

IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY
AT DAR ES SALAAM.

APPEAL CASE NO. 35 OF 2014-15

BETWEEN

M/S HILLARY ENTERPRISES.....APPELLANT

AND

MARA REGIONAL ADMINISTRATIVE
SECRETARY.....RESPONDENT

DECISION

CORAM

1. Hon. Vincent K.D. Lyimo, J. (rtd) - Chairman
2. Mrs. Rosemary A. Lulabuka - Member
3. Mr. Louis P. Accaro - Member
4. Eng. Aloys J. Mwamanga - Member
5. Mr. Ole-Mbille Kissioki - Executive Secretary

SECRETARIAT

1. Mrs. Toni S. Mbillinyi - Principal Legal Officer
2. Ms. Florida R. Mapunda - Legal Officer
3. Ms. Violet S. Limilabo - Legal Officer
4. Mr. Hamisi O. Tika - Legal Officer

FOR THE APPELLANT

1. Ms. Rehema Mgovano - Advocate, Great Harvest Attorneys
2. Mr. Hillary Fungo Albert - Managing Director
3. Mr. Vincent M. S. Misinzo - Accountant

FOR THE RESPONDENT

1. Mr. Mbaraka Forogo - Head of Legal service Unit
2. Mr. Kombania Edwin Z. – Ag. Head of Procurement Management Unit.

This decision was scheduled for delivery today 13th April, 2015 and we proceed to do so.

This Appeal was lodged by M/s HILLARY ENTERPRISES (hereinafter referred to as “the Appellant”) against the MARA REGIONAL ADMINISTRATIVE SECRETARY (hereinafter referred to as “the Respondent”). The Appeal is in respect of a tender for Running of Musoma Club (hereinafter referred to as “the tender”).

After going through the record of proceedings submitted to the Public Procurement Appeals Authority (hereinafter referred to as “the Appeals Authority”), as well as the oral submissions by the parties at the hearing, the facts of the Appeal may be summarized as follows:

On 16th December 2014, the tender was re-advertised by the Respondent and the deadline for the submission of the tenders was 30th December 2014. In that respect, three tenders with their respective tender prices were received from the following firms-

S/NO	Tenderers Name	Quoted Price in Tshs
1.	M/s Hillary Enterprises	400,000.00
2.	M/s Shairoma Co. Ltd.	400,000.00
3.	M/s Mushumuke Co. Ltd.	300,000.00

The tenders were then subjected to evaluation which was conducted in two stages namely; preliminary examination, detailed examination and price comparison. During preliminary examination the tender by M/s Mushumuke Co. Ltd. was disqualified for being non responsive. The remaining two tenders by M/s Hillary Enterprises and M/s Shairoma Co. Ltd. qualified for detailed evaluation.

At the detailed examination and price comparison stage, the tender submitted by M/s Hillary Enterprises was observed to have quoted maintenance budget instead of operating business capital. However, the said tender qualified and was taken for price comparison and ranking. The tender submitted by M/s Shairoma Co. Ltd. was ranked first followed by that of the Appellant. The Evaluation Committee therefore recommended award of the tender to M/s Shairoma Co. Ltd. at a contract

price of Tanzania Shillings four hundred thousand (Tshs. 400,000.00) per month.

The Tender Board at its meeting held on 23rd January 2015, approved award of the tender to M/s Shairoma Co. Ltd. at a contract price of Tanzania Shillings four hundred thousand (Tshs.400,000.00) per month.

On 26th January 2015, the Respondent through its letter Ref: No. BE: 52/264/01/29 notified the Appellant of its intention to award the tender to M/s Shairoma Co Ltd.

Being dissatisfied with the Respondent's intention to award the tender to M/s Shairoma Co. Ltd., the Appellant on 30th January 2015 wrote to the Respondent letter Ref. No. HE/11/217 contesting two issues:-

- i. That, the Appellant had complied with environmental care in the previous contract and had never been issued with a warning letter regarding its failure to maintain the environment.
- ii. That, the Appellant had not contravened the provisions of Regulation 240 of GN No. 446/2013 in regard to confidentiality.

In response to the Appellant's letter, the Respondent's Accounting Officer on 11th February 2015 by his letter Ref. NFA.38/300/01/29 informed the

Appellant that its complaints did not relate to the tender under appeal but rather to an earlier rejected tender.

Being dissatisfied with the Respondent's reply, on 27th February 2015, the Appellant lodged this Appeal with the Appeals Authority. The appellant filed twelve grounds of appeal, ranging from previous contractual issues to the current tender the subject matter of this appeal. Specifically grounds one to eight inclusive have no relevance at all to the current appeal. These were not considered. This Appeal is founded on grounds nine to twelve and exhibits D12 to D20 respectively and both parties made their submissions based on those issues.

SUBMISSIONS BY THE APPELLANT

That, the Appellant had participated in the tender under Appeal by purchasing the Tender Advertisement. He submitted that the Respondent did not issue to tenderers the relevant Tender Document as required by the law.

That, upon receiving the Notice of Intention to award to the successful tenderer, the Appellant wrote to the Respondent protesting to have been unfairly disqualified.

That, the Respondent informed the Appellant that the disqualification was based not only on its failure to show environmental conservation plans but also the necessary operating capital for running Musoma Club.

That, the Appellant disputed the disqualification asserting that it had complied with all tender requirements. He submitted that his company had won the current contract which was due to expire and insisted that the procedures and basis for selecting the successful tenderer for running Musoma Club were not adhered to.

Finally the Appellant prayed for the following orders:-

1) Nullification of award of the tender

2) Compensation for

i.	Advocates' fees (Mara and Dar es Salaam) –Tshs	
	1,000,000	
ii.	Transport two persons:	
	(a) Musoma to Mwanza - Tshs.	31,000.00
	(b) Mwanza to Musoma - Tshs.	31,000.00
	(c) Mwanza to Dar es Salaam - Tshs.	90,000.00
	(d) Dar es Salaam to Mwanza - Tshs	90,000.00
	(e) Taxi from ubungo to ubungo- Tshs.	20,000.00
iii.	Meals (10,000x 2 persons x 7 days) Tshs.	140,000.00
iv.	Accommodation	
	(30,000 x 2persons x 7 days) Tshs.	420,000.00
v.	Appeal filling fees Tshs.	<u>200,000.00</u>
	Total: Tshs.	<u>2,022,000.00</u>

3) Any other relief the Appeals Authority deems fit to grant.

REPLIES BY THE RESPONDENT

In his written replies to the Appeal, the Respondent raised one preliminary point of law, contending that the Appeal is incompetent for being filed contrary to Rule 8 (1) of the Public Procurement Appeals Authority Rules of 2014. Regarding the remaining grounds of appeal, the Respondent simply stated that he was disputing each of the allegations and put the Appellant to strict proof thereof.

During the hearing of the Appeal, the Respondent's learned counsel asserted that the Appellant had not issued to the Respondent the notice of intention to appeal. Learned counsel correctly argued that Rule 8(1) of the said Rules requires that a person who is dissatisfied with a decision giving rise to the dispute to give notice of intention to appeal within seven days from the date he became aware of the circumstances giving rise to the dispute. However, he submitted that failure to serve notice to the Respondent was fatal because the respondent would have been denied the opportunity to prepare for the intended appeal.

The Members of the Authority drew to the attention of the Respondent to the specific provisions of rule 8 of the Public Procurement Appeals Rules 2014 which have used the words....*may*, that shows filing of the notice of intention to appeal is optional and not mandatory requirement and that pursuant to rule 8(2) of the Appeals Rules, the notice is to be served upon the Executive Secretary and not otherwise. Respondent opted to abandon the Preliminary Objection.

The Respondent's learned counsel argued that the nature of the services required under the tender in question was outside the ambit of the Public Procurement Act, 2011 and its Regulations. As a result, he submitted that the Respondent found no need to issue to tenderers the Standard Tender Document. The Respondent said that all tenderers purchased the Tender advertisement and that was the sole document which was relied upon in the determination of the tender under dispute.

In conclusion, the Respondent submitted that despite the absence of the standard tender document, the procedures for determining the successful tenderer were followed in compliance with the law.

Finally the Respondent prays for the following orders:-

- i. Dismissal of the Appeal for lack of merits;
- ii. Declaration that the Respondent intention to award of the tender for running of Musoma Club to M/s Shairoma Co Ltd was legal; and
- iii. Any other reliefs the Appeals Authority deems fit to grant.

Addressing issue of costs to the Appellant, the Respondent disputed compensation fees prayed by the Appellant in regard to legal fees for two counsels, transport fees with respect to the return journey from Musoma - Mwanza to Dar es Salaam and matters incidental thereto.

ANALYSIS BY THE APPEALS AUTHORITY

In this case, the Appeals Authority is of the settled view that there are three issues calling for determination and those are: -

- 1.0 Whether the tender process was conducted in compliance with the law;
- 2.0 Whether the Appellant was fairly disqualified; and
- 3.0 To what reliefs, if any, are the parties entitled to.

Having framed the issues in dispute the Appeals Authority proceeded to resolve them in the following manner-

- 1.0 Whether the tender process was conducted in compliance with the law.

To ascertain whether or not the tender proceedings were properly conducted, the Appeals Authority revisited the documents submitted to it vis-a-vis the applicable law. In the course of doing so, the Authority observed and noted that the Respondent neither issued a formal tender document nor the Public Procurement Regulatory Authority ("the PPRA") standard document stipulated under Sections 69 and 70 of the Public Procurement Act No. 7 of 2011 (hereinafter referred to as "the Act"). For ease of reference the said provisions run as follows-

S. 69 (1) "The Procuring entity shall provide tender documents immediately after first publication of the tender notice to all suppliers or contractors who respond to the tender notice and pay the

requisite fee, if required, for which a receipt shall be given”.

S.70 (1) *“The procuring entity shall use the appropriate standard model documents specified in the Regulations for the procurement in question.”*

The Respondent openly admitted to have used the Tender Advertisement as basis for the evaluation of the tender documents submitted by tenderers. That was a clear contravention of the specific provisions of the laws as cited above. The Tender Advertisement so deployed lacked all the quantifiable evaluation criteria which are fundamental in evaluating tenders. Further, it did not specify the various key stages for a sound evaluation process which could have been stated in the Tender Document as per Regulation 184 (1) (a), (b) and (d) of GN 446 of 2013. The said provisions provide as follows-

Regulation 184.(1) *The solicitation documents shall contain the following information:*

(a) the criteria and procedures relating to evaluation of the qualifications of tenderers and further demonstration of qualification;

(b) the requirements as to documentary evidence or other information that has to be submitted by a prospective tenderer to demonstrate his qualifications;

(c) N/A

(d) the criteria to be used by a procuring entity in determining a successful tender, including any margin of preference and any criteria other than price to be used pursuant to regulations 206 and 213 of these Regulations and the relative weight of such criteria”.

Consequently, the Evaluation Committee assumed the role of the Tender Document and the law by creating the criteria and the stages for evaluation, a matter which is contrary to the specific requirement of Section 72 (1) & (2) of the Act and Regulation 203 of GN No. 446/2013 which, for ease of reference, have been quoted herein below.

S.72 (1) “The basis for tender evaluation and selection of the successful tenderer shall be clearly specified in the tender document.

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

Regulation 203 - “The tender evaluation shall be consistent with the terms and conditions prescribed in the tender documents and such

evaluation shall be carried out using the criteria explicitly stated in the tender documents”.

The stages for evaluation which were created by the Evaluation Committee were preliminary, detailed and price comparison. However, in the current appeal, it has been observed that the Respondent evaluated tenders using additional criteria which were not provided for in the Tender Advertisement. For instance the Tender Advertisement issued by the Respondent contained six requirements which the tenderers were required to comply with. These were;

4. MASHARITI (*sic*) MUHIMU YA KUZINGATIA WAKATI WA KUTUMA MAOMBI YA ZABUNI:

- (a) Mwombaji ni lazima aweze kufanya biashara zote mbili kwa pamoja;
- (b) Mwombaji aeleze Mpango wa biashara (business Plan), mfano aina za vyakula atakavyouza na bei zake, aina za vinywaji na bei zake na mpango wa utumiaji na maboresho ya mazingira.
- (c) Mwombaji awe msafi, mwenye kutoa huduma bora.
- (d) Mwombaji atalazimika katika maombi yake Leseni yake ya Biashara, Tax Identification Number (TIN) na uzoefu alionao katika kazi/ biashara.
- (e) Mwombaji atatakiwa kuonyesha anwani yake ya kudumu (permanent Address) ya biashara yake
- (f) Mwombaji atatakiwa kuwa na mtaji wa kutosha kuendesha biashara hiyo.

Literally translated

4. BASIC REQUIREMENT FOR TENDER SUBMISSION:

- (a) Applicant must be able to operate two businesses together;
- (b) Applicant must state (show) business Plan, example foods to be sold and respective prices, drinks to be sold and respective prices and environmental conservation;
- (c) Applicant must be clean and be able to deliver good services;
- (d) Applicant must attach to his application business license, Tax Payer Identification Number (TIN) and indicate experience in the said business;
- (e) Applicant must show his permanent address;
- (f) Applicant must have sufficient capital to run the business.

Contrary to the above requirements, the evaluation report contained other criterion like attaching certificate of incorporation from Business Registration Licensing Authority (BRELA). The Appeals Authority observed further that some, if not all, of the requirements were not quantifiable due to lack of standard Tender Document. For instance, the requirement for the applicant to be clean, to have sufficient or enough capital, business plan, and environmental conservation. The Tender advertisement did not state how tenderers would be evaluated on the above criteria in order to determine the most responsive tenderer.

In view of the above findings and observations, the Appeals Authority is of the settled view that, the criteria for determination of tenderers'

responsiveness and award thereof were neither certain nor quantifiable and that the entire tender process was deeply flawed.

Accordingly, the Appeals Authority's conclusion in respect of the first issue is that, the tender process was not conducted in compliance with the law.

2.0 Whether the Appellant was fairly disqualified ;

In resolving this issue, the Appeals Authority took cognizance of its findings and conclusion on the first issue above and observed that, since the entire tender process was marred by uncertainties there was no legal basis to make an award or disqualify tenderers. As already indicated above, the appellant was disqualified for its failure to show environmental conservation plan and the necessary operating capital.

In the course of reviewing the tender documents, this Appeals Authority noted that the Appellant had in fact indicated to have Tshs. 18,000,000.00 and Tshs. 2,000,000.00 as working capital and for environmental conservation respectively as was required by the Tender Advertisement. The respondent has not shown how this factor could be used to disqualify the Appellant. And to ascertain the Appellant's contention the Appeals Authority revisited evaluation report and observed that, the Appellant qualified for both the preliminary stage and detailed evaluation and price comparison. It will be noted that both the Evaluation Committee and the Tender Board were at one that the Appellant indicated maintenance budget rather than Business capital. The Appellant was not disqualified instead; it was taken up to next stage of price comparison. Since the Tender Advertisement did not specify how those requirements

could have been be evaluated, the Respondent was obliged to accept whatever capital and environment plan that was projected by tenderers.

Accordingly in respect to the second issue, the Appeals Authority affirmatively holds that the Appellant was unfairly disqualified.

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

The Appeals Authority has established that the whole tender process was flawed by the Respondent’s failure to issue a standard Tender Document as required by the law. It has also established that the Appellant was unfairly disqualified. In that regard the Appeals Authority hereby nullifies the award of the tender and makes the following Orders:

- 1. Respondent to re-start the tender process in observance of the law; and
- 2. Orders the Respondent to compensate the Appellant the sum of Tshs 1,990,000.00 arrived at as follows:-
 - i. Advocates fee Tshs 1,000,000
 - ii. Transport on the following basis:
 - (a) Mwanza to Musoma (return) - Tshs 8000 x2 person x 2
Tshs. 32,000.00
 - (b) Mwanza to Dar es Salaam (return)- 45,000 x2 person x2
Tshs. 180,000.00
 - (c) Taxi (in Dar es Salaam) Tshs. 20,000.00
 - iii. Meals 10,000x2 person x 7 days Tshs. 140,000.00

iv. Accommodation 30,000 x 2 x 7 days	Tshs.	420,000.00
v. Appeal filling fees	Tshs.	200,000.00

This decision is binding upon the parties and may be enforced in any court of competent jurisdiction in terms of Section 97 (8) of the Act.

Right of Judicial Review as per Section 101 of the PPA/2011 explained to parties.

This Decision is delivered in the presence of the Appellant and the Respondent this 13th April, 2015.

The Appeal is allowed.



VINCENT K. D. LYIMO (J. rtd)

CHAIRMAN

MEMBERS:

1. MRS. R. A. LULABUKA 

2. ENG. A. J. MWAMANGA 

3. MR. L. P. ACCARO 