

**IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY**

APPEAL CASE NO. 63 OF 2010

BETWEEN

M/s MFI OFFICE SOLUTIONS LTD.....APPELLANT

AND

**THE MWALIMU NYERERE
MEMORIAL ACADEMYRESPONDENT**

DECISION

CORAM:

- 1. Hon. A.G. Bubeshi, J. (rtd)- Chairperson**
- 2. Mr. M.R. Naburi - Member**
- 3. Ms E. Manyesha - Member**
- 4. Mr. K.M. Msita - Member**
- 5. Ms. B.G.Malambuigi - Secretary**

SECRETARIAT:

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

FOR THE APPELLANT

- 1.Mr. B.L. Binu – Manager Administration
/Human Resources**
- 2.Mr. Vian S.Bwemeno – Account Manager**
- 3.Mr. Edwin Godwin – Account Manager**

FOR THE RESPONDENT

- 1.Mr. J.R. Chamriho – Chairman of the Tender
Board**
- 2.Ms. Theresia Kanisio – Secretary of the
Tender Board**

This decision was scheduled for delivery today 15th March, 2010 and we proceed to deliver it.

The Appeal at hand was lodged by **MFI OFFICE SOLUTIONS LTD** (hereinafter to be referred to as "**the Appellant**") against **THE MWALIMU NYERERE MEMORIAL ACADEMY** (hereinafter to be referred to as "**the Respondent**").

The said Appeal is in respect of Tender No. 03 of 2009/2010 for Provision of Various Goods. The said tender had four Lots and the Appeal at hand is confined to Lot No. 2 which was for Supply of Computers and Accessories and Lot No.3 which was for Supply of Photocopier (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 Provision of Various Goods vide The Daily News and Mwananchi newspaper of 05th November, 2009.

The tender opening took place on 04th December, 2009 whereby the tenderers who took part in the tender under Appeal were as follows:

| S/NO | Name of a Tenderer | Price Quoted | |
|------|--------------------------------|------------------------|------------------------|
| | | Lot 2 | Lot 3 |
| 1. | M/s MFI Office Solutions Ltd | Tshs. 146,624,504/- | Tshs. 34,655,784.86 |
| 2. | M/s Business Machines (T) Ltd | Tshs. 106,160,895/- | Tshs. 35,047,593/- |
| 3. | M/s Infosys IPS (T) Ltd | USD. 132,725.35 | - |
| 4. | M/s Simply Computers Ltd | USD 107,427.60 | USD 37,485 |
| 5. | M/s Eristic (T) Investment Ltd | Tshs. 151 489,600/- | Tshs. 19,850,000/- |
| 6. | M/s Canocity Ltd | | Tshs. 41,215,566.32 |

After evaluation of tenders, award of Lot No 2 for Supply of Computers and Accessories was made to M/s Simply Computers Ltd at a contract price of USD 107, 427.60 and the award for Lot no 3 was made to M/s Canocity Ltd at contract price of Tshs 41,215,566.32.

On 6th January, 2010, the Appellant wrote to the Respondent vide letter referenced MFI/Dar/001/10 requesting for the tender results.

On 11th January, 2010, the Respondent replied *vide* letter referenced MNMA/BO/1G/VOL.II/64 informing the Appellant that they were unsuccessful.

On 15th January, 2010, the Appellant being dissatisfied with the tender results lodged an appeal to the Public Procurement Appeals Authority (hereinafter to be referred to as the "**Authority**").

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 tender opening took place on 04th December, 2009, whereby the tenderers and /or their representatives attended.

That, the Appellant was not informed about the tender results until he requested for them on 6th January 2010 to which the Respondent replied on 11th January, 2010.

That, the tender results were sent to the Appellant after the successful tenderer had fully executed the said contract and payment had been made contrary to the requirements of the law.

That, the evaluation of tenders was not properly done as the Appellant had met all the criteria and there were no justifiable reasons for their disqualification.

In view of the above cited anomalies, the Appellant prayed to be compensated for costs incurred amounting to **Tshs. 48,520,000/=** comprising the following:

- a) Appeal filing fees – Tshs. **120,000/=**
- b) Purchase of the Tender Document
Tshs. **100,000/=**
- c) Secretarial charges for preparation of the tender document Tshs. **2,000,000/=**
- d) Cost of wages paid for two staff worked for the tender Tshs. **500,000/=**
- e) Opportunity costs (Director for sale-time loss) Tshs. **2,000,000/=**
- f) Loss of profit Tshs. **37,200,000/**
- g) Opportunity costs (Sales Manager)Tshs. **2,000,000/=**

- h) Transportation and communication expenses Tshs. **100,000/=**
- i) Legal consultation fees Tshs. **1,500,000/=**
- j)** Sales Manager/ Key Account Manager/Account Executive – time loss **2,000,000/=**
- k) Administrative expenses Tshs. **1,000,000/=**

SUBMISSION BY THE RESPONDENT

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

That, the Respondent adhered to all tender procedures in accordance with the Public Procurement Act No. 21 of 2004 (hereinafter to be referred to as "**the Act**") and its Regulation in dealing with Tender No. 3 of 2009/2010 for provision of Various Goods.

That, the Evaluation Committee had recommended the Appellant to be awarded the tender for supply of Computers and Accessories as well as for supply of Photocopier.

That, the Tender Board at its meeting held on 22nd December, 2009, disagreed with recommendations of the Evaluation Team for the reasons that;

- a) **In Lot No. 2 which was for the supply of Computers and Accessories**, the Evaluation Committee used a wrong rate to convert the tender price quoted by the Appellant. It was found that the Evaluation Committee used an exchange rate of Tshs. 1,365.42 to one dollar instead of at Tshs. 1,328.30 to one US dollar, which was the Bank of Tanzania rate prevailing on 4th December, 2009, as required under Item 26 of the Bid data Sheet. The rate used resulted in overstating the Tender Price of M/s Simply Computers at Tshs. **146,683,794/=** instead of Tshs.

142,696,081.08 converted at the correct rate. After converting the Tender Price at the correct exchange rate by the Tender Board, M/s Simply Computers emerged the Lowest Evaluated Bidder

b) Under Lot No. 3 for the Supply of Photocopier

- M/s Canocity Ltd quoted to supply a Photocopier Canon IR 5075 while the Appellant quoted to supply a Photocopier Taskalf 820. Since Taskalf 820 photocopier is a new brand in the country the Tender Board was worried about its durability.
- Furthermore, the Appellant did not submit Manufacturer's Authorization for Taskalf 820 as required by the Tender Document, instead they submitted the Manufacturer's Authorization for Kyocera Mita.

That, due to the above reasons, the Tender Board decided to award Lot No 2 for supply of Computers

and accessories to M/s Simply Computers Ltd at a total price of USD 107,427.60 and award the tender for Lot No 3 for the Supply of Photocopier to M/s Canocity Ltd at a total price of Tshs. 41,215,566.32.

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, the Appeal at hand is based on the following issues;

- **Whether the evaluation process was conducted in accordance with the law and if so, whether the award to the successful tenderer was justified;**
- **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 follows:

1.0 Whether the evaluation process was conducted in accordance with the law and if so whether the award to the successful tenderer was justified;

In its endeavour to ascertain whether the evaluation that led to the Appellant's disqualification was conducted in accordance with the law, the Authority reviewed the documents submitted and the contesting oral submissions by parties *vis-a-vis* the Tender Document and the applicable law.

To start with, the Authority reviewed the Tender Document in order to ascertain whether it contained the requisite information as required by Regulation 83 of the Public Procurement (Goods, Works, Non consultant services and disposal of public assets by tender) Government Notice No. 97 of 2005 (herein

after to be referred to as "**GN No. 97/2005**"). The said Regulation requires that the content thereof to include, among other things; eligibility criteria, technical specifications, the manner in which the tender price is to be formulated and criteria to be used in determining the successful tenderer.

The Authority noted that the Tender Document contained most of the required information, save for the following shortfalls:

- **Commercial Evaluation of the bids:** Under this part, the evaluation criteria in the Bid Data Sheet were narrowed down to only three items namely; cost of inland transportation, insurance and other costs within Tanzania incidental to delivery of goods to their final destination, delivery schedule and deviation in payment schedule even though the ITB provided for the relevant criteria as required by the Law. Item 27 of the Bid Data sheet provides as follows:

**“Criteria for bid evaluation: 31.4 (a)
(b) and (c)”**

During the review, the Authority observed that Item 27 of the Bid Data Sheet had limited most of the important criteria which were to be complied with by the tenderers, for instance the said Item 27 read together with Item 31 and 32 of the Bid Data Sheet indicated that the provisions which required tenderers to show the availability of spare parts and after sales services for the product to be supplied were not applicable. The Authority finds these provisions to be of importance as they will help the Procuring Entity to be sure of the life span of the goods to be supplied. The Authority also noted that, although the issue of availability of spare parts was not among the criteria but it was used by the Tender Board to disqualify the Appellant which was wrong. For purposes of clarity, the said Items 31 and 32 of the Bid Data Sheet are reproduced as hereunder:

“31. Cost of Spare parts: Not Applicable”

“32. Spare parts and after sales service facilities in Tanzania: Not applicable
(Emphasis supplied)

- **Bid prices:** under this part the Authority noted that there were two contradictory **Items** under the Bid Data Sheet which provided for instructions on **how the bid prices will be**. The said Items provides as hereunder;

“14. The prices shall be fixed”

“7 Rates and prices quoted by the bidder subject to adjustment during performance of the contract”

Based on the above quoted provision the Authority is of the view that, the said Items were contradictory and ambiguous as it was difficult for the tenderers to

understand what price was to be quoted for this particular tender and therefore it was possible for each tenderer to have different interpretation based on the same Items. During the hearing the Respondent admitted the said weaknesses in their Tender Document.

- **Post Qualification:** Under this part, the Authority revisited Item 35 of the Bid Data Sheet which provides as follows;

“Post Qualification will not be undertaken”
(Emphasis added)

On the basis of the above quoted item the Authority is of the view that, the Respondent erred by indicating that Post Qualification will not be undertaken as it is contrary to the requirement of the law. The Authority reproduces Section 48(1) of the Act which provides for the circumstances under which Post qualification is to be conducted, as hereunder:

“48(1) If the tenderers have not been pre qualified, the procuring entity and the Tender Board shall determine whether the tenderer whose tender or proposal has been determined to offer the lowest evaluated tender in case of procurement or the highest evaluated tender in case of disposal of public asset by tender, has the capability and resources to carry out effectively the contract as offered in the tender.” (Emphasis supplied)

In course of hearing the Appeal, it became evident that the Respondent, through the Secretary of the Tender Board, carried out post qualification by physical visitation to the Successful tenderer’s office which was not supported by any report to indicate what was being checked. The Authority finds this to be highly irregular and improper at law.

The Authority therefore finds that, although the Respondent's Tender Document did contain most of the information as required by the law, there was omission of some mandatory provisions and contradictory information as observed herein-above.

Having established that some of the provisions of the Tender Document and actions of the Respondent contravened the law, the Authority proceeded to examine the evaluation process in order to ascertain whether it was conducted in accordance with the law.

In so doing the Authority reviewed the Evaluation Report and noted that the evaluation process was done in three stages, namely; Preliminary Evaluation, Technical Evaluation and Commercial Evaluation.

The Authority noted that, during Preliminary Evaluation all six tenders were subjected to the same criteria. They were checked to see if they had

complied with the eligibility criteria, submission of tenders security, delivery schedule and completeness of the tenders as required by Clause 27.1 of the ITB which provides as follows;

“Prior to detailed evaluation of tenders, the Procuring Entity will determine whether each tender

(a) meets the eligibility criteria defined in ITB Clause 2 & 4;

(b) has been properly signed;

(c) is accompanied by the required securities;

(d) is substantially responsive to the requirements of the Bidding Documents.

The Procuring Entity’s determination of a tender’s responsiveness will be based on the contents of the tender itself.” (Emphasis added)

During this Evaluation stage, two tenders were found to be non responsive and four tenders, the

Appellant's inclusive, qualified for Technical Evaluation.

The Authority revisited the Respondent's argument that, although the Appellant was found to be responsive at this stage, it was later on discovered by the Tender Board at its meeting held on 22nd December, 2009, that the Appellant had submitted Manufacturer's Authorization for Kyocera Mita instead of the Manufacturer's Authorization for Photocopier Taskalf 820 which was to be supplied.

In reply to this argument the Appellant stated that, they had submitted Manufacturer's Authorization from Kyocera Mita because the same company is the manufacturer of photocopier Taskalf 820.

Based on the two contesting arguments by the parties, the Authority is of the view that it was the duty of the Appellant to provide assurance to the Respondent that the manufacturer of photocopier Taskalf 820 were also the manufacturer of Kyocera

Mita whose Authorization was attached. It was not possible by merely looking at the Manufacturer's Authorization for Kyocera Mita to conclude that they are the manufacturer's of Photocopier Taskalf 820.

The Authority is of the considered view that, had the evaluation been properly done the Appellant would have been found to be substantially non responsive for failure to submit the required Manufacturer's Authorization and therefore would have been disqualified at the Preliminary Evaluation stage.

Having Reviewed the Preliminary Evaluation, the Authority also reviewed the Technical Evaluation and noted that, at this stage evaluation was done separately for each Lot. Under Lot No. 2 only two tenders qualified for Financial Evaluation while under Lot.3 all three tenders who were evaluated at this stage qualified for Financial Evaluation.

In reviewing the Evaluation Report, the Authority noted that, during Financial Evaluation, the Appellant

was found to have quoted the lowest price in both Lots and was recommended for award. However, this position was changed by the Tender Board upon discovery of some errors in the Evaluation Report and therefore refused to approve award of tender to the Appellant. In support of their decision the Respondent submitted that although the Appellant was found to be the lowest evaluated tenderer by the Evaluation Committee, the Respondent's Tender Board found that there was an error made in converting the foreign currency.

Having effected the requisite corrections, the tender appearing as the second lowest in the Evaluation Report was found to have a lower price than the Appellant's tender. This was due to the reason that, the exchange rate used to convert the price quoted by M/s Simply Computers Ltd, the second lowest evaluated tenderer for Lot No. 2 was Tshs. 1,365.42 to one US Dollar while the exchange rate that was required to be used was Tshs. 1,328.30 since that was the rate existing at the date of tender opening.

The said exchange rate was explicitly provided for in the Tender Document under Clause 30.2 read together with Item 26 of the Bid Data sheet which provides as hereunder;

“The currency shall be used for bid evaluation and comparison purposes to convert all bid prices expressed in various currencies is: Tanzanian Shilling. Source of the exchange rate shall be; Bank of Tanzania. Date of exchange rate shall be 4th December, 2009.” (Emphasis added)

In analyzing the Respondent’s argument, the Authority observes that the Tender Board was right in noting the said anomaly in the Evaluation Report. The Authority also noted that after converting the tender price using the correct rate, the tender by M/s Simply Computers emerged to be the lowest.

On closer scrutiny of the evaluation process, the Authority discovered that the Respondent’s Tender

Board had discovered the error in the exchange rate used in the Evaluation Report. However, the Authority deems the Tender Board's act of correcting the exchange rate and the subsequent computation of the prices was tantamount to re-evaluation and hence *ultra vires* as the said duty is mandated to the evaluation committee. The Authority finds this to be improper and contrary to Section 68(b) of the Act which guides on what should be done in a situation where the tender board differs with the recommendations of the evaluation committee. The said Section 68(b) is reproduced as hereunder;

“The tender board shall review the evaluation and recommendation made by the procuring entity and may either;

(b) refuse to authorize acceptance of any of the tenders and refer the evaluation back to the procuring entity with instruction to re evaluate the tenders or a recommendation for re-

tendering or other actions” (Emphasis added)

Based on the above quoted provision, the Authority is of the view that the act of re-evaluating the tenders by the Tender board instead of referring them back to the procuring entity was improper. Thus the Tender Board acted beyond its powers.

Having reviewed the Evaluation Report and having established that the said process was not properly conducted, the Authority is of the view that the whole process was marred by irregularities.

In the light of the above findings, the Authority concludes that, the evaluation was not properly done and therefore the award to the successful tenderer was not justified.

2.0 Whether the Appellant was unfairly disqualified

In resolving this issue, the Authority took cognizance of its findings in issue number one above, that the evaluation was not properly conducted and that the Tender Board had acted beyond their powers in re-evaluating the tenders and thereby disqualifying the Appellant. It goes without saying therefore that, the Appellant was unfairly disqualified. However, the Authority is of the firm view that, had the evaluation been properly conducted the Appellant would have been disqualified at the Preliminary stage for being substantially non responsive.

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

Having resolved the two issues, the Authority considered the prayers by parties as follows:

(a) The Appellant's prayers:

Even though the Authority has concluded that the Appellant's tender would have been disqualified for being non responsive the Appeal has merit in that, it has helped to uncover irregularities in the tender under Appeal. The Authority therefore finds that there is justification for the Appellant to recover some of the direct costs incurred in pursuit of this Appeal. The Respondent is ordered compensate the Appellant a sum of **Tshs. 720,000/=** being costs for:

(i) Appeal filling fees Tshs. **120,000/=**

(ii) Legal Consultation fees Tshs. **600,000/=**.

The Authority also considered the other compensatory items requested by the Appellant and rejects them for being too remote.

(b) The Respondent's prayer:

With regards to the Respondent prayer that the Appeal be dismissed, the Authority is of the view that, the Respondent had breached the law and therefore their prayer is rejected in its totality.

Other matters that caught the Authority's attention

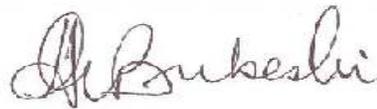
In the course of handling this Appeal the Authority discovered the following matters which are worth mentioning:

- (a) The Authority noted that the Members of the Evaluation Committee signed the Personal Covenants at the end of evaluation process contrary to the requirements of the law.
- (b) The Authority also noted that there was improper numbering of the Bid Data Sheet in that, Item 21 was followed by Items '7' and '8' and then '22'.

Having considered all facts and evidence, the Authority concludes that, the Appeal has merit and therefore orders the Respondent to compensate the Appellant a total of Tshs. 720,000/= as 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 the Respondent this 15th day of March, 2010.



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JUDGE (rtd) A. G. BUBESHI

CHAIRPERSON

MEMBERS:

1. Mr. M.R. Naburi



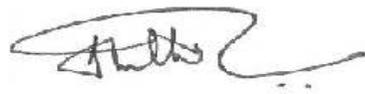
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