

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

APPEAL CASE NO. 8 OF 2013-14

BETWEEN

**M/S SEAMENS CO-OPERATIVE
SOCIETY TANGA LIMITED.....APPELLANT**

AND

TANZANIA PORTS AUTHORITY.....RESPONDENT

DECISION

CORAM:

- | | |
|--------------------------------------|-----------------|
| 1. Hon. Augusta G. Bubeshi, J. (rtd) | -Chairperson |
| 2. Mr. Haruni S. Madoffe | - Member |
| 3. Ms. Esther J. Manyesha | - Member |
| 5. Mrs. Nuru S. N. Inyangete | - Member |
| 6. Mr. Ole-Mbille Kissioki | - Ag. Secretary |

SECRETARIAT:

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

FOR THE APPELLANT:

1. Mr. Yusuph Athumani - Chairman
2. Mr. Mikidadi Tekko – Coordinator, Board Member

FOR THE RESPONDENT:

1. Mr. Freddy J. Liundi – Ag. Port Master
2. Mr. Mutabaazi J. Lugaziya - Advocate, TPA
3. Mr. Casmir Lujegi - Principal Procurement Officer

This Decision was scheduled for delivery today 5th September, 2013, and we proceed to deliver it.

The Appeal at hand was lodged by **M/S SEAMENS CO-OPERATIVE SOCIETY TANGA LIMITED** (hereinafter referred to as "**the Appellant**") against the **TANZANIA PORTS AUTHORITY** commonly known by its acronym TPA (hereinafter referred to as "**the Respondent**").

The said Appeal is in respect of Tender No. AE/016/2012-2013,TA/NC/02 for Provision of Operational and Non Operational Services (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 and the Mwananchi newspaper both dated 14th November, 2012, invited tenders for the tender under Appeal.

The deadline for the submission of tenders was set for 13th December, 2012; whereby a total of twenty four (24) tenders were received from the following firms;

S/NO	TENDERER
1.	M/s Tanga Village Support Programme
2.	M/s Kiomboi Holding Ltd.
3.	M/s Dynamic Ships Contractors and General Services
4.	M/s Tanzania Tallying Contractors
5.	M/s Ushirika wa Makuli Bandarini
6.	M/s Sife and Mans Enterprises Joint Venture
7.	M/s Mmasa Construction Company Ltd
8.	M/s Keno Engineering Services
9.	M/s Centre for Informal Sector Programs
10.	M/s 4MS Investment Company Ltd
11.	M/s Experience Labour Pool Ltd
12.	M/s Portable Enterprises Ltd
13.	M/s Safreight (E.A) Ltd
14.	M/s International Containership Tanzania
15.	M/s Najeza Hadodo Enterprises

16.	M/s Tropical Contractors Ltd
17.	M/s Baga Investment Ltd
18.	M/s Canival Investment Ltd
19.	M/s Maji ya Pwani General Enterprises
20.	M/s Tricon Investment Ltd
21.	M/s United Talent Services
22.	M/s Ushirika wa Mabaharia Tanga
23.	M/s Kujenga Kwetu Ltd
24.	M/s Ushirika wa Upakiaji na Upakuaji wa Mzigo

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

During the Preliminary Evaluation, ten tenders including that of the Appellant were disqualified for failure to comply with the requirements of the Tender Document. Furthermore, some of the tenderers who submitted Bank Statements instead of Financial Statements were not disqualified as Evaluators treated such an omission as a

minor deviation, thus they were subjected to the next stage of evaluation.

The Appellant's tender was disqualified for failure to submit a business license and a financial statement.

The remaining twelve tenders were subjected to detailed evaluation, whereby they were checked on whether they had met the required experience in contracts of similar nature, experience of key personnel and correction of arithmetic errors, if any, of the tender prices. During that process of evaluation, seven tenders were disqualified for failure to comply with the requirements of the Tender Document.

The remaining five tenderers were subjected to price comparison, whereby the Evaluation Committee observed that all five tenderers had offered competitive and acceptable prices as follows;

S/NO	TENDERER	Price in Tshs per gang
1.	M/s Baga Investment Ltd	46,400/-
2.	M/s Kiomboi Holding Ltd.	46,400/-
3.	M/s Dynamic Ships Contractors	46,400/-
	M/s Dynamic Ship Contractors, miscellaneous General Services (Group C)	45,600/-
4.	M/s Najeza Hadodo Enterprises	48,000/-
5.	M/s Sife and Mans Enterprises	48,000/-

After the price comparison, the Evaluation Committee was of the view that, the rate offered by M/s Sife & Mans Enterprises and M/s Najeza Hadodo Enterprises should be harmonized to have a common price of Tshs. 46,400/- instead of Tshs. 48,000/- per gang.

Thereafter, the Evaluation Committee recommended the award of the tender to M/s Sife & Mans Enterprises, M/s Najeza Hadodo Enterprises, M/s Baga Investment Ltd, M/s Kiomboi Holding Ltd and M/s Dynamic Ships Contractors at a contract price of Tshs 46,400/- per gang (week days) and Tshs. 92,800 per gang (weekends).

The Tender Board in its meeting held on 18th February, 2013, approved the award of the tender as recommended by the Evaluation Committee subject to harmonization of price rate per gang at Tshs.46,000/- to all five service providers and Tshs.45,600/- to Dynamic Ships Contractors for miscellaneous services.

On 19th June, 2013, the Respondent vide a letter referenced TPS/2/1/01 communicated the award of the tender to one of the successful tenderers, namely, M/s Sife & Mans Enterprises.

On 4th July, 2013, the Respondent vide a letter referenced TPS/ 2/1/01 notified the Appellant that their tender was unsuccessful.

Being dissatisfied with the award of the tender to the successful tenderers, the Appellant vide a letter without reference dated 18th July, 2013, sought for clarification from the Respondent on the following grounds;

- i. That, it was not possible that all the successful tenderers had quoted the same price in their Forms of tender. Hence, the Appellant wanted to know why there was one price for all the successful tenderers.
- ii. That, the tender had been awarded beyond the bid validity period of 90 days and that the Respondent extended the bid validity period without notifying the tenderers.
- iii. That, the quoted price of each tenderer was not read out during the tender opening ceremony.

Having received no response from the Respondent, on 22nd July, 2013, the Appellant lodged their Appeal to the Authority.

SUBMISSIONS BY THE APPELLANT

The Appellant's arguments as deduced from the 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 had a right to lodge an Appeal before this Authority since they were among the tenderers who participated in the tender under Appeal. Furthermore, the Appeal at hand is based on the fact that, the Respondent had violated the Public Procurement Act No. 21 of 2004 (hereinafter referred to as "**the Act**"), in the disputed tender process.

That, the tender under Appeal was awarded beyond the Bid Validity Period of ninety days which is contrary to the requirement of Regulation 87 (2) of the Public

Procurement (Goods, Works, Non-Consultant Services and Disposal of Public Assets by Tender) hereinafter referred to as (“**the GN No. 97 of 2005**”).

That, one member of the Evaluation Committee, namely, Mr. Abdallah Msemo is the Respondent’s Supplies Officer; hence, he ought not to have been amongst the evaluators. Thus, the Respondent’s act of appointing the above named person to be among the Evaluators had contravened Section 38 of the Act which requires Procurement Management Unit, Evaluation Committee and Tender Boards to discharge their duties independently.

That, the whole tender process was tainted with irregularities due to the Respondent’s failure to read out the quoted prices during the tender opening ceremony as per the requirement of Regulation 89(9) of GN. No. 97 of 2005.

That, during the tender opening the tenders were neither numbered nor initialled at the last page by the Members

of the Tender Opening ceremony in presence of the tenderers or their representatives.

That, the tender was awarded to tenderers who had quoted the same prices in their tenders. The Appellant suspected that some of the tenderers might have had inside information from the Respondent.

Finally the Appellant prayed for the following:

- i. Nullification of the entire tender proceedings and the award thereof.
- ii. Nullification of the award letter dated 4th July, 2013.
- iii. Allow the previous service provider to continue during the time prior to the re-award of this tender to avoid the impact of the nullification prayed for.
- iv. Compensation to the tune of Tshs. 1,350,000/- being the total costs for lodging the Appeal, food and transport from Tanga

to Dar es Salaam and accommodation in Dar es Salaam.

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, this Appeal is frivolous, vexatious and without merit.

That, the Appellant had no locus standi before this Authority since their tender was disqualified at the preliminary stage of evaluation for failure to meet the criteria set out in the Tender Document.

That, the tender was awarded within the bid validity period as per the requirement of Regulation 96 (3) of GN. No.97 of 2005 and not as per Regulation 87(2) as claimed by the Appellant since the Tender Board

approved the award of the tender on 18th February, 2013. The tender opening took place on 13th December, 2013 and the Bid Validity Period was 90 days which expired on 12th March, 2013. At the time the Bid Validity expired, the Tender Board had already approved the award of the tender to the successful tenderers.

That, the bid validity period does not run from the tender advertisement as stated by the Appellant but it starts to run from the date of the tender opening up to the award of tender to the successful tenderer.

That, the appointment of Mr. Abdallah Msemu as a member of the Evaluation Committee did not violate the law since he is neither a member of the Tender Board nor involved in the preparation of the Tender Document but he was involved in the Evaluation Committee as a procurement expert as per the PPRA Evaluation Guidelines for Works and Goods issued in February 2007.

That, the tender opening ceremony complied with the requirements of Regulation 89(9) of GN. No. 97 of 2005.

During the Opening ceremony, the tenderers' representatives and the Respondent agreed that, the quoted prices should not be read out, instead the name of the tenderer, tender form, bid security or business licence be read out. Thus, the bid form was initialled by the Respondent and one Subira Mwala representing the tenderers as recorded in the tender opening Minutes.

That, all tenders were sequentially numbered and the last one was marked accordingly.

The Respondent therefore, prayed for the dismissal of the Appeal and prayed further that the Appellant's request for costs should not be granted since they had not proved to have incurred such costs as claimed.

ANALYSIS BY THE AUTHORITY

Having gone through the documents submitted and having heard the oral submissions from parties, the Authority framed the following three issues:

- **Whether the Appellant has *locus standi* in this Appeal.**
- **Whether the tender process was conducted in accordance with the law.**
- **To what reliefs, if any, are the parties entitled to.**

Having framed the issues in dispute the Authority proceeded to resolve them as follows:

1.0 Whether the Appellant has a *locus standi* in this Appeal.

In order to ascertain who is entitled to lodge an Appeal, the Authority revisited Sections 79 (1) of the Act, which provides as follows:

Sec. 79 (1) "Subject to Sub-section (2) of this section, **any supplier, contractor or consultant who claims to have suffered or that may suffer any loss or injury as a result of a breach of duty imposed on a procuring entity or an approving authority may seek a review in accordance with**

section 81 and 82 of this Act, provided that, the application for review is received by the procuring entity or approving authority within twenty-eight days of the supplier, contractor, or consultant becoming aware of the circumstances giving rise to the complaints or when the supplier should have become aware of those circumstances". (Emphasis added)

The Authority observes that, the above provision accords the right to seek review to "any supplier, contractor or consultant". The Authority revisited the Tender Document and noted that, the tender under Appeal was for provision of Operational and Non Operational Services, hence, the Authority deems it necessary to revisit the definition of a "Supplier" provided for under Section 3 of the Act in order to ascertain if the Appellant falls within the ambit of that definition.

Section 3(1) "Supplier" means company, corporation, organisation, partnership or individual person supplying goods or services, hiring equipment or providing transport services and who is, according to the contract, a potential party or **party to a**

procurement contract with the procuring entity". (Emphasis added)

From the above quoted provision the Authority is of the firm view that, the Appellant falls within the definition of a supplier and they were a party to the tender under Appeal since they participated in the disputed tender process.

The Authority considered the Respondent's argument that, the Appellant lacks *locus standi* because they were disqualified at the preliminary stage and observes that, the disqualification at any stage does not take away the tenderer's rights to lodge an Appeal if they claim that there was a breach of duty on the side of the procuring entity leading into them, suffering loss or injury.

The Authority wishes to enlighten the Respondent that, a tenderer who participates in a particular tender process is entitled under the law to lodge their complaint upon suffering any loss or injury as a result of a breach of duty

imposed on a procuring entity provided that, they follow the proper procedures in doing so.

Accordingly, the Authority's conclusion in the first issue is that, the Appellant has a locus standi in this Appeal.

2.0 Whether the tender process was conducted in accordance with the law.

In resolving this issue the Authority confined its analysis on the specific areas complained against by the Appellant and framed the following sub-issues as guidance:

- **Whether the tender opening was conducted in accordance with the law.**
- **Whether the appointment of Mr. Abdallah Msemo, the Respondent's Supplies Officer to be amongst the Evaluators contravened the law.**
- **Whether the tender was awarded within the Bid Validity period.**
- **Whether the award of the tender to the successful tenderers was proper at law.**

Having framed the sub-issues the Authority proceeded to resolve them as follows:

Sub issue (i) Whether the tender opening was conducted in accordance with the law.

In resolving this sub issue the Authority considered the parties arguments in relation to the tender opening procedures stated herein earlier and observed that, the tender opening process is guided by Regulation 89 of GN. No. 97 of 2005. In particular Regulation 89(9) which reads as follows;

Reg. 89 (9) **"At a public tender opening, the tenderer's names, the tender prices and the total amount of each tender,** written notifications of tender modifications and withdrawals, any alternatives tenders, if they have been requested or permitted, any discounts, the presence of the requisite tender security, and such other details as the tender board may consider appropriate **shall, if**

any, be announced to those persons present at the opening of the tenders...” (Emphasis added)

The Respondent during the tender opening did not comply with the above quoted regulation for not announcing the tender prices to those persons present at the opening of the tenders.

The above notwithstanding, the Authority hastens to state that, since tender opening issues are pre award matters, the Appellant was required to exhaust the review mechanism as provided under Sections 80, 81 and 82 of the Act. The above provisions in a nutshell require an aggrieved tenderer to seek review within specified periods of time, first to the Accounting Officer then to PPRA and finally to this Authority.

Based on the above, the Authority clearly does not have the jurisdiction to entertain tender opening issues which did not follow the proper review procedures as explained above.

Therefore, although the tender opening was not conducted in accordance with the law, the Authority cannot entertain the same for lack of jurisdiction.

Sub issue (ii) Whether the appointment of Mr. Abdallah Msemo, the Respondent's Supplies Officer to be among the evaluators contravened the law.

In resolving this sub-issue the Authority considered the contesting arguments by parties' and deemed it prudent to revisit Section 38 of the Act and the PPRA's Evaluation Guidelines for Goods and Works relied upon by the parties' in their submission. The said provisions are reproduced as follows:

S.38 "Subject to the provisions of this Act, the Accounting Officer or Chief Executive, the Tender Board, the Procurement Management Unit, the user Department and the Evaluation Committee shall act independently in

relation to their respective functions and powers”.

Paragraph 1.3 of the Evaluation Guidelines

“Every Committee shall have an expert or a person qualified in the subject matter of the particular procurement”.

Paragraph 2.1

“the committee set up under paragraph 1 shall each be headed by a chairperson and consist of at least three (3) committee members. Each committee shall comprise of not less than two government officials with the necessary qualifications and experience, one official from other public authorities who is a specialist or qualified person in the field of a particular procurement to be called for and **one procurement specialist who shall not be involved in the approval process.** Subject to the prior written approval by the PPRA, non-public officers may be appointed as committee members”. (Emphasis supplied)

Based on the above quoted provisions, the Authority observes that, the Evaluation Committee is required to

work independently in the execution of its functions. The Authority observes further that, paragraph 2.1 of the PPRA's Evaluation guidelines clearly entails that an evaluation committee shall comprise of a procurement specialist who should not be involved in the approval process.

According to the documents submitted before this Authority, Mr. Abdallah Msemu, a Supplies Officer participated in the evaluation process only; he was neither involved in the tender opening process nor participated in the Tender Board meeting which approved the award to the successful tenderers.

From the above facts the Authority is of the settled view that, it was not wrong for the Respondent to appoint one Mr. Abdallah Msemu to be amongst the Evaluators as the same was in accordance with PPRA's Evaluation Guidelines. Thus, the Respondent's act in this regard did not contravene Section 38 of the Act.

Accordingly, the Authority's conclusion on the second sub issue is that, the Appointment of Mr. Abdallah Msemo, the Respondent's Supplies Officer to be amongst the Evaluators did not contravene the law.

Sub issue (iii) Whether the tender was awarded within the bid validity period

In resolving this sub-issue the Authority considered the Appellant's arguments that, the tender was awarded beyond the Bid Validity period of 90 days as stipulated in the Tender Document contrary to the requirement of Regulation 87(2) of GN. No 97/2005.

In reply thereof, the Respondent submitted that the tender was awarded within the bid validity period of 90 days, since the Tender Board approved the recommendation of award of tender on 18th February, 2013, while the tender was opened on 13th December, 2012. Thus, they complied with the requirement of Regulation 96(3) of GN No. 97 of 2005.

In order to ascertain the validity of the parties' arguments, the Authority revisited Regulation 87(2) and (3) of GN. No. 97/2005 relied upon by the Appellant and reproduces it as hereunder:

Reg.87(2) **"The period fixed by the procuring entity shall be sufficient to permit evaluation and comparison of tenders, for obtaining all necessary clearance and approval, and for the notification of the award of contracts and finalise a contract"**.

(Emphasis supplied)

Reg.87(3) **"The validity period shall not exceed one hundred and twenty days from the final date fixed for the submission of tenders** but it may vary depending on the nature and complexity of the contract"

(Emphasis added)

From the above quoted provisions the Authority observes that, the Procuring Entities are required to award tenders

and finalise the contract within the bid validity period stipulated in their Tender Document.

The Authority revisited the Tender Document and noted that, Clause 21 of the Bid Data Sheet (hereinafter referred to as "**BDS**") provided clearly that;

Clause 21 "**The Bid validity period shall be 90 days**".

The Authority further noted that, the Bid Validity period was not extended in accordance with Regulation 87(4) of GN No. 97/2005. This means that, for all practical purposes and intents the bid validity period remained unchanged, that is, ninety days (90).

Having established the required bid validity period the Authority proceeded to see if the same was complied with. The Authority hastens to state that as per Regulation 87(3) of GN. No 97/2005 the bid validity period starts to run from the final date fixed for submission of tenders. That period comes to an end in

terms of Regulation 87(2) of GN No. 97/2005 upon finalization of the contract. During the hearing it became crystal clear that the Respondent had yet to finalize the contract in relation to this tender. Counting from the tender opening date, that is, 13th December, 2012 the ninety days run out on 12th March, 2013 while notification of the award was made on 19th June, 2013. Based on that fact, the Authority is of the settled view that, the award was made beyond the bid validity period. Pursuant to Section 55(7) the procurement contract was entered into force after the expiry of bid validity period.

Therefore, the Authority agrees with the Appellant and concludes that, the award to the successful tenderer was made beyond the bid validity period.

Sub issue (iv) Whether the award of tender to the successful tenderers was proper at law.

In resolving this sub issue the Authority revisited the tenders submitted by the successful tenderers and noted

that, they had quoted similar price of Tshs.46,400/- save for two tenderers who quoted Tshs.48,000/- and their prices was harmonized so that it can be Tshs. 46,400/-. From the document submitted, the Authority failed to substantiate the Appellant's claim that the awarded price was doubtful.

Furthermore, the Authority took cognizance of its findings made on sub issue three above, that the tender was awarded beyond the bid validity period stipulated in the Tender Document and concludes that, the award of tender to the successful tenderer was not proper at law since the tender was awarded beyond the bid validity period of 90 days.

Accordingly, the Authority's conclusion with respect to the second issue is that, based on the findings made under sub issue three the tender process was not conducted in accordance with the law.

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

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

With regard to the Appellant's first prayer that, the entire tender proceedings and its acceptance of award be nullified and further an order for re-tendering process be granted. The Authority observes that there is nothing to be nullified as the tender was awarded beyond the bid validity period. As such there was no award in the eyes of the law.

With regard to the prayer that, the previous service provider be allowed to continue during the weeks in between so as to avoid the impacts of nullification. The Authority cannot grant this prayer for want of jurisdiction

With regard to the prayer for compensation of Tshs. 1,350,000/- the Authority is of the firm view that, the Appellant deserves some compensation to the tune of Tshs. **692,000/=** as per the following breakdown:-

- i. Appeal filing fees Tshs.120,000/=
- ii. Transport costs from Tanga to Dar es salaam
Tshs 18,000 x 2 x 2 people = Tshs.72,000/=
- iii. Living costs in Dar es salaam 50,000/= x 5 days
x 2 people = Tshs.500,000/=

Total Tshs. 692,000/=

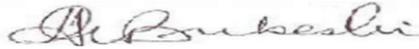
The Authority also considered the Respondent's prayer that, the Appeal be dismissed with costs. The Authority does not agree with the Respondent as the Appeal has some merits.

Accordingly, the Authority partly upholds the Appeal and orders the Respondent to;

- **re-start the tender process afresh in observance of the law; and**
- **to compensate the Appellant the sum of Tshs. 692,000/= only**

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

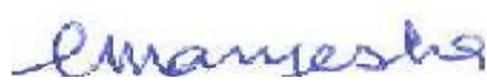
Decision delivered in the presence of the Appellant and the Respondent this 5th September, 2013.



JUDGE (rtd) A. BUBESHI

CHAIRPERSON

MEMBERS:

1. MR. H.S. MADOFFE 
2. MS. E.J. MANYESHA 
3. MRS. N.S.N. INYANGETE 