

IN THE PUBLIC PROCUREMENT APPEALS AUTHORITY

APPEAL NO. 28 OF 2020-21

BETWEEN

M/S CEILING AND PARTITIONS SYSTEM LIMITED.....APPELLANT

AND

BANK OF TANZANIARESPONDENT

DECISION

CORAM

- | | |
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| 1. Adv. Rosan Mbwambo | - Ag. Chairperson |
| 2. Eng. Stephen Makigo | - Member |
| 3. Dr. Leonada Mwangike | - Member |
| 4. Ms. Florida Mapunda | - Ag. Secretary |

SECRETARIAT

- | | |
|------------------------|------------------------|
| 1. Ms. Agnes Sayi | - Senior Legal Officer |
| 2. Ms. Violet Limilabo | - Legal Officer |

FOR THE APPELLANT

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| 1. Mr. Reginald Martin | - Advocate- Breakthrough Attorneys |
| 2. Mr. Alex Andrea Matovu | - Managing Director- Ceiling and Partitions System Ltd |
| 3. Ms. Doreen George | - Advocate- Breakthrough Attorneys |

FOR THE RESPONDENT

- | | |
|--------------------------|-----------------------|
| 1. Mr. Deodath Mushi | - State Attorney- BOT |
| 2. Mr. Clay J. Apiyo | - Manager Procurement |
| 3. Mr. Grace A. Massawe | - Procurement Officer |
| 4. Mr. Melkiory E. Maria | - Mechanical Engineer |

This Appeal was lodged by **M/s Ceiling and Partitions System Limited** (hereinafter referred to as "**the Appellant**") against the Bank of Tanzania (hereinafter referred to as "**the Respondent**"). The Appeal is in respect of Tender No. PA/082/2020-2021/HQ/G/77 for Supply of Raised Floor at the Bank of Tanzania (hereinafter referred to as "**the Tender**").

According to the documents submitted to the Public Procurement Appeals Authority (hereinafter referred to as "**the Appeals Authority**") the background of this Appeal may be summarized as follows: -

The Tender was conducted using National Competitive Tendering Method through Tanzania National e-Procurement System (TANePS) as specified under the Public Procurement Act, No. 7 of 2011 as amended (hereinafter referred to as "**the Act**") and the Public Procurement Regulations, GN. No. 446 of 2013 as amended by GN. No. 333 of 2016 (hereinafter referred to as "**the Regulations**").

On 21st October 2020, the Respondent through TANePS invited qualified tenderers to submit their tenders. The deadline for the submission was set for 4th November 2020. The Tender opening took place on 12th November 2020. Ten (10) tenders were received, including that of the Appellant.



Tenders were then subjected to evaluation which was conducted into three stages namely; preliminary, technical and financial. During preliminary evaluation Seven (7) tenders were disqualified for failure to comply with the requirements of the Tender Document, including the tender by M/s City-Tech Engineering Company Ltd on the reason that Manufacturer's Authorization letter attached was not in the Manufacturer's headed paper as required by the Tender Document. The remaining three (3) tenders were subjected to technical evaluation. In that process one (1) tender was disqualified and the remaining two (2) tenders proceeded to the financial evaluation stage.

At the financial evaluation stage, the tenders were checked for arithmetic correction of errors. After completion of the evaluation process the Evaluation Committee recommended award of the Tender to M/s Ceiling and Partitions Company Ltd (the Appellant) at a bid price of Tanzanian Shillings Three Hundred Fifteen Million One Thousand and Four Cents Seventy Two only (TZS 315,001,004.72) VAT inclusive. The Tender Board at its meeting held on 9th February 2021, approved the award as recommended by the Evaluation Committee.

On 16th February 2021 the Respondent issued a Notice of Intention to award the Tender to all tenderers who participated in the Tender. The Notice informed the tenderers that award has been proposed to M/s Ceiling and Partitions Company Ltd at a bid price of TZS 315,001,004.72 VAT inclusive. The Notice also informed M/s City-Tech Engineering Company Ltd that its tender was disqualified for attaching Manufacturer's Authorization



letter which was not in the manufacturer's headed paper as required by the Tender Document.

Dissatisfied, on 22nd February 2021, M/s City- Tech Engineering Company Ltd applied for administrative review to the Respondent challenging the reason for its disqualification. On 1st March 2021, the Respondent informed all tenderers that the procurement process has been suspended pending investigation and that tenderers would be notified on the outcome of the investigation.

The Respondent re-evaluated all the Tenders and was satisfied that the award to the Appellant was not justified. It was also found that M/s City-Tech Engineering Co. Ltd was the first ranked tenderer with quoted price of Tanzania Shillings Two Hundred Forty Five Million Eight Hundred Ten Thousand Three Hundred Eighty Six only (TZS 245,810,386.00) VAT inclusive. The Tender Board at its meeting held on 19th March 2021, approved the award as recommended by the Evaluation Committee.

On 30th March 2021, the Respondent issued the 2nd Notice of Intention to award the Tender. This notice was sent to the Appellant via email by one Neema P. Lyoka (Neema) on 31st March, 2021 copied to one Baraka D. Mageche (Baraka) and Gesona G. Baraka (Gesona). The Appellant was also informed that the Respondent intends to award the Tender to M/s City-Tech Engineering Company Ltd at the bid price of TZS 245,810,386.00 VAT inclusive. The Appellant was also informed that its tender was not successful on the ground that the quoted bid price of TZS 315,001,004.72



VAT inclusive was higher compared to the price quoted by the proposed bidder.

Dissatisfied, on 5th April 2021, the Appellant wrote an application for administrative review and sent it by email on 6th April 2021. On 8th April 2021 the Appellant received an email responding to the application for administrative review and dismissing it. Aggrieved further the Appellant filed this Appeal on 16th April, 2021.

When the matter was called on for hearing, the Respondent raised a preliminary objection on a point of law that this Appeal is pre-mature and thus incompetent as there was no formal application for administrative review that was lodged before the Respondent. The Appeals Authority directed that it would hear both the preliminary objection and the Appeal together. Therefore, the following issues were framed namely: -

1. Whether this Appeal is incompetent.
2. Whether the proposed award of the Tender to the Appellant was justified;
3. Whether there was a decision on the application for administrative review lodged by M/s City- Tech Engineering Company Ltd;
4. Whether the proposed award of the Tender to M/s City- Tech Engineering Company Ltd was made whilst the Tender was still valid; and
5. What reliefs, if any, are the parties entitled to.



The learned state attorney for the Respondent took the floor first to address the Appeals Authority on the preliminary objection. He submitted that this Appeal contravened Section 96 of the Act and Regulations 105 and 106 of the Regulations. According to those provisions it is a mandatory requirement to file an application for administrative review to the accounting officer before filing an appeal to the Appeals Authority. The Appellant did not lodge any formal application for administrative review.

The learned State Attorney submitted further that according to the Tender Document all communications in this tender should be filed with the accounting officer. Accounting officer is either the Governor or Deputy Governor. According to the learned state attorney a formal application for administrative review was lodged on 15th April 2021. The Appellant's Statement of Appeal indicates that the Appeal was lodged in this Appeals Authority on 16th April 2021, just a day after it had lodged a formal application for administrative review to the Respondent. The Appellant ought to have waited for seven (7) working days before filing this Appeal. Therefore, the Appellant lodged this Appeal prematurely. He therefore, prayed for dismissal of this Appeal for having been filed contrary to the law.

The learned counsel for the Appellant in response submitted that the Appeal is competent as it has been filed as per the requirements of the law. According to the learned counsel, the Appellant received the notice of intention to award the tender dated 30th March 2021 via email dated 31st March, 2021. On 6th April 2021, the Appellant lodged an application for



administrative review. The said application was lodged electronically and physically.

On 8th April 2021, the Appellant received the Respondent's response with regard to the application for administrative review. The response was sent to the Appellant via email by Baraka. The said email was also copied to Neema. The learned counsel expounded its argument by indicating that throughout this Tender process the Appellant has been communicating with the two Respondent's officials, Baraka and Neema. In the circumstances the Appellant believed that the two officers were the key personnel in the Tender. Therefore, the Appellant had no reason to doubt when receiving from and/or sending emails through them.

It was further submitted that, when the Appellant received an email from Neema then Baraka would be in copy and vice versa. For instance, Neema sent the notice of intention to award the tender dated 30th March 2021 to the Appellant and copied Baraka. On 6th April 2021, the Appellant lodged an application for administrative review via email through Baraka. On 8th April 2021 Baraka sent a response on the Appellant's application for administrative review and Neema was in copy. The Appellant believed that all communications from Baraka and Neema were official communications from the Respondent.

Therefore, the application for administrative review was duly lodged to the Respondent on 6th April 2021 and the decision thereof being issued on 8th April 2021. This Appeal was lodged on 16th April 2021 well within seven (7) working days from the date the Appellant received the Respondent's

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decision. The learned counsel prayed that the preliminary objection should be overruled.

ANALYSIS OF THE APPEALS AUTHORITY ON THE PRELIMINARY OBJECTION

The Appeals Authority revisited section 96 (1) and (4) of the Act which provides as follows: -

*"S.96(1) "Any complaints or dispute between procuring entities and tenderers which arise in respect of procurement proceedings, disposal of public assets by tender and awards of contracts shall be reviewed and decided upon **a written decision of the accounting officer of a procuring entity and give reasons for his decision.***

*S.96(2) **The accounting officer shall not entertain a complaint or dispute unless it is submitted within seven working days from the date the tenderer submitting it became aware of the circumstances giving rise to the complaint or dispute or when that tenderer should have become aware of those circumstances whichever is earlier.***"

(Emphasis Supplied)

According to the above quoted provision tenderers who are dissatisfied with the tender process are required to lodge their complaints to the accounting officer within seven (7) working days from the date they became aware of the circumstances giving rise to the complaints.



Looking at the record of this Appeal, the Appeals Authority observes that, the Notice of Intention to award is dated 30th March 2021 signed by the Deputy Governor. This notice was sent to the Appellant by Neema (NPLYOKA@bot.go.tz) through her email dated March 31st, 2021 at 12:57PM. This email was copied to Baraka (bdmageche@bot.go.tz) and Gesona (GGBARAKA@bot.go.tz).

Upon receipt of the notice the Appellant was dissatisfied and lodged an application for administrative review. The application for administrative review is dated 5th April 2021 addressed to the Accounting Officer of the Respondent and was sent via email by one Alex Matovu to Baraka on 6th April 2021. The Appellant's email was also copied to, among others, Neema, Gesona and to the Appeals Authority (es@ppaa.go.tz).

The Appeals Authority has reviewed threads of emails as supplied in the Appellant's List of Additional Documents filed on 19th May 2021, with leave, and observed that on 31st March 2021, the Appellant received the Notice of intention to award dated 30th March, 2021 signed by the Deputy Governor and sent via Neema's email. The said email was also copied to Baraka and Gesona. It is further observed that on 1st April 2021 one Hellen via info@cps.co.tz acknowledged receipt of the Notice via Neema's e-mail. The acknowledgement email was also copied to Baraka and Gesona. On the same date Baraka through his email (bdmageche@bot.go.tz) responded to Hellen's email by stating that "WELL NOTED". Baraka's email was also copied to among others Neema and Gesona.



Thereafter, on 6th April 2021 the Appellant sent an application for administrative review addressed to the Respondent's Accounting Officer via the email of Baraka. The said email was titled "*Application for administrative review of the decision to change the intention to award Ceiling and Partitioning Systems Ltd the tender*".

On 8th April 2021 the Respondent acknowledged receipt of the Appellant's application for administrative review via the email of Baraka stating that "THIS IS WELL RECEIVED". In the same email Baraka also responded to the grounds of the Application for administrative review. The email was also copied to this Appeals Authority.

From the above sequence of events as depicted in the threads of emails the Appeals Authority is of the settled view that communications between the Appellant and the Respondent were through emails. Senders and or recipients on the part of the Respondent were Neema and Baraka. The Respondent confirmed during the hearing that the two are officers of the Respondent. In the circumstances, the Respondent's invitation to find that the Application for administrative review dated 5th April 2021 as sent by the Appellant and received by Baraka was not formerly submitted to the Respondent's Accounting Officer is declined.

The Appeals Authority is of the further view that, since the Notice of Intention to award was received by the Appellant on 31st March 2021, an application for administrative review lodged on 6th April 2021 was within the seven (7) working days stipulated under Section 96(4) of the Act.



The Appeals Authority considered the Respondent's argument that it could have not entertained the Appellant's application for review as it was lodged on 15th April 2021, beyond the stipulated time limit. The Appeals Authority rejects the Respondent's proposition in this regard as the record of Appeal indicates that the application for administrative review was lodged within time.

Furthermore, regarding the issuance of the decision for administrative review, the Respondent denied that the accounting officer had issued the decision on 8th April 2021. The Appeals Authority observes an email from Baraka dated 8th April 2021 responding to the grounds on complaints as they appear in the application for administrative review dated 5th April 2021. According to Section 96(1) of the Act, the decision on the application for administrative review has to be issued by the Accounting Officer. Baraka is not an Accounting Officer of the Respondent. Therefore, the Appeals Authority is in agreement with the learned state attorney that the Respondent did not issue a decision on the application for administrative review.

However, Section 97(2)(a) of the Act allows tenderers to lodge appeal to this Appeals Authority if the accounting officer fails to issue its decision within the stipulated seven (7) working days. The provision reads: -

S.97(2) "Where-

- a) ***the accounting officer does not make a decision within the period specified under this Act; or***



b) the tenderer is not satisfied with the decision of the accounting officer,

the tenderer may make a complaint to the Appeals Authority within seven working days from the date of communication of the decision by the accounting officer".

(Emphasis Added)

Counting from 6th April 2021 when the application for administrative review was lodged, the seven (7) working days within which the Respondent ought to have issued its decision expired on 16th April 2021. Apparently, this Appeal was lodged on 16th April 2021 a day before expiry of the seven (7) working days within which the Respondent ought to have issued its decision.

Therefore, this Appeal is premature for the above reason. Not because of the reason advanced by the learned state attorney.

The Appeals Authority finds that this point is sufficient to dispose of this Appeal.

Under the circumstance, the Appeal is hereby dismissed.

No order as to costs.

It is so ordered.

This Decision is binding on the Parties and may be executed in terms of Section 97 (8) of the Act.



The Right of Judicial Review as per Section 101 of the Act is explained to the Parties.

The Decision is delivered in the presence of the parties this 21st day of May 2021.

ADV. ROSAN MBWAMBO



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AG. CHAIRMAN

MEMBERS:

1. ENG. STEPHEN MAKIGO 

2. DR. LEONADA MWAGIKE..... 