

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

APPEAL CASE NO. 18 OF 2013-14.

BETWEEN

M/S Y.N.INVESTMENT.....APPELLANT

AND

MAGU DISTRICT

COUNCIL.....RESPONDENT

DECISION

CORAM

- | | |
|-------------------------------------|---------------|
| 1.Hon. Augusta G. Bubeshi, J. (rtd) | -Chairperson |
| 2.Mr.Kesogukewe M.Msita | -Member |
| 3.Mrs. Nuru S.N. Inyangete | -Member |
| 4.Ms. Esther J.Manyesha | -Member |
| 5.Mr. Ole-Mbille Kissioki | -Ag.Secretary |

SECRETARIAT

- | | |
|---------------------------|-----------------|
| 1. Ms. Violet S. Limilabo | - Legal Officer |
| 2. Mr. Hamisi O.Tika | - Legal Officer |

FOR THE APPELLANT

Mr. Swahibu Nyambwa - Administrative Director.

FOR THE RESPONDENT

1. Ms. Naomi Nnko Ndelilio -District Executive
Director
2. Mr. Bashir Muhoja - District Solicitor
3. Eng. Rutta Merchades -District Water Engineer
4. Mr. Renatus Paul Shule -Head Procurement
Management Unit

FOR THE OBSERVER

Mr. C.J. Mushi -Managing Director, Cyril
Investments Limited.

This decision was scheduled for delivery today 21st
November, 2013 and we proceed to deliver it.

The appeal at hand was lodged by **M/S Y.N INVESTMENT LIMITED** (hereinafter referred to as **“the Appellant”**) against **MAGU DISTRICT COUNCIL** (hereinafter referred to as **“the Respondent”**).

The said Appeal is in respect of Tender **No. LGA/090/W/2012/2013/26** for **Supply of Materials and Refurbishment (Two storage tanks, pipe line from 135m³ Nyanguge tank to 90m³ Muda tank and civil works)** for **Nyanguge – Muda piped water supply in Magu District Council** (hereinafter referred to as **“the tender”**).

According to the documents submitted to the Public Procurement Appeals Authority (hereinafter referred to as **“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 Daily News dated 5th June, 2013 invited eligible tenderers to submit their tenders for the tender under Appeal.

The deadline for the submission of the tenders was set for 4th July, 2013; whereby four tenders were received from the following firms;

| S/N | NAME OF THE TENDERER | READ OUT PRICE IN TSHS. |
|------------|--|--------------------------------|
| 1. | M/s Cyril Investment Company Limited | 1,589,759,092.24 |
| 2. | M/s Y.N.Investment. | 399,566,400.00 |
| 3. | M/s Rwambali Investment Limited | 409,366,760.00 |
| 4. | M/s DM & C Construction Company Limited. | 544,766,700.00 |

The tenders were then subjected to three stages of evaluation namely; preliminary evaluation, detailed evaluation and price comparison.

During the preliminary evaluation stage, all four tenders were found to be substantially responsive and were subjected to detailed evaluation stage.

During detailed evaluation stage, the Evaluation Committee did arithmetical correction whereby they found three tenders to have errors. The errors were

corrected and the corrected tender prices were compared with the Engineers estimate and thereafter were ranked as hereunder;

| S/N | NAME OF THE TENDERER | READ OUT PRICE IN TSHS. | CORRECTED TENDER PRICE | % OF DEVIATION FROM ENGINEERS ESTIMATES | RANKING |
|------------|--|--------------------------------|-------------------------------|--|-----------------|
| 1. | M/s Cyril Investment Company Limited | 1,589,759,092.24 | 1,589,735,492.24 | +5.98% | 1 st |
| 2. | M/s Y.N.Investment | 399,566,400.00 | 395,172,400.00 | -73.65% | 3 rd |
| 3. | M/s Rwambali Investment Limited | 409,366,760.00 | 409,366,760.00 | -72.7% | 2 nd |
| 4. | M/s DM&C Construction Company Limited. | 544,766,700.00 | 34,440,104,200.00 | +2196% | 4 th |

Having ranked the above tenderers, the Evaluation Committee recommended the award of the tender to M/s Cyril Investment Company Limited at a contract price of Tshs.1, 589,735,492.24.

The Tender Board at its meeting held on 26th July, 2013, approved the recommendations by the Evaluation Committee and awarded the tender to M/s Cyril Investment Company Limited.

On 29th July, 2013, the Respondent vide a letter referenced MDC/PF.10/61/VOL.III/50 communicated the award of the tender to the successful tenderer M/s Cyril Investments Company Limited.

On 23rd September, 2013, the Appellant travelled to Mwanza to make a follow up of their tender. It was at this moment when they realized that the award of the tender had already been made to M/s Cyril Investments Company Limited, after they saw them executing the project.

Being dissatisfied with the award decision, on the 27th September, 2013, the Appellant consulted the Public Procurement Regulatory Authority (hereinafter referred to as "**the PPRA**") over the matter.

Having noted that the award of the tender had already been made, PPRA advised the Appellant to lodge their Appeal to this Authority.

On 3rd October, 2013, the Appellant lodged an Appeal to this 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 were dissatisfied with the award of the tender to M/s Cyril Investments Company Limited.

That, the Tender Document issued by the Respondent contained Bills of Quantities which according to their Quantity Surveyor the project could not have exceeded Tshs. 430 million. To the contrary, the award of the tender to the successful tenderer was over and above the amount estimated by their Quantity Surveyor.

That, the Respondent's act to award the tender over and above their estimated price was in contravention

with the law and practices regulating public procurement.

That, as an outcome of increased funds, the Respondent ought to have made adjustments on the scope of work through an addendum or should have re-advertised the tender in order to accord equal opportunity to all tenderers to adjust their tenders.

That, the successful tenderer had never tendered for to the increased funds and scope; yet, the award of the tender had been made in their favour.

That, the Respondent, without justifiable reasons, did not communicate the tender results to them contrary to Clauses 41.2, 41.3 and 43.3 of the Instructions To Bidders (hereinafter referred to as "**the ITB**").

The Appellant wondered as to why the tender was awarded to a firm which tendered for Tshs. 1.5 Billion while their estimates was not to that effect.

That, they did an investigation and realised that the successful tenderer is registered as Class V contractor. Thus, according to their registered class, they were not eligible to be awarded that contract whose value is

over and above the threshold for the Class which is Tshs. 750 million.

Finally, the Appellant prayed for the following orders;

- i. The Authority to suspend the execution of the contract pending determination of the Appeal.
- ii. The award of the tender to the successful tenderer be nullified and the award of the tender to be made to them.
- iii. The Respondent to be ordered to pay them;
 - specific damages to the tune of Tshs.19,000,000/-
 - Legal fees Tshs. 6,700,000/-
 - Advocate's transport costs Tshs.200,000/-
 - Transport costs (to and from) Mwanza Tshs. 365,000/-
 - Living costs in Mwanza Tshs. 680,000/-
 - Communication costs Tshs. 11,000/-
 - Costs of this Appeal Tshs. 120,000/-
- iv. Any other relief(s) the Authority deems just and fit to grant.

SUBMISSIONS 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, they never issued a Tender Document containing BoQ with prices not exceeding Tshs. 430,000,000/- as claimed by the Appellant. Every tenderer was free to tender based on the realistic market prices.

That, it was not true that the award of the tender to the successful tenderer was over and above the amount specified in the BoQ.

That, the award of the tender to the successful tenderer adhered to the procedures provided for under the Public Procurement Act and its Regulations.

That, the award of the tender to the successful tenderer was based on the decisions of the appropriate bodies empowered by the law to do so.

That, the Appellant's quotations on some items in their BoQ were not realistic compared to the magnitude of the work to be performed. Thus, accepting their tender would have led to sub-standard work while the Engineer's estimates for the tender was Tshs. 1.5 billion.

That, it is not true that, they did not communicate the tender outcome to the Appellant. The Respondent vide letters referenced MDC/PF.10/61/VOL.III/51,52 and 53, informed the Appellant and the other two tenderers that their tenders were unsuccessful.

That, neither increase of funds nor scope of work as claimed by the Appellant. Moreover, no firm was given opportunity to make adjustments to its tender as claimed. All tenderers were put on the same playing field and were evaluated on the same criteria. Thus, the tender process was fair as all tenderers were given equal opportunity.

That, there was no irregularity occasioned by them regarding this tender process.

That, their Tender Document provided that the contractors should be registered with the Contractors Registration Board. What mattered most was the experience of the tenderer and not their class of registration.

Finally, the Respondent prayed for the dismissal of the Appeal with costs.

ANALYSIS BY THE AUTHORITY

Having gone through the documents submitted and having heard the oral submissions from parties, the Authority deemed necessary to frame the following issues;

1. Whether the Evaluation process was conducted in accordance with the law.

2. Whether the award of the tender to the successful tenderer was proper at law.

3. To what reliefs, if any, are parties entitled to?

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

1.0 Whether the Evaluation process was conducted in accordance with the law.

In resolving this issue, the Authority considered the Appellant's contentions that, the award of the tender to the successful tenderer was very high compared to their estimates; and that the successful tenderer did not deserve to be awarded the tender since the tender price exceeded the limit of Class V registered contractors of Tshs 750 million.

In order to ascertain the Appellant's contentions, the Authority revisited the Evaluation Report and the Tender Document vis-a-vis the applicable law. In the course of doing so, the Authority observed that, the evaluation of the tender had to undergo three stages namely; preliminary evaluation, detailed evaluation and post-qualification pursuant to Clauses 30, 31, 32 37 and 38 of the Instructions To Bidders (hereinafter referred to as "**the ITB**").

The Authority observed that, during the preliminary evaluation, tenders were checked for their responsiveness pursuant Clause 30 of the ITB.

During, the detailed evaluation stage, tenders were to be checked in terms of technical specifications and drawings provided for in the Tender Document, corrections of errors, commercial evaluation of tenders and price comparison pursuant to Clauses 31, 32,34 and 35 of the ITB. Thereafter, Clause 37 of the ITB required determination of the lowest evaluated bid out of those which were eligible, compliant, and substantially responsive.

Furthermore, post- qualification was to be undertaken to the tenderer whose tender had been found to be the lowest evaluated.

The Authority observed that, all four tenders were subjected to preliminary evaluation and were all found to be substantially responsive, thus subjected to the detailed evaluation.

During detailed evaluation stage, the Evaluation Committee did arithmetical corrections of errors to the tenders and ranked them on the basis of the percentage deviation of the corrected tender prices from the Respondent's Engineers estimates. Thereafter, the Evaluation Committee recommended the award of

the tender based on such criterion. Thus, the bid with the lowest deviation of 5.98 % of the tender by M/s Cyril Investment Company Limited was recommended for award of the tender.

The Authority observes that both the Respondent's evaluation process and subsequent award did not adhere to procedures provided for in their own Tender Document; by not awarding the tender pursuant to Clause 39 of the ITB which provide as follows;

"Clause 39.1

Subject to ITB Clause 38 and 35, the Procuring Entity will award the Contract to the Bidder whose bid has been determined to be substantially responsive to the bidding document and who has offered the lowest Evaluated Bid Price, provided that such Bidder has been determined to be (a) eligible in accordance with the provisions of ITB Clause 3, and (b) is determined to be qualified to perform the contract satisfactorily (c)

successful negotiations has been concluded”.

The Authority is of the further view that, the Engineer’s estimate criterion applied by the Respondent as the basis for award of the tender was an alien criterion to the Tender Document and the same ought not to have been used.

Furthermore, post-qualification was not undertaken to the recommended tenderer contrary to Clauses 38 and 14 of the ITB and Bid Data Sheet respectively. This equally contravened Section 48 (1) and (2) of the Public Procurement Act of 2004 (hereinafter referred to as **“the Act”**).

The Authority finds the Respondent’s action were in contravention with Section 65 (1) and (2) of the Act, and Regulation 90(4) of the Public Procurement (Goods, Works, Non- Consultant Services and disposal of public assets by Tender) Regulations, 2005 (hereinafter referred to as **“GN. No 97 of 2005”**) which read as follows;

“S.65(1) The basis for tender evaluation and selection of the lowest evaluated tender shall be clearly specified in the instructions to tenderers or in the specifications to the required goods or works.

(2) The tender documents shall specify any factor, in addition to price, which may be taken into account in evaluating a tender and how such factors may be quantified or otherwise evaluated.”

(Emphasis Added)

“Reg. 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”.

(Emphasis Added).

Accordingly, the Authority’s conclusion regarding this issue is that the Evaluation process was not conducted in accordance with the law.

2.0 Whether the award of the tender to the successful tenderer was proper at law.

As observed under issue number one above that the evaluation process and the subsequent award of the tender had contravened the law, accordingly, the award of the tender to the successful tenderer was not proper at law.

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

Having resolved the contentious issues, the Authority revisited the Appellant's prayers as hereunder:

- The Authority to suspend the execution of the contract pending determination of the Appeal.

The Authority is of the view that this prayer has already taken by events.

- The award of the tender to the successful tenderer to be nullified and the same to be made to them.

The Authority observes that, the tender was marred by procedural irregularities. The Authority therefore, agrees with the Appellant's prayer and hereby nullifies the purported award of the tender to M/s Cyril

Investments Company Limited. Furthermore, the Authority cannot award the same to the Appellant on the reasons explained on issue number one above. Again, the law does not empower this Authority to award tender, a task solely vested upon Tender Boards.

- With regard to the prayer for compensation, and after due consideration of various items raised by the Appellant; the Authority in exercise of its discretion orders the Respondent to pay the Appellant a sum of Tshs. 685,000/- only as per the following breakdown;
 - i. Appeal filling fees Tshs. 120,000/-
 - ii. Transport costs (to and from) Mwanza Tshs.365,000/-
 - iii. Living costs and incidentals in Mwanza from 23rd to 24th September,2013 Tshs. 200,000/-

The Authority cannot grant other prayers by the Appellant for lack of justification and want of jurisdiction.

The Authority also considered the Respondent's prayer that, the Appeal be dismissed with costs for lack of

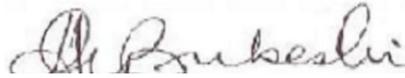
merit. The Authority does not agree with them as the submissions made by the Appellant have some merit. Furthermore, the Authority does not award costs to Procuring Entities upon Appeal on their procurement decisions. Accordingly, this prayer is hereby rejected.

On the basis of the aforesaid findings, the Authority partly upholds the Appeal and orders the Respondent to;

- **Re-start the tender process afresh in observance of the law.**
- **Compensate the Appellant to the tune of Tshs. 685,000/- only.**

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 21st November, 2013.



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JUDGE (rtd) A. G. BUBESHI

CHAIRPERSON

MEMBERS:

1. MR. K.M.MSITA.....

2. MRS N.S.INYANGETE.....

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