

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

APPEAL CASE NO. 31 OF 2013-14

BETWEEN

**JOINT VENTURE OF INNOVATION
STRATEGIES, INFOPORT VALENCIA S.A,
KPMG LIMITED & ERP SOFTWARE
TECHNOLOGIES PLCAPPELLANT**

AND

**TANZANIA PORTS
AUTHORITY.....RESPONDENT**

DECISION

CORAM

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

SECRETARIAT

1. Mrs.Toni S. Mbilinyi -Principal Legal Officer
2. Mr. Hamisi Tika - Legal Officer
3. Violet Limilabo -Legal Officer

FOR THE APPELLANT

Mr. Salim Abbas Khatri - Managing Director(ERP
SoftwareTechnologies PLC)

FOR THE RESPONDENT

1. Mr. Plasduce Mbossa -Legal Officer
2. Mr. Alex Seneu -Legal Officer
3. Mr. Robert Ngwatu -Principal Procurement Officer
4. Mr. Kilian Chale -Principal Data Base Administrator

FOR OBSERVERS.

1. Thomas Nsimbillah -Legal representative of Intertek
2. M.Aziz - IT Officer of Intertek
3. G.Kiki - Regional managing Director of SGS

This decision was scheduled for delivery today 17th April, 2014 and we proceed to deliver it.

The appeal at hand was lodged by a **JOINT VENTURE OF INNOVATION STRATEGIES, INFOPORT VALENCIA S.A, KPMG LIMITED & ERP SOFTWARE TECHNOLOGIES PLC** (hereinafter referred to as “**the Appellant**”) against the **TANZANIA PORTS AUTHORITY** commonly known by its acronym **TPA** (hereinafter referred to as “**the Respondent**”).

The Appeal is in respect of Tender No. AE/016/2013-14/CTB/G/51 for Supply, Installation, Training and Commissioning of Electronic Single Window System (eSWS) (hereinafter referred to as “**the tender**”).

According to the documents submitted to the Public Procurement Appeals Authority (hereinafter referred to as “**the Authority**”), the facts of the Appeal may be summarized as follows:

The Appellant was among the nine (9) tenderers who had submitted their tenders in response to an invitation made by the Respondent through the International Competitive Bidding Procedures provided in the Public

Procurement (Goods, Works, Non Consultant Services and Disposal of Public Assets by Tender) Regulations, 2005 (hereinafter referred to as “**GN. 97**”). The invitation to tender was vide the Daily News Paper dated 21st October, 2013.

A total of nine (9) tenders were received by the 5th December, 2013 and their respective read out prices at the tender opening ceremony were as follows;

S/N	Tenderer's Name	Quoted price in USD	Quoted price in Euros
1.	M/s Web Fontaine	5,219,424.90 (VAT Exclusive)	
2.	M/s Phaeros group BVBA		5,041,533.00 (VAT Exclusive)
3.	M/s Soget - TechnoBrain	11,090,863.08 (VAT Inclusive)	
4.	M/S Inovation Strategies	4,748,000.00 (VAT Exclusive)	
5.	M/S Imatic	12,506,796.00	

	Technologies Ltd	(VAT Inclusive)	
6.	M/S Biz - Logic	1, 181,240.00 (VAT Inclusive)	
7.	M/S SGS	18,991,000.00 (VAT Exclusive)	
8.	M/S Intertek	8,900,000.00 (VAT Exclusive)	
9.	M/S PWC Technologies for Computers	9,990,000.00 (VAT Exclusive)	

The tenders were then subjected to evaluation which was conducted in three (3) stages namely; preliminary, technical and financial evaluation.

At the preliminary stage, eligibility of tenderers was verified. As a result three tenderers namely; the Appellant, M/S Biz – Logic and M/S PWC Technologies Computers were disqualified for being non responsive to the Tender requirements. The Appellant was specifically

disqualified because one of the companies in the joint venture with them, namely KPMG **Cyprus** has a sister company in Tanzania (KPMG – Tanzania). The KPMG Tanzania was previously engaged by the Respondent in the preparation of the bidding document for this tender. That, in the Respondent's view, amounted to a conflict of interest which is contrary to **ITB clause** 3.4 of the Tender Document. The six remained tenderers qualified for technical evaluation.

During the technical evaluation, all the six tenders were found to be substantially responsive by scoring above the minimum scores set. The total score marks for technical requirements were 80 points and the pass mark was at least 50 out of 80 points. That was met by all six tenderers, hence qualified to proceed to the financial evaluation stage.

Financial evaluation was done, by making corrections of arithmetic errors from each tenderer's quoted price before combining the technical and financial scores. The total scores set for the financial aspect was 20 points and it was fully given to the lowest quoted bid while scores for other bids were calculated accordingly. The bidders'

scores were combined and ranked in accordance with the highest scored marks as follows;

S/N	Tenderer's Name	Technical scores	Financial scores	Total scores	Ranking
1.	M/s Web Fontaine	69.38	20.00	89.38	2nd
2.	M/s Phaeros group BVBA	76.02	14.72	90.73 (sic)	1st
3.	M/s Soget TechnoBrain	70.07	10.58	80.65	4th
4.	M/S Imatic Technologies Ltd	55.17	10.18	65.35	6th
5.	M/S SGS	69.75	5.50	75.25	5th
6.	M/S Intertek	72.20	11.73	83.93	3rd

Having ranked the tenderers as above, the Evaluation Committee recommended M/s Phaeros group BVBA who was ranked the first for award of the tender.

On 27th December, 2013 the Respondent Tender Board approved the Evaluation Committee's recommendation, and awarded the tender to M/S Phaeros Group BVBA at a contract price of Euro 5,041,533 exclusive of VAT.

On 23rd January, 2014 vide a letter referenced PMU/2013-14/G51, M/S Phaeros Group BVBA was notified of the award of the tender by the Respondent. The Appellant on the other hand, was notified of their disqualification through a letter with Ref no. PMU/2013-14/51 dated 10th February, 2014 and which was received by the Appellant on the 13th February, 2014.

The appellant, vide a letter referenced ERPST/TZ/TPA/017 dated 14 February, 2014 applied to the Respondent's Accounting Officer for a review of the tender award on the grounds that, the Respondent did not issue Notice of Intention to award a contract to all tenderers before awarding a contract contrary to S.60 (3) of the Public Procurement Act, 2011. The letter however, was never responded to by the Respondent.

The Appellant, being dissatisfied with the Respondent's conduct appealed to this Authority.

APPELLANT'S GROUNDS OF APPEAL

The Appellant's grounds of appeal as deduced from their Statement of Appeal before hearing were as follows;

That, the Respondent has contravened the provisions of the Public Procurement Act, 2011 and Public Procurement Regulations, 2013 as follows;

- i. For not issuing the notice of intention to award contract contrary to Section 60 (3) of the said Act and Regulation 231(2) thereof.
- ii. For not giving reasons for disqualification of Appellant's tender contrary to Regulation 231(4).
- iii. Failure by the Respondent to give reasons for not awarding the tender to the Appellant led them to doubt the legitimacy of the decision thereof and deprived the Appellant the rights to appeal and challenge the decision, considering that the Appellant's tender price quoted was the lowest of all.

- iv. Failure by the Respondent's Accounting Officer to respond to the Appellant's letter and make decision within fourteen days as required by S.96(6) of the said Act.

However, during the hearing of the appeal, the Appellant informed the Authority that they are dropping their grounds 1, 2 and 4 of their appeal in concession of the Respondent's written reply. However, they retained ground number 3 because in their argument even the Public Procurement Act, 2004 obliged procuring entities to give reasons for disqualifying a tenderer. In their view such failure denied them critical information which they could have used to appeal.

Therefore Appellant's Prayed for the following;

- i. The Authority to annul the Respondent's decision to award the tender.
- ii. Order the Respondent to act in a lawful manner by restarting the procurement process in

accordance with the Public Procurement Act, 2011 and its Regulations.

RESPONDENT'S REPLY TO THE GROUNDS OF APPEAL

The Respondent written replies, submitted to the Authority were as follows;

- i. The Appellant based their grounds of Appeal on the Public Procurement Act, 2011 and Public Procurement Regulations, 2013 in total ignorance of the fact that the procurement process for the tender commenced before the coming into force of the referred laws. Besides, PPRA has issued a directive that procurement process that were undertaken before the coming into operation of the new Act (Public procurement Act, 2011) would be handled with reference to the Public Procurement Act, 2004 and its Regulations.
- ii. On the issue of the Appellant's lowest quoted price during the tender opening, a tenderer's lowest

quoted price was not the only criterion to enable the tenderer to be awarded the tender.

Upon the Appellant's oral submission of dropping their grounds 1, 2 and 4 during the hearing, the Respondent replied further that the remaining ground by the Appellant should equally fall because it was anchored on an inapplicable law. Accordingly, the Appellant's are estopped from invoking the Public Procurement Act, 2004 at the hearing of this appeal. To do so would tantamount to amending their statement of Appeal without leave of the Authority.

Accordingly, the Respondent prayed for dismissal of the appeal and informed the Authority that the Contract for the tender has already been signed.

ANALYSIS OF ISSUES BY THE AUTHORITY

Having gone through the oral and written submissions by parties to this appeal, the following issues were framed by the Authority;

1. Whether the Appellant was justified in using the Public Procurement Act, 2011 and Public Procurement Regulations, 2013 in this Appeal.

2. Whether the oral amendment to the statement of appeal by the Appellant is justified, in the circumstance.

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

After identifying the issues in dispute, the Authority proceeded to determine them as follows;

1. Whether the Appellant was justified in using the Public Procurement Act, 2011 and Public Procurement Regulations, 2013 in this tender.

As conceded by the Appellant during the hearing and as stated by the Respondent in their statement of reply, the applicable law in this tender was the Public Procurement Act of 2004 and its Regulations and not the Public Procurement Act of 2011. The Authority totally concurs with the Respondent and has nothing useful to add.

2. Whether the oral amendment to the statement of appeal by the Appellant is justified, in the circumstance.

In its endeavor to satisfy itself on the legitimacy of the Appellant's attempt to orally amend their statement of Appeal, the Authority referred to Rule 11 of the Public Procurement Appeals Rules, 2005, which provides as follows;

Rule (11) "The Appeals Authority may, on its own motion or on application by a party to the proceedings order that the statement of appeal be amended in such manner as may be suitable and necessary for the determination of the appeal."

In the Authority's considered view, the requirements of the law with respect to amending the Statement of Appeal are crystal clear. Short of the Authority's order *suo moto* action, the Appellant is obliged to apply to the

Authority to make the required amendment. This must be followed by the Authority's permission thereof and finally the proposed amendment. An amendment which contravenes these requirements cannot be entertained. The purpose of the Rule is without doubt to give the other party an opportunity to be heard, to wit, to respond to the amended statement which cannot be done orally.

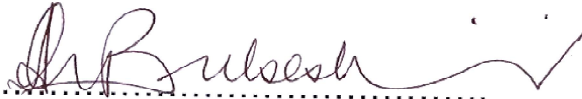
In conclusion the Authority declines to entertain the said amendment and rejects it in total. Furthermore, the Authority cannot address other matters raised by the Appellant in their Appeal.

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

As the Appellant's appeal could not stand, the Authority concur with the Respondent who prayed that the appeal be dismissed. Consequently, the appeal is hereby dismissed. Each party to bear their own costs.

Rights of Judicial review as per section 101 of PPA/ 2011 explained to parties.

Decision delivered in the presence of the Appellant and the Respondent this 17th day of April, 2014.




JUDGE (rtd) A. BUBESHI

CHAIRPERSON

MEMBERS:

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

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

3. MRS. R.A. LULABUKA... .....