

IN THE  
PUBLIC PROCUREMENT APPEALS AUTHORITY

AT DAR ES SALAAM

APPEAL No. 31 OF 2017-18

BETWEEN

M/S SEMUKA INTERNATIONAL LIMITED .....APPELLANT

AND

TANZANIA INSTITUTE OF EDUCATION.....RESPONDENT

DECISION

CORAM

- |                            |   |                 |
|----------------------------|---|-----------------|
| 1. Ms. Monica P. Otaru     | - | Ag. Chairperson |
| 2. Eng. Francis T. Marmo   | - | Member          |
| 3. Mr. Louis P. Accaro     | - | Member          |
| 4. Mr. Ole-Mbille Kissioki | - | Secretary       |

SECRETARIAT

- |                        |   |                      |
|------------------------|---|----------------------|
| 1. Ms. Florida Mapunda | - | Senior Legal Officer |
| 2. Ms. Violet Limilabo | - | Legal Officer        |
| 3. Mr. Hamisi Tika     | - | Legal Officer        |

FOR THE APPELLANT

- |                           |   |                              |
|---------------------------|---|------------------------------|
| 1. Mr. Sinare Zaharan     | - | Advocate, ENSafrica Tanzania |
| 2. Mr. Katabalo           | - | Managing Director M/S Semuka |
| 3. Mr. Froidius Mutungi   | - | Advocate, ENSafrica Tanzania |
| 4. Mr. Emmanuel Augustino | - | Advocate, ENSafrica Tanzania |

FOR THE RESPONDENT

- |                         |   |                                     |
|-------------------------|---|-------------------------------------|
| 1. Ms. Pilly Magongo    | - | Senior Legal Counsel                |
| 2. Mr. Benedicto Mahela | - | Consultant                          |
| 3. Mr. Vedastus Makweba | - | Head of Procurement Management Unit |

The Appeal was lodged by M/s Semuka International Limited (hereinafter referred to as "the Appellant") against the Tanzania Institute of Education (hereinafter referred to as "the Respondent"). The Appeal is in respect of Tender No.PA/070/2016/2017/G/07 for Printing and Supply of Text Books under Framework Agreements (hereinafter referred to as "the Tender").

After going through the submissions by the parties, the Public Procurement Appeals Authority (hereinafter referred to as "the Appeals Authority"), summarized the facts of the Appeal as follows:-

The Respondent through the Daily News and Mwananchi newspapers, dated 9<sup>th</sup> February 2017 invited tenderers to participate in the Tender. The Tender had Seven Lots and tenderers were allowed to bid for any amount of Lots separately. Awards however, could not exceed one Lot per bidder. The deadline for submission of the tenders was set for 10<sup>th</sup> March 2017; whereby a good number of firms submitted their tenders.

The tenders were subjected to evaluation which was conducted in three stages, namely; Preliminary, Detailed and Post-qualification Evaluations. After completion of the evaluation process, award of contracts was proposed to the successful tenderers. In this Appeal, the dispute lies on Lot Nos. 1 and 2 whereby, Lot No.1 was proposed to be awarded to M/s English Press Ltd and Lot No.2 to the Appellant. The award proposals were approved by the Tender Board on 11<sup>th</sup> August 2017.

After completing the necessary procedures, on 18<sup>th</sup> December 2017, the Respondent issued award letters to all proposed successful tenderers, the Appellant inclusive. On 15<sup>th</sup> January 2018, the Appellant accepted the award made to them.

On 13<sup>th</sup> February 2018 the Respondent informed the Appellant that the award made to them has been cancelled since the same was made after expiry of the Tender validity period contrary to Regulation 191 of the Public

Procurement Regulations, Government Notice. No.446 of 2013 (hereinafter referred to as "GN. No. 446 of 2013").

Dissatisfied, on 19<sup>th</sup> February 2018 the Appellant submitted his complaint to the Respondent's Accounting Officer challenging, amongst others; the cancellation of the award made. Having not received the Respondent's decision within the stipulated time, the Appellant lodged this Appeal on 6<sup>th</sup> March 2018.

### SUBMISSIONS BY THE APPELLANT

The Appellant's grounds of Appeal may be summarized as follows;

1. That, according to Regulation 3 of GN No. 446 of 2013 the Tender validity period means the period of time subsequent to the closing date for submission of tenders for which the tender price and conditions shall not be changed by the tenderer. As the Appellant changed neither the tender price nor conditions from the date his tender was submitted, he considers his tender to be valid to this moment.
2. That, the Tender validity period was 90 days from the opening date 10<sup>th</sup> March 2017, which expired on 7<sup>th</sup> June 2017. The Respondent issued the first request for extension of the period on 6<sup>th</sup> July 2017, a month after expiry. According to Regulation 191(4) of GN. No 446 of 2013 the obligation to request for extension lies on the procuring entity thus the Respondent's omission to fulfill his obligations as required by law should not affect the tenderers' rights.

In support of his argument on this point, the Appellant relied on the decision of this Authority in Appeal Case No. 08 of 2017/18 between M/s Nyalinga Investment Company Limited Vs Mpanda Urban Water Supply and Sanitation Authority, whereby it was held that the Respondent's negligence to extend the Tender validity period should not benefit them. The Appellant also cited the case of Alghussein Establishment V Eton College, (1988) 1 WLR 587 whereby the principle of "one should not benefit from his own wrong" was insisted.

The Appellant argued further that, the Respondent's failure to extend the Tender validity period as per the requirement of the law should be equated to commission of offence as stipulated under Section 104(2)(c) of the Act.

3. That, the Appellant challenges the Respondent's act of cancelling the award under Section 59(2) of the Public Procurement Act of 2011, as amended (hereinafter referred to as "the Act"), on the ground that the Tender validity period had expired. The Appellant expounded that Section 59(2) of the Act relied on by the Respondent, did not mandate procuring entities to cancel tenders but to reject them. In any case, none of the circumstances specified in that provision are in line with the Respondent's acts.

The Appellant elaborated further that, even Section 59(2)(e) of the Act, cannot be relevant as expiry of the Tender validity period could not render the performance of the contract impossible.

4. That, the Appellant challenges the Respondent's contention that the reason for cancellation of the award was expiration of the Tender validity period. Expounding on this point the Appellant submitted that the tenders were still valid up to the time the award letters were issued. He argued further that, there were five extensions of the Tender validity period. Thus, it was not proper for the Respondent to cancel the award while the same was issued within the Tender validity period.
5. That, since the Appellant had accepted the award and made confirmations, the same ensures that the Appellant was ready to comply with the terms and conditions of the Tender. Thus, the expiration of the Tender validity period in neither way affected the performance of the contract nor the rights of the Respondent.
6. That, although the disputed Tender had Seven Lots it was one and the same Tender. The Appellant is surprised with the Respondent's act of cancelling the Appellant's award and proceed to sign the contract with M/s English Press Ltd who was awarded Lot No. 1. The Appellant

argued that if validity period for this Tender expired on 7<sup>th</sup> June 2017 as contended by the Respondent, then all awards made should have been cancelled; which was not the case. Therefore, the Respondent's act in this regard should be considered as intention to commit an offence and limit standards of equity and fairness.

7. That, the cancellation of the award is contrary to the basic principles of procurement and the emphasis to obtain best value for money in terms of price, quality and delivery. Cancellation and commencement of the procurement process afresh delays the primary objective of this procurement which is to provide books to the government schools at the earliest possible time.
8. That, the Respondent's act of floating a fresh Tender No.PA/070/2017/2018/G/2 for Printing and Supply of STD I-IV text books using the same schedule of requirements which was already awarded to the Appellant contravened the law.
9. That, the Respondent ignored the application for administrative review lodged by the Appellant on 19<sup>th</sup> February 2018, which act is in contravention of Regulation 106(1),(a) of GN No. 446 of 2013.

Finally, the Appellant prayed for the following orders;

- a) Suspension of the procurement proceedings of the Tender No.PA/070/2017/2018/G/2 for Printing and Supply of STD I-IV Text Books and Tender No. PA/070/2016/2017/G/07 for Printing and Supply of Text Books until determination of this Appeal.
- b) Revoke the award cancellation and compel the Respondent to issue contract No. PA/070/2016/2017/G/07 for Printing and Supply of Text Books under Framework Agreement to the Appellant for immediate performance.
- c) Alternatively, invoke requirement of Regulation 67(1), (b) of GN. No. 446 of 2013 and Section 104(1), (e) of the Act.

- d) The Respondent be compelled to compensate the Appellant a sum of TZS 600,000,000.00 being damages and total loss to be incurred by the Appellant in case of cancellation of this award. The breakdown is as follows
- i) Preparation of the bid TZS 500,000.00.
  - ii) Printer's travel costs TZS 3,000,000.00.
  - iii) Printing Materials USD 268,000.00.
  - iv) Mortgage for Letter of Credit USD 260,000.00.
  - v) Legal fees TZS 10,000,000.00.

#### REPLY BY THE RESPONDENT

The Respondent's submissions in response to the grounds of the Appeal are as follows;

1. That, the cancellation of the award issued to the Appellant was done after realization that the same was made beyond the Tender validity period stipulated in Clause 22 of the Tender Data Sheet (TDS).
2. That, the Tender validity period for this Tender expired since 7<sup>th</sup> July 2018. At the time the Respondent issued award letters, he was not aware that the Tender validity period had already expired. The Respondent became aware of the expiration of the Tender validity period on 8<sup>th</sup> February 2018 after receipt of the Report by an independent review committee. This committee was formed to review the evaluation report, after the Respondent doubted the capacity of the tenderers proposed for award of Lot Nos. 2 and 7.
3. That, the extension request of 6<sup>th</sup> July 2017 was not effective as the same was issued after the expiry period, contrary to Regulation 191(4) of GN. No. 446 of 2013. Claiming that the same was merely an oversight and was not done deliberately.
4. That, having realized that the awards were issued beyond the stipulated Tender validity period the Respondent decided to cancel

them save for Lot No.1 pursuant to Section 59(2), (4) and (5) of the Act read together with Regulation 191 of GN. No 446 of 2013. In justifying the cancellation made, the Respondent referred the Appeals Authority to consider its own Decision in Appeal Case No. 17 of 2017/18 between M/s Professional Cleaners Ltd Vs Muhimbili University of Health and Allied Sciences, and Consolidated Appeals Nos. 24&25 of 2016/17 between M/s Low's Creek Treated Timber (PTY) Ltd and another Vs Tanzania Electric Supply Company Limited. In both Appeals it was held that the Tender process including finalization of the contract must be completed within the tender validity period, any act conducted beyond that period is a nullity in the eyes of the law.

5. That, when the Respondent realized that the Tender validity period had expired, they had already issued a commitment letter to M/s English Press Ltd who was awarded Lot No. 1 and allowed him to proceed with preparations and printing. That it was done so because the books were needed urgently. On 8<sup>th</sup> February 2018 when the Respondent became aware that the Tender validity period had expired, M/s English Press Ltd had already printed the books and its first delivery was done on 2<sup>nd</sup> February 2018. The Respondent expounded further that, the risks of cancelling Lot No. 1 was considered to be higher than cancelling the Appellant's award.
6. That, the Respondent challenged the inclusion of M/s English Press Ltd in this Appeal. Stating that Lot No.1 and Lot No. 2 should be treated as distinct tenders. Therefore, the inclusion of Lot No.1 is not proper as it is not subject of this Appeal.

Finally, the Respondent prayed for the following;

- a) The Appellant's prayer that Tender No.PA/070/2017/2018/G/2 be suspended should be rejected as he did not participate in the said Tender.

- b) The Appellant's prayer that the Respondent's decision to cancel the award be nullified should be rejected as the cancellation was in accordance with the law.
- c) The Appellant's prayer for compensation should be struck out as there is no breakdown to accrue the said amount and the total loss.
- d) The Appeal be struck out as it lacks merits.
- e) The Respondent be compensated a total amount of TZS 7,800,000.00 as per the following break down;
  - i) Legal Representation Shs. 3,500,000/-.
  - ii) Transportation costs Shs.300,000/-.
  - iii) General Damages Shs. 4,000,000/-.

#### ANALYSIS BY THE APPEALS AUTHORITY

Before resolving the issues in dispute by the parties, the Appeals Authority deemed it prudent to point out that much as the Appellant was not served with the Respondent's decision on his application for administrative review, the same did not prejudice them as they have exhausted the remedies provided for under Section 97(1) and (2) (a) of the Act.

The Appeals Authority having gone through the Tender proceedings including various documents and the oral submissions by the parties, is of the view that the Appeal is centred on three main issues, which are:-

1. Whether the nullification of the award made to the Appellant is proper in law;
2. Whether the award made to M/s English Press Ltd is proper in law.
3. What reliefs if any are the parties entitled to.

Having identified the issues, we proceed to determine them as hereunder:-



## 1.0 Whether the nullification of the award made to the Appellant is proper in law

In resolving this issue, the Appeals Authority considered the Respondent's argument that the award made to the Appellant was nullified after it was realised that the same was made beyond the stipulated Tender validity period and revisited Section 71(1) of the Act read together with Regulation 191(3) of GN. No. 446 of 2013, which provide as follows:

Section 71: "The procuring entity shall require tenderers to make their tenders and tender securities including tender securing declaration valid for the periods specified in the tendering documents, sufficient to enable the procuring entity to complete the comparison and evaluation of the tenders and for the appropriate tender board to review the recommendations and approve the contract or contracts to be awarded whilst the tenders are still valid".

Regulation 191(3): "The period fixed by a procuring entity shall be sufficient to permit evaluation and comparison of tenders, for obtaining all necessary clearances and approvals, and for the notification of the award of contracts and finalize a contract but the period shall not exceed one hundred and twenty days from the final date fixed for submission of tenders". (Emphasis added)

The above quotations entail that the Tender validity period must be specified in the Tender Document and the same must be sufficient to permit completion of tender processes including finalization of the contract. According to Regulation 3 of GN No. 446 of 2013, the Tender validity period starts to run from the date of Tender opening.

We tend to concur with the Respondent that the bid validity period for this Tender was 90 days as stipulated in Clause 22 of the TDS and the same started to run from 10<sup>th</sup> March 2017 when the tenders were opened. As such, the Tender validity period expired on 7<sup>th</sup> June 2017. The records of Appeal indicate that the first request by the Respondent to tenderers to

extend the Tender validity period was on 6<sup>th</sup> July 2017, a month after its expiration. This request was followed by four others.

Regulation 191(4) of GN No.446 of 2013 is clear as to when a request for extension should be made. For purposes of clarity, Regulation 191(4) of GN. No. 446 of 2013 is reproduced herein below;

“In exceptional circumstances, prior to expiry of the original period of effectiveness of the tenders, a procuring entity may request tenderers to extend the period for an additional specified period of time”. (Emphasis added)

As the Tender validity period expired on 7<sup>th</sup> June 2017, and the first extension was requested one whole month thereafter, we are of a firm view that the Respondent’s request for extension was not proper in law. As such, by virtue of Section 71 of the Act read together with Regulation 191 of GN. No. 446 of 2013 and as submitted by the Respondent, all the subsequent acts of the Respondent after expiry of the Tender validity period including approval of award done on 11<sup>th</sup> August 2017 and communication of award done on 18<sup>th</sup> December 2017 are null and void.

Regarding the Appellant’s argument that the Respondent’s cancellation of award based on Section 59 of the Act is not proper, the Appeals Authority observes that the relied provision is a proper one since the expiration of the Tender validity period had rendered the award to be null and void; hence, rendering performance of the contract impossible. The Appeals Authority noted that the Respondent when informing the Appellant about the rejection of award; instead of using the word “rejection” they used the word “cancellation”. The Appeals Authority is the view that despite the word used, there was no Tender capable of being executed due to expiry of the Tender validity period in June 2017.

The Appeals Authority distinguishes Appeal Case No. 08 of 2017/18 between M/s Nyalinga Investment Company Limited Vs Mpanda Urban Water Supply and Sanitation Authority and this Appeal in that, the Respondent in Nyalinga’s case deliberately let the Tender validity expire instead of complying with the order of this Appeals Authority which

required them to post qualify and award the Tender to the Appellant. The Respondent in Nyalinga's case went on re-evaluating all the tenders the process which was in contravention with the orders of this Appeals Authority, as a result the process took more time and the Tender validity expired.

Therefore, the Appeals Authority's conclusion with regard to the first issue is that the cancellation of the Appellant's award was proper in law.

## 2.0 Whether the award made to M/s English Press Ltd is proper in law

In resolving this issue the Appeals Authority first considered the Respondent's argument that the Appellant cannot challenge the award made with respect to Lot No.1 since his Appeal relates to Lot No.2. According to Clause 1.1 of the TDS the Tender had seven Lots, but it is one and the same Tender. The Appeals Authority cannot buy the Respondent's argument in this regard since the disputed Tender validity period is in respect to the whole Tender. In addition thereto the Appellant participated in Lot No.1 and therefore, entitled to challenge the award made therein.

The Appeals Authority considered the Appellant's contention that the Respondent's act of signing the contract with M/s English Press Ltd while the tender validity period had expired is in contravention of the law.

In substantiating the validity of the Appellant's argument, the Appeals Authority reviewed the documents submitted before it and observed that the Respondent proceeded to sign the contract with M/s English Press Ltd for Lot No. 1 after the expiry of the Tender validity period as correctly said by the Appellant. During the hearing the Respondent conceded to have proceeded with the process of signing the contract after expiration of the Tender validity period with M/s English Press Ltd due the urgent need of the Text Books.

Taking cognizance of the findings made on the first issue above and the Respondent's own admission, the Appeals Authority is of the settled view

that after expiration of the Tender validity period any subsequent acts conducted including the signing of the contract are null and void.

Furthermore, the argument by the Respondent that they proceeded to sign the contract for Lot 1 because by the time they became aware that the Tender validity period had expired, they had already issued commitment letter to M/s English Press Ltd and some books were already delivered. The Appeals Authority is not convinced with this argument as the so called commitment letter has no legal backing, it is therefore unprocedural.

On the Respondent's defense that they were not aware that the Tender validity had expired way back on 7<sup>th</sup> June 2017, the Appeals Authority is flabbergasted that the Respondent could come up with such an irresponsible defense. This is because it is a legal requirement and ignorance of the law can never be a defense. Further, the said requirement is contained in their own Tender Document.

The Appeals Authority noted with dismay that the Respondent's act of signing the contract with M/s English Press Ltd for Lot No.1 and cancel awards for other Lots due to expiration of the Tender validity period contravenes not only the clauses stated herein above but also Section 4A (3) (a) and (b) of the Act which states as follows;

"The procuring entities shall in conduct of their duties, undertake to achieve the highest standard of equity, taking into account-

- (a) Equality of opportunity to all tenderers
  - (b) Fairness of treatment to all parties"
- (Emphasis supplied).

Therefore, the Appeals Authority conclusion with regard to the second issue is in the negative as the award made to M/s English Press Ltd is not proper in law.

### 3.0 What reliefs if any are the parties entitled to

Taking cognizance of the findings above, the Appeals Authority hereby declares that the nullification of award made to the Appellant was proper

since after expiration of the Tender validity period there was no valid Tender that existed. The Appeals Authority hereby declares that the contract signed between the Respondent and M/s English Press Ltd in relation to Lot No. 1 is also null and void as the same is based on the award that was issued after expiration of the Tender validity period.

Therefore, the Appeals Authority finds that the Appeal partly has merits and ordered the Respondent to compensate the Appellant the sum of TZS 5,000,000.00 being legal fees. The Appellant is not compensated cost for preparation of the bid because it is a non refundable cost. Regarding the cost incurred in Items ii – iv the same cannot be compensated since there was no contract signed between the parties.

It is so ordered.

This Decision is binding on the parties and can be enforced in accordance with Section 97(8) of the Act.

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

This Decision is delivered in the presence of the parties this 29<sup>th</sup> March 2018.

  
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**Ms. MONICA P. OTARU**  
**Ag. CHAIRPERSON**

**MEMBERS:**

**1. ENG. FRANCIS MARMO**   
.....

**2. MR. LOUIS ACCARO**   
.....