclusions under issues number one to four, the Authority dismisses the Appeal for lack of merit and orders each party to bear their own costs.

Right of judicial review as per Section 85 of the Act explained to parties.

Decision delivered in the presence of the Appellant and the Respondent this 31st day of October, 2012.



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JUDGE (rtd) A.G. BUBESHI

CHAIRPERSON

MEMBERS:

1. MR.F.T. MARMO.....

2. MRS. N.S. INYANGETE

3. MS. E. J. MANYESHA.....
