

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

**APPEAL CASE NO. 3 OF 2013-14**

**BETWEEN**

**M/S SOKONI PARTNERS.....APPELLANT**

**AND**

**KARIAKOO MARKETS  
CORPORATION.....RESPONDENT**

**CORAM:**

1. Hon. Augusta .G.Bubeshi,J (rtd) -Chairperson
2. Mr. Kesogukewele.M.Msita -Member
3. Mr.Haruni .S. Madoffe -Member
4. Ms. Esther .J.Manyesha -Member
5. Ms. Florida .R.Mapunda -Ag. Secretary

**SECRETARIAT**

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

**FOR THE APPELLANT.**

1. Mr. Mohamed Ally Kimweri - Trade Manager
2. Mr. Jonah A. Mwambande -Collection Supervisor.

**FOR THE RESPONDENT.**

1. Mr. G. B. Mwarekwa - Chairman, Tender Board
2. Mr. Emmanuel Maro - Member, Evaluation Committee
3. Mr.Anderson Shaka -Member, Evaluation Committee
4. Ms.Dayness Sooi -Member, Evaluation Committee
5. Ms.Gloria K.Kalabamu -Legal Officer
6. Mr.Marco. M.M ganga - Secretary -Tender Board.

This decision was scheduled for delivery today 22<sup>nd</sup> August, 2013, and we proceed to deliver it.

The Appeal at hand was lodged by **M/S SOKONI PARTNERS** (hereinafter referred to as "**the Appellant**") against the **KARIAKOO MARKETS CORPORATION** (hereinafter referred to as "**the Respondent**").

The said Appeal is in respect of Tender No. PA/106/2013 Lot 1 for Revenue Collection at the Basement Area (Shimoni), Kariakoo Market (hereinafter referred to as "**the tender**").

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

The tender under Appeal was publicly invited through Uhuru newspaper dated 25<sup>th</sup> April, 2013 and the advertisement was also posted on the Respondent's Notice Board.

The said tender was to be conducted through National Competitive Tendering Procedures specified in the Public Procurement (Goods, Works, Non- Consultant Services and disposal of public assets by Tender)

Regulations, 2005 hereinafter to be referred to as "**the GN 97 of 2005**".

The deadline for submission of tenders was set for 24<sup>th</sup> May, 2013 whereby two tenders were submitted with respect of Lot No 1 from the following firms.

- i. Bukinga General Supplies Limited
- ii. Sokoni Partners.

The tender by M/s Usambara Grocery and Vegetables Supplies was added later by the Respondent after it was found included in Lot No.2

The tenders were then subjected to evaluation whereby the Evaluation Committee recommended award of the tender to M/s Usambara Grocery and Vegetables Supplies on grounds that;

- a. They had performed various contracts with several public corporations and institutions such as Temeke, Ilala and Kilwa Districts.
- b. Since the contracts performed were with the Central and Local Government Authorities, they are good and acceptable tenderers.

The Tender Board at its meeting held on 14<sup>th</sup> June, 2013, deliberated on the recommendations by the Evaluation Committee and rejected the said recommendations. Thereafter, the Tender Board awarded the tender to M/s Sokoni Partners on the ground that they had long experience.

The Accounting Officer vide a Loose Minute Sheet referenced KMC/MM/C-30B/S/7 dated 24<sup>th</sup> June, 2013, wrote to the Chairman of the Tender Board informing them that M/s Usambara Grocery and Vegetables Supplies had a valid business license. Thus, the Accounting Officer decided that, the award of the tender should be made as recommended by the Evaluation Committee; that is to M/s Usambara Grocery and Vegetable Supplies.

On 26<sup>th</sup> June, 2013, the Respondent vide a letter referenced SMK/MM/C-30B informed the Appellant that their tender was unsuccessful.

Having received the Respondent's letter and being dissatisfied with their disqualification, on 10<sup>th</sup> July, 2013, the Appellant lodged their Appeal to the Public

Procurement Appeals Authority (hereinafter referred to as **"the Authority"**)

## **SUBMISSIONS BY THE APPELLANT**

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

That, they are appealing against the decision of the Respondent to award the tender to an unqualified tenderer whose tender was rejected during the tender opening ceremony.

That, there were only two tenderers who submitted tenders for Lot 1.

That, the tender by M/s Bukinga General Supplies Limited was rejected by the Secretary of the Tender Board during the tender opening ceremony for failure to indicate the tender they were tendering for. Thus, the only remaining tender for the disputed Lot was theirs. To their surprise another tenderer named M/s Usambara Vegetable and Supplies was awarded the tender.

That, the Appellant had met all the requirements provided for in the Tender Document and that they deserved to be awarded the tender.

That, M/s Usambara Vegetable and Supplies did not comply with the requirements of the Tender Document which required them to submit the original tender document in one envelope and a copy thereof in the second envelope. To the contrary, M/s Usambara Vegetable and Supplies submitted two envelopes, one containing two originals and the other containing two photocopies. Thus, contravening the requirement of the Tender Document.

That, the Secretary of the Tender Board during the tender opening ceremony rejected the tender of the successful tenderer. Thus, the said tender ought not to have been subjected to any evaluation and it was therefore, not proper for them to be awarded the tender.

That, the Respondent's act of awarding the tender to the successful tenderer was not proper as the same had been previously rejected.

That, the Appellant was told by the Secretary of the Tender Board that they have not been awarded the tender since they did not talk to the General Manager.

That, when they met the General Manager, they were told that their tender was rejected because they did not submit a Bank Statement although no such requirement was provided for in the Tender Document.

That, the reasons given for their disqualifications were not provided for in the Tender Document.

That, the Respondent did not consider the additional advantage the Appellant had in working with them for the preceding two years without any problem.

The Appellant therefore prayed for the following;

- i. Declaration that the Respondent's award of tender is null and void.
- ii. The Authority to reverse the Respondent's award decision and the Appellant be declared the winner of the disputed tender.
- iii. General damages to the tune of Tshs.11,240,000/- be awarded to them
- iv. Costs of this Appeal.

- v. Any other relief the Authority may deem just and fit to grant.

### **REPLIES 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, there were three tenderers who participated in the tender process and not two as contended by the Appellant.

That, none of the said tenderers was disqualified during the tender opening ceremony as claimed by the Appellant since that mandate is vested onto the Evaluation Committee and not the Secretary of the Tender Board.

That, the experience requirement of tenderers was adequately analyzed and it was not limited to only those who had previously worked with the Respondent.

That, the Appellant failed to submit a Bank Statement of their firm while the successful tenderer's tender

contained a Bank Statement which showed their financial capability.

That, the award of tender was made in accordance with the law and that the Appellant did not meet the criteria specified in the Tender Document.

The Appellant's prayers have no basis as the Respondent complied with the law.

The Respondent therefore 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:

- i) Whether the Appellant was unfairly disqualified**
  
- ii) Whether the award of tender to the successful tenderer was proper at law.**

**iii) To what reliefs, if any, are the parties entitled to.**

After identifying the issues in dispute, the Authority proceeded to resolve them as hereunder;

**i) Whether the Appellant was unfairly disqualified.**

In resolving this issue the Authority considered the Appellant's contention that, they were disqualified on the ground that they did not attach a bank statement in their tender; and that the said requirement was not provided for in the Tender Document. Thus, the Respondent's act to reject their tender was in contravention of the law.

In its endeavour to ascertain whether the Appellant's disqualification was justified, the Authority reviewed the documents submitted as well as the applicable law and the Tender Document. In so doing, the Authority observed that, the Tender Document did not contain the requirement for a Bank Statement. The Authority noted that, the Tender Document contained only four

requirements which were listed in the Form of Tender as follows;

- i. Business license
- ii. TIN and VAT Certificates
- iii. A copy of receipt for tender fees
- iv. Tenderer's experience

Therefore, the need for a bank statement was neither a requirement in the Form of Tender nor in the invitation to tender issued by the Respondent.

The Authority is of the considered view that, the Respondent's act to disqualify the Appellant using an alien criterion was contrary to the requirements of Regulations 14(5) and 90(4) of GN.No.97/2005 which provide as follows;

**“Reg 14(5)the procuring entity shall evaluate the qualification of suppliers, contractors, service providers or buyers in accordance with the qualification criteria and procedures set forth in the pre-qualification documents, if any, and in the solicitation documents or other documents for solicitation of proposals , offers or quotations”**

**“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)

In addition to the above findings, the Authority noted in passing that, the Respondent’s Tender Document was very sketchy. The said document did not provide for the qualification and evaluation criteria and guidance on how the tender evaluation process would be conducted as provided for under Regulations 14, 83, 90 and 94 of GN.No.97/2005

In view of the above findings, the Authority’s conclusion with regard to this issue is that, the Appellant’s disqualification was not proper at law.

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

In resolving this issue the Authority revisited arguments by parties, the Tender Document, the Evaluation Report together with the Minutes of the

Tender Board which deliberated on the tender under Appeal.

To start with, the Authority revisited the Appellant's arguments that, the award of the tender to M/s Usambara Grocery and Vegetable Supplies was biased. This is because they did not fulfill the requirement specified in the Tender Document as it was observed during the opening ceremony as follows;

- i) Only two tenders were opened for the disputed Lot, namely, the Appellant's tender and that of M/s Bukinga General Supplies Limited.
- ii) It was during the opening of the Tender for Lot 2 that, the envelope submitted by M/s Usambara Grocery and Vegetable Supplies was opened. In doing so, it was discovered that, one envelope contained two originals for Lots 1 and 2 and the other envelope contained copies again for Lots 1 and 2. In other words, the envelope marked Lot 2 contained tenders for both Lot 1 and 2.

According to the Appellant, the tenders by M/s Usambara Grocery and Vegetable Supplies for Lot No 1 which were opened under Lot 2 ought not to have been evaluated as a part of the tenders under Appeal. Therefore, they did not deserve to be awarded the tender since the submission of tenders was against the requirement contained under Clause number six of the Form of Tender.

In reply thereof, the Respondent submitted that, the award of tender was made in accordance with the law and that none of the tenders was disqualified in the opening ceremony since the mandate to reject a tender or otherwise is vested in the Evaluation Committee. Furthermore, the Respondent submitted that the Appellant's disqualification was justified since they did not submit a Bank Statement as did the successful tenderer.

In order to ascertain the contentions by parties, the Authority revisited the Tender Document and observed that Clause six of the Form of Tender which is similar to condition three of the Invitation to Tender required tenderers to submit their tenders in the following manner;

**“Tenders should be in two copies (original and copy) and also in two different sealed envelopes one written on top “ORIGINAL” and the other“COPY”. The two envelopes should then be put in one sealed envelope clearly mentioning type of tender being applied for”. (Emphasis Added)**

The Authority observes that, the tenders that had to be considered for Lot 1 were from the Appellant and M/s Bukinga General Supplies Limited, since, they were the only tenders opened under Lot 1 during the tender opening ceremony. Thus, accepting and evaluating the tender by M/s Usambara Grocery and Vegetable Supplies while the same was not opened under the relevant Lot was not proper; since tenders for each Lot must be processed separately.

The Authority further noted that, the Evaluation Committee recommended the award of the tender to be made in favour of M/s Usambara Grocery and Vegetable Supplies since they had experience in revenue collection with various public institutions.

The Authority observed further that, the Tender Board at its meeting held on 14<sup>th</sup> June, 2013 rejected the recommendations made by the Evaluation Committee and decided to award the tender to the Appellant on the ground that they were the current service providers and that they had a long experience compared to the successful tenderer.

The Authority is of the considered view that, after the rejection of the Evaluation Committee's recommendations on the tender, the Tender Board ought to have referred their decision back to the procuring entity with their instructions pursuant to Section 68(b) of the Act. For purposes of clarity, the Authority reproduces the said provision as hereunder;

**“S.68 the Tender board shall review the Evaluation and recommendations 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 action”.**

The Authority noted further, with utter dismay, that the Respondent's Accounting Officer vide a Loose Minute Sheet referenced KMC/MM/C-30B/S/7 dated 24<sup>th</sup> June, 2013 addressed to the Chairman of the Tender Board, reversed the decision made by the Tender Board. Instead, he directed that the said tender be awarded to M/s Usambara Grocery and Vegetable Supplies as recommended by the Evaluation Committee. The reason for his decision was that M/s Usambara Grocery and Vegetables Supplies had a valid business license issued by the Ilala Municipal Council and that the same was signed by one M.R.B. Mayila who is the Trade Officer. Subsequently, the Accounting Officer on 13<sup>th</sup> August, 2013 vide letter referenced SMK/MM/C-30B communicated the award to the purported successful tenderer.

The Authority failed to comprehend the Accounting Officer's findings in respect of the business license since there is nowhere in the Evaluation Report or in the Minutes of the Tender Board where it is indicated that M/s Usambara Grocery and Vegetables Supplies had a problem related to their business license.

Furthermore, the Respondent confirmed during the hearing that, the Tender Board did not award the tender to M/s Usambara Grocery and Vegetables Supplies.

The Authority therefore, hastens to state that the Accounting Officer usurped the powers of the Tender Board and acted ultra vires official since the power to award tenders is squarely vested into the Tender Boards as provided under Section 31(1) (b) of the Act which provides as follows;

**“S.31(1)Notwithstanding any other enactment, no public body shall:-**

- (a) advertise, invite, solicit or call for tenders or proposals in respect of a contract unless authorized by the appropriate tender board; and**
- (b) award any contract unless the award has been approved by the appropriate tender board”.** (Emphasis Added).

Accordingly, the purported award made to the M/s Usambara Grocery and Vegetables Supplies was null and void.

In the light of the above findings and in view of the observations made under the first issue above, the Authority's conclusion in respect of issue two is that the award of the tender to the successful tender was not proper at law.

**iii. To what reliefs, if any, are 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 prayer for a declaration that the award of tender to M/s Usambara Grocery and Vegetables Supplies as null and void and the Authority to reverse the award made by the Respondent and the same be made to them. Furthermore, the Authority to order the Respondent to compensate the Appellant a total of Tshs. 11,240,000/- as per the following breakdown;

- i. Preparation of Appeal made by an Advocate  
Tshs. 1,000,000/-
- ii. Appeal filling fees Tshs. 120,000/-
- iii. Transport costs Tshs. 120,000/-
- iv. General damages Tshs. 10,000,000/-

As established under the first and second issues, the tender process was not conducted in accordance with the law. The Authority therefore declares that the award of the tender to M/s Usambara Grocery and Vegetables Supplies was null and void.

With regard to the prayer that the Appellant be awarded the tender, the Authority rejects that prayer since it has no jurisdiction to do so.

With regard to the costs, the Authority orders the Respondent to compensate the Appellant a sum of Tshs. 1,240,000/- only as actual costs incurred in relation to this Appeal.

The Authority also considered the prayer by the Respondent that the Appeal be dismissed with costs and observes that, the Appeal has merit and therefore the Respondent's prayer is rejected.

On the basis of the aforesaid findings, the Authority 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. 1,240,000/- only being actual costs incurred in relation to this Appeal.

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

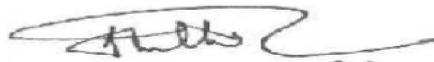
Decision delivered in the presence of the Appellant and the Respondent this 22<sup>nd</sup> August, 2013.



.....  
JUDGE (rtd) A. BUBESHI  
CHAIRPERSON

**MEMBERS:**

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



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



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

