

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

APPEAL CASE NO. 78 OF 2010

BETWEEN

KONSAD INVESTMENT LTD.....APPELLANT

AND

BAGAMOYO DISTRICT COUNCILRESPONDENT

CORAM:

- | | |
|--------------------------------|---------------|
| 1. Hon. A.G. Bubeshi, J. (rtd) | - Chairperson |
| 2. Mr. K.M. Msita | - Member |
| 3. Mrs. N.S.N. Inyangete | - Member |
| 4. Ms. E.J. Manyesha | - 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. James. K. Wambura – Managing Director
2. Mr. Habibu M. Jitwae – Director of Planning and Operations

FOR THE RESPONDENT

1. Mr. Rumelius Paschal Bakirane – Senior Supplies Officer.
2. Mr. Salum A. Papen – Legal Officer

This decision was scheduled for delivery today 1st October, 2010, and we proceed to deliver it.

The appeal at hand was lodged by **M/s KONSAD INVESTMENT LIMITED** (hereinafter to be referred to as "**the Appellant**") against the **BAGAMOYO DISTRICT COUNCIL** (hereinafter to be referred to as "**the Respondent**").

The said Appeal is in respect of Tender No. BDC/CTB/2010/2011/4 for Collection of Revenue on behalf of the Respondent. The appeal is specifically related to Lot No. 4 which was for collection of Levy on Aggregates, Sand and Murram (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 made an invitation to eligible tenderers for the tender for collection of revenues on behalf of the Bagamoyo District Council through the Mwananchi Newspaper of 22nd May, 2010. This advertisement was

also posted on various Public Notice Boards within the District.

The tender opening took place on 21st June, 2010, whereby the five tenderers who took part in the tender process were as follows:

S. No	Name of a Tenderer	Price offered TSHS	Duration
1.	Kagambo Investments	41,000,000/-	Per Month
2.	New Metro Merchandise Ltd	40,600,000/-	Per Month
3.	The Pelican Hut	39,800,000/-	Per Month
4.	Bicem Investment & General Service Co. Ltd	192,000,000/- (32,000,000 per month)	Per six Month
5.	Konsad Investment Ltd	47,750,000/-	Per Month

Following evaluation of tenders the award was made to New Metro Merchandise Co. Ltd at a contract price of Tshs. 40,600,000/-.

After notification of their being unsuccessful in the Tender, on 5th July, 2010, the Appellant wrote to the

Respondent asking for the reasons of their disqualification. However, no response was received from the Respondent. This aggrieved the Appellant, thus they applied for administrative review to the Public Procurement Regulatory Authority (hereinafter to be referred to as "**PPRA**") vide a letter referenced KIL/HQ/PPRA/01/2010 dated 15th July, 2010.

On 20th July, 2010, PPRA replied to the Appellant's application for review vide a letter referenced PPRA/LGA/014/4 in which they informed them that PPRA did not have jurisdiction to entertain the appeal as the contract was already in force. They therefore advised them to lodge their Appeal directly to the Public Procurement Appeals Authority (hereinafter referred to as "**the Authority**").

On 23rd July, 2010, the Appellant lodged an appeal to this Authority.

SUBMISSION 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 may be summarized as follows:

That, the Appellant had met all the requirements provided for in the Tender Document.

That, the Appellant quoted the highest amount of Levy collection per month as it was evidenced during tender opening.

That, the Respondent awarded the tender to a company which does not have the required experience and its submitted licenses were forged.

That, the Appellant had never been given the reasons for their disqualification despite the fact they had written to the Respondent to inquire for the same.

That, the whole procurement process was conducted without adherence to the requirements specified in the Tender Document and the law.

That, the Appellant declined another tender which was awarded to them for collection of service levy due to the fact that it was based on the same evaluation criteria. They were of the view that they could not have qualified for award of one tender based on the same criteria while on the other tender they were disqualified.

That, the Appellant suspected that corruption was involved in awarding the said tender to New Metro Merchandise Co. Ltd.

That, the Appellant disputed the said award to New Metro Merchandise Co. Ltd and prayed to the Authority for review of the whole process so that justice can be done.

Finally, the Appellant prayed to be compensated a total of Tshs. 3,650,000/- as per the following breakdown;

- Purchase of Tender Document – Tshs. 50,000/-
 - Site visits for three days Tshs. 3,600,000/- which arose from the following;
 - (i) Lugoba: costs of transport and accommodation for two staff Tshs. 506,000/-
 - (ii) Msolwa: costs of transport and accommodation for two staff Tshs. 506,000/-
 - (iii) Sanzale: costs of transport and accommodation for two staff Tshs. 510,000/-
 - (iv) Pongwe: costs of transport and accommodation for two staff Tshs. 524,000/-
 - (v) Stationeries and Telephone costs Tshs. 840,000/-
 - (vi) Preparation of the Tender Document Tshs. 714,000/-
- TOTAL TSHS. 3,650,000/-**

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, the Appellant was one of the tenderers in the disputed tender process.

That, the Appellant failed to comply with Clause 3(g) and Item 4(ix) of the Tender Document.

That, with regard to the responsiveness of the tender, it was the discretion of the Respondent to award to any tenderer without considering who had offered the highest price.

That, the Appellant was awarded the tender for "**Collection of Service Levy**". However, the Respondent had not been informed that the said award has been rejected by the Appellant.

That the Appellant's allegations are mere hearsay as there is no evidence to prove them. Thus the Respondent prayed for dismissal of the Appeal with costs.

ANALYSIS BY THE AUTHORITY

Having gone through the documents submitted and having heard the oral arguments from parties, the Authority is of the view that the Appeal is based on the following issues:

- **Whether the Appellant's disqualification was justified**
- **Whether the award to the successful tenderer 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 Appellant's disqualification was justified

In its endeavour to ascertain whether the Appellant's disqualification was justified, the Authority reviewed the documents submitted as well as the contesting oral submissions by parties *vis-a-vis* the applicable law and the Tender Document. In so doing, the Authority examined the evaluation process in its entirety in order to establish whether the procedural requirements were adhered to in accordance with the Tender Document and the Public Procurement Act of 2004, (Cap. 410) (hereinafter to be referred to as "**the Act**").

The Authority examined the Respondent's Tender Document to see if it complied with the requirements of Regulation 83 of 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**") and observes that, it did not have minimum requirements. However, it contained the evaluation criteria under Clause 2 of the Tender Document.

The Authority noted further that, the Tender Document did not provide guidance on how the evaluation process would be conducted in that, there was no indication of the stages of evaluation which were to be followed by the evaluators.

The Authority finds this to be contrary to Regulation 90 of GN No. 97/2005 which provides guidance on the procedures to be followed during evaluation process. For the purpose of clarity the Authority reproduces part of the said provision as hereunder;

“Reg. 90(6) prior to detailed evaluation of tenders, the tender evaluation committee shall carry out a preliminary examination of tenders to determine whether or not each tender is substantially responsive to the requirement of the tender document, whether the required guarantees have been provided, whether the documents have been properly signed and whether

the tenders are otherwise generally in order”(Emphasis supplied)

Furthermore, the Authority noted that the tender document did not provide for post-qualification as required under Regulation 94(2) of GN No. 97/2005 which stipulates as follows;

“Reg. 94(2) The criteria for post qualification shall be set out in the solicitation document and may include;

- (a) Experience and past performance on similar contracts
- (b) Knowledge of local working conditions
- (c) Capabilities with respect to personnel, equipment and construction of manufacturing activities
- (d) Financial capabilities to perform the contract
- (e) ...
- (f) ...
- (g)”

In view of the above findings the Authority concludes that the Tender Document was not comprehensive enough to allow proper evaluation of tenders.

Accordingly, the Authority reviewed the Evaluation Report in order to ascertain how the said evaluation was conducted. In so doing the Authority noted that, the evaluation was done in two stages namely; Preliminary Evaluation (checking eligibility) and Financial Evaluation.

The Authority revisited the Appellant's ground of appeal that they were unfairly disqualified during evaluation. In order to establish if the said disqualification was the result of the improper evaluation or non compliance with the requirements of the Tender Document, the Authority started its analysis by revisiting the submissions by the parties on that ground.

The Authority further revisited the submission by the Appellant that the evaluation was to be done in accordance with the criteria provided under Clause 2 of the Tender Document. Hence, the Respondent's

imposition of the new requirements during evaluation process was contrary to the law. The Appellant also suspected that they were awarded the tender for collection of service levy as a way of silencing them so as not to inform the appropriate organs about the shortfalls noted in that procurement process. Furthermore they contended that, it was not possible to be disqualified in one tender which had the same criteria and be awarded another tender while they had failed to comply with the same requirements.

In response, the Respondent submitted that the Appellant had failed to comply with Clause 3(g) of the Tender Document and Item 4(ix) of the tender advertisement to show that they had vehicles and motorcycles to be used for collection of levy.

In order to establish the validity of the parties' arguments, the Authority revisited the Tender Document and the Evaluation Report so as to ascertain if the evaluation was conducted in accordance with the requirements of the Tender Document. In so doing the

Authority noted that, Clause 5 of the Tender Document had explicitly stated that, Evaluation will be conducted in accordance with the criteria provided for under Clause 2 of the Tender Document. For the purposes of clarity the Authority reproduces the said Clauses in Swahili as follows:

“2 BARUA ZA MAOMBI ZIAMBATANISHWE NA MAELEZO NA VIVULI VYA;

I. Leseni ya Biashara

II. Hati ya kuandikishwa kwa kampuni

III. Memorandum and Articles of Association

IV. Stakabadhi ya Ada ya maombi(Kivuli)

V. Maelezo ya kazi alizowahi kufanya (uzoefu) na vielelezo.

VI. Usajili wa VAT/TIN

VII. Power of Attorney

VIII. Bank Statements za miezi mitatu mfululizo kuanzia Februari, Machi na April 2010.” (Emphasis supplied)

Literally translated the quoted Clause means that, all applications must be accompanied with statements and photocopies of the following:

- i) Current valid business license
- ii) Certificate of Incorporation (Company Registration Certificate)
- iii) Memorandum and Articles of Association
- iv) Receipt for application fees
- v) Experience in levy collection
- vi) Registration of VAT/TIN
- vii) Power of Attorney
- viii) Bank Statement for three months from February, March and April 2010.

“5 UCHAMBUZI WA ZABUNI (EVALUATION)

Uchambuzi wa Zabuni utafuata vigezo vilivyoianishwa katika kifungu namba 2 cha nyaraka hii.” (Emphasis added)

Literally translated Clause 5 above means that, the evaluation will be carried out using the criteria specified in Clause 2 of the Tender Document.

Based on the above quoted Clauses, the Authority is of the view that, the Tender Document had specified the evaluation criteria. The Authority reviewed the Evaluation Report so as to establish the criteria used by the evaluators during evaluation process. In so doing the Authority noted that, the following criteria were used:

1. Application letter by authorized signatories
2. Attached receipt for application fees
3. Certificate of Incorporation (Company Registration Certificate)
4. Directors names and Authorized signatures
5. VAT/TIN
6. Experience in levy collection at any council basing on value of assignments and numbers of assignments
7. Physical and postal address of the company
8. Current valid business license
9. Bank Statement of at least three months; April, May and June, 2010.
10. Transport Facilities
11. Power of Attorney

Based on the above quoted criteria the Authority is of the view that, the evaluators had imposed some additional criteria which were different from the ones specifically provided for in the Tender Document. The additional criteria were as follows:

- Application letter by authorized signatories
- Directors' names and Authorized signatures
- Bank Statement of at least three months April, May and June 2010 **instead of February, March and April 2010**
- Transport Facilities.

Having pointed out the additional criteria which were used for evaluation, the Authority is of the view that the evaluation was not conducted strictly using criteria provided for in Tender Document; contrary to Regulation 90(4) of GN. No. 97/2005 which provides as hereunder:

“Reg.90(4) The tender evaluation shall be consistent with the terms and conditions set

forth in the tender document and such evaluation shall be carried out using criteria explicitly stated in the Tender Document.”

(Emphasis added)

Accordingly, the Authority is of the view that, the Respondent erred in law by conducting the evaluation using some of the criteria which were not part of the Tender Document.

The Authority also noted that, the Appellant's tender was disqualified for failure to mention and attach registration cards so as to prove ownership of the transport facilities to be used by their company in undertaking their assignments as per the requirements of Clause 3(g) of the Tender Document.

The Authority is of the view that, the said criterion of transport facilities had been wrongly applied since it was not among the criteria stated under Clause 2 of the Tender Document.

Upon further review the Authority noted that, Bicem Investment and General Services Co. Ltd did not attach the certificate of registration for proving availability of transport facilities as noted by the evaluators on page 22 of the Evaluation Report. However, the said company was not disqualified as it was the case for the Appellant. This shows unfair treatment of the tenderers contrary to Section 46(4) of the Act which reads as follows:

“Any qualification criteria shall be made known to and shall apply equally to all suppliers, contractors or consultants and a procuring entity shall impose no discriminatory criteria, requirement or procedure with respect to the qualification of any supplier, contractor or consultant.”

(Emphasis supplied)

The Authority revisited the submission by the Appellant that, the criteria for evaluation of the tender for collection of levy were the same as for evaluation of tender for collection of service levy. Hence the Appellant suspected

that the award of tender for service levy to them was made purposely so as to silence them from reporting the faults noted on that procurement process; as it was not possible to have met the requirements in one tender and failed to meet the same requirements in the other tender.

The Authority having reviewed the Evaluation Report noted that it is true that the same criteria were used to evaluate both tenders. Thus the Authority accepts the Appellant's contentions that, if they were found to be non responsive in the disputed tender for failure to provide evidence of transport facilities, they should have been equally disqualified for the tender relating to collection of service levy.

The Authority also revisited the Appellant's submission that, they had never been informed of the reasons for their disqualification despite several reminders on same matter to the Respondent's office. The Respondent contended that, the Appellant was informed on the reasons for their disqualification vide a letter referenced

HWB/F.10/42/120 of 14th July, 2010, which was sent to the Appellant vide postal services. The Respondent submitted further that the Appellant had made several visits to the Respondent's office and had been insisting to be informed even verbally the reasons for their disqualification. However verbal communication was considered by the Respondent to be contrary to normal office procedures.

The Authority revisited Regulation 17(2) of GN No. 97/2005 which provides for the modality of communication between the procuring entity and tenderers. The said Regulation 17(2) of GN No.97/2005 is reproduced herein below as follows;

“Reg. 17(2) communication between... may be made by means of communication that does not provide a record of the content of the communication provided that, immediately thereafter confirmation of the communication is given to the recipient in a form which

provides a record of the confirmation”
(Emphasis added)

Based on the above provision the Authority is of the view that, the Respondent ought to have replied to the Appellant’s inquiry orally as the law permits and thereafter confirm in writing the said verbal communication. The Authority observes that the Appellant had not received any reply to the said queries up to the date of hearing. Failure by the Respondent to reply to the Appellant’s queries proves that, the Appellant had been denied his right to know the reasons for their disqualification.

The Authority also discovered that, the Appellant’s Power of Attorney was defective as it was transferring power from one person to the same. The same kind of defect was noted on the bid document of Bicem Investment and General Services Co. Ltd. The Authority wishes to enlighten the parties that the Power of Attorney accepted under the law has to show the transfer of powers from a company (Directors) to a person appointed to act on

behalf of the company for the specified works. The Authority observe further that, had the evaluators been diligently enough they would have disqualified the Appellant for the defectiveness on his Power of Attorney. Thus this shows that even if the Appellant was unfairly disqualified on the criterion of transport facilities, they could also be disqualified on the criterion of the Power of Attorney.

The Authority also discovered that, the successful tenderer's Power of Attorney was defective as an employee of the said successful tenderer transferred powers to the Managing Director who had been appointed to act on behalf of the Company, instead of the powers being transferred from a Director to a person appointed to act on behalf of the company. However this anomaly was not detected by the evaluators as the same could have been the basis of rejecting the successful tenderer's bid as it was the case for the bids of Pelican Hut and Kagambo Investment limited which were rejected for failure to submit Power of Attorney.

The Authority therefore is of the view that the whole evaluation process was marred by irregularities which had resulted from non adherence of the law.

Accordingly, the Authority's conclusion in respect of the first issue is that the Appellant's disqualification on the criterion that they failed to indicate evidence of transport facilities was not justified.

2.0 Whether the award to the successful tenderer was proper at law

In resolving this issue the Authority revisited Appellant's argument that, the tender had been awarded to New Metro Merchandise Limited which did not have the required experience and its licenses were forged. In support of this argument the Appellant submitted that the successful tenderer does not have the required experience as they had been issued with a license for Debt Collection on 31st March, 2010. Further that, their license had been issued by the Ilala Municipal Council which means that such a license cannot be used for collection of levy outside the area of jurisdiction of the

Ilala Municipal Council. The Appellant further submitted that the required licenses for this kind of work are issued by Ministry of Industry, Trade and Marketing. Moreover, the license is for debt collection and not for levy collection. The Respondent in reply conceded that the license submitted by the successful tenderer was issued by the Ilala Municipal Council and its jurisdiction was within Ilala Municipality. It was admitted by the Respondent that the said license was for debt collection and not for collection of levy.

In order to establish the validity of the Appellant's argument the Authority consulted the Ministry of Industry, Trade and Marketing. Following the consultation, the Authority is in agreement with the Appellant's submission that, licenses for Commission Agents on levy collection are only issued by the Ministry of Industry, Trade and Marketing. Accordingly, the license for debt collection issued by the Ilala Municipal Council to the successful tenderer and which was submitted as a requirement in the tender under dispute was not proper.

On the issue of the license being forged, the Authority could not establish whether it was forged or not as that matter is outside its Jurisdiction.

The Authority also considered the Appellant's contention that the successful tenderer did not have the required experience. In regard to this point, the Authority is of the view that the Tender Document required tenderers to show experience possessed. Perusal of the successful tenderer's document shows they have experience in levy collection in the following areas;

- Bill board revenue collection at Arusha Municipal Council
- Bus stand revenue collection in Kinondoni Municipality.

The Authority therefore does not agree with the Appellant's contention in this regard.

In the light of the above findings, the Authority's conclusion on the second issue is that, the award to the successful tenderer was not proper at law.

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

Having analyzed the contentious issues in dispute, the Authority finds it prudent to consider prayers by the parties.

To start with the Authority considered the Appellant's prayers that , the Authority is requested to do justice and further order the Respondent to compensate the Appellant a total of Tshs. 3,650,000/-

As it has been established in the first and second issues that, the tender process in its totality was marred by irregularities and that the Appellant's tender was also defective; thus it could not have been substantially responsive. Accordingly the Authority is unable to grant the prayer for compensation to the tune of Tshs. 3,650,000/-. However the Authority finds it proper to

order a refund of Tshs. 120,000/- being appeal filling fees. The Authority therefore orders the Respondent to;

(i) Re-start the tender process in observance of the law;

(ii) Compensate the Appellant the sum of Tshs. 120,000/- only being Appeal filing fees.

The Authority also considered the prayer by the Respondent that the Appeal be dismissed in its entirety as it has no merit; and observes that, the Appeal has some merit and therefore the Respondent's prayer is rejected.

Other matters that caught the attention of the Authority:

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

- (a) The Tender Document issued by the Respondent was not in compliance with the law as it lacked some of the important requirements provided by the law.
- (b) In view of the weaknesses identified in the evaluation as analyzed under the first issue, the Authority doubts the competence of the Members of the Evaluation Committee.
- (c) The Authority is also concerned with the conduct and competence of the PMU for failure to:
- prepare the comprehensive tender documents;
 - detect the anomalies and shortfalls contained in the Evaluation Report;
 - advise the Tender Board accordingly.
- (d) The Authority observes that the Respondent does not have a Procurement Management Unit as they operate through a Procurement Management Committee contrary to the requirements of Section 34 of the Act.

- (e) The Authority also noted that the Respondent's Tender Document does not differentiate the certificate of incorporation from a certificate of Registration as the terms have been used interchangeably. The Authority wishes to enlighten the parties that a Certificate of Incorporation issued under the Companies Act Cap. 212 gives a company legal personality while the Business Names (Registration) Act Cap. 213 is for registering names to be used in business (trade names).
- (f) The Authority also noted that, there are contradictions on the commencement dates of the contract; as the first page of the contract indicates that commencement is 10th July, 2010 while Clause 6 of the same contract shows the commencement date to be 1st July, 2010.

Having considered all the facts and evidence, the Authority concludes that, the tender process was marred by

irregularities and the award made in favour of New Metro Merchandise Limited is a nullity at law.

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

- **Re-start the tender process in observance of the law;** and
- **Compensate the Appellant a sum of Tshs. 120,000/- only being appeal filling fees.**

That said, it is the sincere hope of this Authority that, the Respondent in particular and other procuring entities in general, will take a lesson from this decision in abiding with the law.

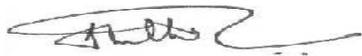
Right of Judicial Review as per Section 85 of the PPA/2004 explained to parties.

Decision delivered in the presence of the Respondent and in absence of the Appellant though duly notified this 1st October, 2010.



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JUDGE (rtd) A. BUBESHI
CHAIRPERSON

MEMBERS:

1. MR. K.M. MSITA

2. MRS. N.S.N INYANGETE

3. MS. E. J. MANYESHA
