

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

APPEAL CASE NO. 7 OF 2013-14

BETWEEN

M/S TELJOJ COMPANY LIMITED.....APPELLANT

AND

**KARIAKOO MARKETS
CORPORATIONRESPONDENT**

DECISION

CORAM:

1. Hon. Augusta G. Bubeshi,J (rtd) -Chairperson
2. Mr. Haruni S. Madoffe -Member
3. Ms. Esther J. Manyesha -Member
4. Mrs. Rosemary A. Lulabuka -Member
5. Mr. Ole-Mbille Kissioki -Ag. Secretary

SECRETARIAT

1. Ms. Florida R. Mapunda -Legal Officer
2. Ms. Violet S. Limilabo -Legal Officer
3. Mr. Hamisi O. Tika -Legal Officer

FOR THE APPELLANT:

1. Mr. Theonas L. Tarimo - Director
2. Mr. Ezekiel Samwel - Storekeeper

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. Mr. Marco M. Mganga - Secretary, Tender Board.

This decision was scheduled for delivery today 4th September, 2013, and we proceed to deliver it.

The Appeal at hand was lodged by **M/S TELJOJ COMPANY LIMITED** (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/106/2013-6/2013, Lot 3 for provision of Toilet Services at ground floor women's toilets – north, at Kariakoo Market (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 parties during the hearing, the facts of the Appeal may be summarized as follows:

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

The said tender was conducted through the National Competitive Tendering Procedures specified in the

Public Procurement (Goods, Works, Non- Consultant Services and disposal of public assets by Tender) Regulations, Government Notice No. 97 of 2005 (hereinafter referred to as "**GN. No. 97 of 2005**").

The deadline for submission of tenders was set for 24th May, 2013, whereby three tenders were submitted with respect to Lot 3 from the following firms;

S/N	TENDERER'S NAME	READ OUT PRICES IN TSHS.	MODE OF PAYMENTS
1.	M/s Teljoj Company Limited	915,000/- Without utility costs	PER MONTH
2.	M/s Sokoni Partners.	1,860,000/ Without utility costs	PER MONTH
3.	M/s Hakika Limited.	372,750/- Without utility costs	PER DAY

The tenders were then subjected to evaluation, whereby the Evaluation Committee recommended

award of the tender to M/s Teljoj Company Limited on the grounds that;

- a) They had a long experience
- b) Their average proposed returns are payable depending on the situation obtaining at the toilet.
- c) They have been offering services to the Respondent diligently without any problems.

The Tender Board in its meeting held on 14th June, 2013, deliberated on the recommendations made by the Evaluation Committee and observed that there was confusion with respect to Lots 2 and 3. The said confusion arose from the tender advertisement that was published in the Uhuru newspaper which indicated that, Lot 2 was for women's toilet and Lot 3 was for men's toilet.

The Tender Board observed further that, what was advertised in the newspaper was different from what was intended by the Respondent. However, the Secretary of the Tender Board informed the Board that, the said confusion was rectified by writing the Lots names and numbers on the respective toilets.

Furthermore, the Secretary informed the Tender Board that, every tenderer who had purchased the Tender Document for Lots 2 and 3 was informed of the anomaly and the corrections made thereof. During the tender opening ceremony the said clarification was also made prior to the opening of the tenders.

Having received the said clarifications, the Tender Board deliberated on the recommendations made by the Evaluation Committee and disagreed with them. Hence, they proposed that the disputed Lot should be re-advertised or the Accounting Officer should decide the way forward.

The Respondent's Accounting Officer, vide a Loose Minute Sheet referenced KMC/MM/C-30B/S/7 dated 24th June, 2013, wrote to the Chairman of the Tender Board informing them that, although the Tender Board had observed that there was a confusion for Lots 2 and 3, having read the minutes, he observed that there was no such confusion on the contended Lots; and that, the Secretary to the Tender Board had already clarified on the purported confusion. The Accounting Officer therefore, decided that the award of the tender be

made to M/s Teljoj Company Ltd for Lot 3 as recommended by the Evaluation Committee.

On 26th June, 2013, the Respondent vide a letter referenced SMK/MM/C-30B informed the Appellant that their tender for Lot 3 was successful.

Having received the Respondent's letter of award, they realized that, they had been awarded a contract for provision of toilet services to the women's toilet instead of the men's toilet which they had tendered for.

Being dissatisfied with the said award, the Appellant on 1st July, 2013, vide a letter referenced SAM/CORR/5/2013/39 sought for clarification from the Respondent as to why they had been awarded the contract for provision of toilet services to the women's toilet while they had tendered for the men's toilet.

On 12th July, 2013, the Respondent vide a letter referenced SMK/MM/C-30B informed the Appellant that, they had tendered for the women's toilet which was Lot 3 and not the men's toilet that was Lot 2. The Tender Document contained clear information with respect of the two Lots and the Appellant decided to tender for Lot

3 and they were awarded the same after being found to be substantially responsive.

Upon being dissatisfied with the clarifications given by the Respondent, on 22nd July, 2013, the Appellant lodged their Appeal to this 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 Respondent's decision of awarding them the tender for provision of toilet services to the women's toilet instead of the men's toilet.

That, they submitted their tender with respect to Lot 3 which was the men's Toilet and not Lot 2 which was the women's toilet.

That, the Respondent forcibly, removed them from managing the Men's toilet for which they were the

outgoing service providers and wanted them to manage the women's toilet while they did not tender for it.

The Appellant therefore prayed for the following;

- a) That, the award made on 26th June, 2013 be set aside
- b) That, the Appellant be awarded the tender for Lot 3, namely; the men's toilet
- c) Costs of this Appeal to the tune of Tshs. **18,170,000/-** as per the following breakdown;
 - i) Appeal filing fees Tshs. 120,000/-
 - ii) Purchase of Tender Document Tshs. 50,000/-
 - iii) Advocate's fees Tshs.3,000,000/-
 - iv) General damages Tshs. 15,000,000/-

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, it is true that, the contents of the Tender Document differed from the tender advertisement published in the Uhuru newspaper.

That, the differences between the tender advertisement which invited tenderers to bid and the Form of Tender was clarified by the Secretary of the Tender Board when tenderers went to purchase the Tender Document. The said clarification was also posted on the respective toilets.

That, all the Tender Documents issued to tenderers had the Respondent's stamp. The Tender Document annexed to the Appellant's Statement of Appeal was not stamped with the Respondent's stamp and it contained different information with respect to Lot 3. That indicated that, the Tender Document relied upon by the Appellant was not the one issued by the Respondent.

That, all tenderers who tendered for Lots 2 and 3 were informed of the error contained in the advertisement published in the Uhuru newspaper and the corrections made thereof. Tenderers were also shown the site for

each Lot before they purchased the Tender Document. Thus, they knew the proper names for each lot.

That, they acted prudently and in accordance with the law in awarding tender for Lot 3 to the Appellant since they had tendered for that particular Lot.

The Respondent therefore, prayed for dismissal of the Appeal.

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 award of tender to the Appellant was made in accordance with what they had tendered for.

ii) To what reliefs, if any, are parties entitled to

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

i) Whether the award of tender to the Appellant was made in accordance to what they had tendered for.

In resolving this issue the Authority considered the Appellant's main contention that, the Respondent obstructed them to manage the men's toilet they had tendered for as Lot No.3 and required them to manage the women's toilet which they had not tendered for. The Respondent deliberately decided to name it as Lot No.3 contrary to the tender advertisement in the Uhuru newspaper and the Form of Tender contained in the Tender Document issued by the Respondent.

In its endeavour to ascertain the validity of the Appellant's contention, the Authority reviewed the tenders submitted, the Tender Advertisement, the Tender Document as well as the applicable law. In the course of so doing, the Authority observed that, the Tender Advertisement published in the Uhuru newspaper dated 25th April, 2013, contained the following information under item 6/2013 (ii) and (iii);

“Huduma ya choo kama ifuatavyo;

- ii. **Choo cha chini ghorofani (Kaskazini wanawake) Lot. Na 2**
- iii. **Choo cha chini ghorofani (Kaskazini wanaume) Lot Na. 3”**

Literally translated;

“To provide toilet services to the Kariakoo Market Corporation as follows;

- ii. The ground floor toilet (at north- women’s) Lot 2
- iii. The ground floor toilet (at north- men’s) Lot 3

The Authority observed further that, the Tender Document contained an invitation to tender which was in Swahili and English versions. The said invitation indicated that Lot No. 2 was for the men’s toilet while Lot No 3 was for the women’s toilet. The Authority noted further that, the Form of Tender that was included in the Tender Document contained Lots names as indicated in the invitation to tender, namely; Lot 2 for men’s toilet and Lot 3 for women’s toilet.

The Authority reviewed the tender submitted by the Appellant and noted that, in the Form of Tender it contained information which clearly indicated that Lot 2

was for the men's toilet and Lot 3 for the women's toilet. During the hearing, Members of the Authority asked the Appellant to justify their argument that Lot 3 was for men's toilet while their tender form clearly indicated that the said Lot was for the women's toilet. In reply thereof, the Appellant submitted that, the Respondent might have tampered with their tender by changing the Form of Tender to suit the award communicated to them. Upon being asked further by the Members of the Authority as to why they did not include such allegation in their Statement of Appeal to this Authority while they were aware of such anomaly, the Appellant contended that they forgot to do so.

From the facts of this Appeal, the Authority is of the view that, it is true that the tender advertisement in the Uhuru newspaper had different information from the Tender Document in relation to Lots 2 and 3. However, the Tender Document contained information which clearly indicated that Lot 2 was for the men's toilet and Lot 3 was for the women's toilet.

The Authority observes further that, if the Appellant had noted that there was contradictory information in

relation to Lots 2 and 3 they ought to have sought for clarification from the Respondent before submission of their tender.

The Authority revisited further the Form of Tender submitted by other tenderers and observed that the same were in *parimateria* with the original Form of tender issued by the Respondent and the invitation to tender thereof. In view of the conflicting arguments by parties, the Authority is of the considered view that, the Appellant ought to have tendered in accordance with what was contained in the issued Tender Document and not the tender advertisement published in the Uhuru newspaper.

The Authority also took cognizance of the fact that, the Appellant was the current service provider under the umbrella of another firm; thus, they were expected to be diligent and seek clarification from the Respondent upon discovering that the names of Lots 2 and 3 shown in the Uhuru newspaper were different from the contents of the issued Tender Document. The tenderer's right to seek clarification was provided for under Clause 9 of the Form of Tender which was in

conformity with the requirement of Regulation 83(1) (n) of GN. No. 97/2005 which requires the Tender Document to include a provision in which tenderers may seek for clarification from the procuring entity. Clause 9 of the Form of Tender and Regulation 83(1) (n) are reproduced as here under;

“Clause 9. Endapo mwombaji wa zabuni atahitaji maelekezo zaidi au ufafanuzi, amuone Katibu wa Zabuni...”

Literary translated as;

“Where a tenderer needs further instructions or clarifications, he should contact the secretary of the tender(sic)”.

“Reg. 83(1) the solicitation documents shall include instructions to tenderers with at a minimum, the following information:

(n) The means by which, contractors, service providers, suppliers or asset buyers may seek clarifications of the solicitation documents... (Emphasis Added)

From the above findings, the Authority is of the view that, the Appellant waived their own rights provided for

under the law. Thus, they acted negligently by tendering using names indicated in the newspaper instead of tendering using the form of tender availed to them.

The Authority wishes to enlighten the Appellant that, when preparing their tenders, tenderers are required primarily to comply with the requirements set forth in the Tender Document and not otherwise, since the basis of the evaluation is the Tender Document and not the contents of the tender advertisement. This is clearly enshrined under Regulation 90(4) of GN. No.97/2005 which reads as follows;

“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)

Indeed, if there is a conflict between the contents of the Tender Document and the tender advertisement, the former shall prevail.

With regard to the issue of the Respondent's tampering with the Appellant's tender, the Authority observes that the Appellant could not prove before the Authority that their tender was tampered with by the Respondent. The Authority observed that, the tenders by the other tenderers contained forms of tender that were similar with that of the Appellant. Hence, the Authority has failed to substantiate the Appellant's allegation in this regard in absence of any proof to the contrary.

Additionally, the Authority noted in passing that the award of the tender to the Appellant was preceded by a number of flaws which contravened both the Tender Document and the Act in the following areas;

i. Business License

The Authority observed that, the Appellant did not submit a proper business license required under Clause 4(a) of the Form of Tender related to the provision of toilets services. To the contrary, the Appellant submitted a Business License **No. B. 01126001** for **pesticides and farm implements**. However, the evaluators considered the Appellant to have met this criterion.

ii. Experience.

The Appellant indicated to have two years experience related to the tender in dispute but they had no proof of such experience. The Authority noted further that, the Appellant was managing the disputed toilet under the umbrella of one Johnson Mulla who had a previous contract with the Respondent. The Appellant used the said contract to support their current experience knowing that Teljoj Company Limited and Johnson Mulla are two distinct legal persons but the Evaluators considered it to be the Appellant's experience while it was not correct.

iii. Defective Power of Attorney

The Appellant's Power of Attorney was clearly defective because the donor and the donee were one and same person.

The Authority is of the view that, if the evaluators were diligent enough in the process of evaluating this tender, the Appellant ought to have been disqualified for total

failure to comply with the requirements of the Tender Document.

In addition to the above findings, the Authority noted 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.

The Authority noted further that, the Respondent's Accounting Officer vide a Loose Minute Sheet referenced KMC/MM/C-30B/S/7 dated 24th June, 2013 addressed to the Chairman of the Tender Board, awarded the tender to the Appellant instead of the Tender Board. The Authority observed 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 and not the Accounting Officer pursuant to Section 31(1) (b) of the Act.

Accordingly the Authority's conclusion with regard to this issue is that, the award of tender to the Appellant

was made in accordance with what they had tendered for.

ii.To what reliefs, if any, are parties entitled to.

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

To start with the Authority considered the Appellant's prayer that the award made on 26th June, 2013 be set aside and the Authority award them the tender for Lot 3 the men's toilet. Furthermore, the Authority to order the Respondent to compensate the Appellant a total of Tshs. 18,170,000/-.

As established under the first issue, that Lot No.3 was for women's toilet and not men's, the Authority observes that the Appellant, if at all they had met the criteria provided under the Tender Document, ought to have been awarded the women's toilet as Lot No. 3 and not the men's toilet which was Lot No.2. That said, the Authority rejects the Appellant's prayer with regard to this issue.

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 and as pointed out that, the Appellant did not deserve to be awarded this tender since they ought to have been disqualified for failure to comply with the Tender Document.

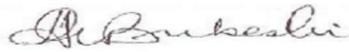
With regard to the costs, the Authority rejects this prayer since the Appeal has no merit.

The Authority also considered the prayer by the Respondent that the Appeal be dismissed. The Authority agrees with the Respondent and hereby dismisses the Appeal in its entirety.

On the basis of the aforesaid findings, the Authority dismisses the Appeal and orders each party to bear their own 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 4th September, 2013.



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JUDGE (rtd) A. BUBESHI
CHAIRPERSON

MEMBERS:

1. MR. H.S. MADOFFE 
2. MRS. R.A.LULABUKA 
3. MS. E.J. MANYESHA 