

IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY AT
DAR ES SALAAM
APPEAL CASE NO. 46 OF 2014-15
BETWEEN
M/S MNM ENGINEERING SERVICES LIMITED.....APPELLANT
AND
PANSIANSI WILDLIFE TRAINING INSTITUTE.....RESPONDENT

RULING.

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 | - | Secretary |

SECRETARIAT

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

FOR THE APPELLANT

Absent

FOR THE RESPONDENT

Absent

The appeal at hand was lodged by M/s MNM ENGINEERING SERVICES LIMITED (hereinafter referred to as "the Appellant" against the PASIANSI WILDLIFE TRAINING INSTITUTE (hereinafter referred to as "the Respondent").

The said Appeal is in respect of Tender No. PWTI/NRI/D.2/2014/2015/W/01 for Construction of two (2) Dormitories and Rehabilitation of one (1) Modern Canteen (hereinafter referred to as "the tender"), which was donor funded.

Having received the above Appeal, the Public Procurement Appeals Authority (hereinafter called "the Appeals Authority"), decided to determine the same by way of review of documents pursuant to Rules 5(1) (a) and 28 of the Public Procurement

Appeals Rules (hereinafter referred to as G.N No. 411 of 2014). In the course of so doing the Appeals Authority deems it proper to satisfy itself whether the Appeal is properly before it before embarking on the analysis of the disputed issues between the parties. And as it shall soon become clear, this appeal is not properly before this Appeals Authority.

According to the documents submitted to the Appeals Authority, the facts of the Appeal may be summarized as follows:

The Respondent, through the Daily News newspaper dated 29th October 2014, invited tenderers to submit tender under the National Competitive Tendering procedures specified in the Public Procurement Act No. 7 of 2011 (hereinafter called "the Act") and the Public Procurement Regulations No. 446 of 2013 (hereinafter referred to as "G.N No. 446/2013").

The deadline for submission of the tender was initially set for 31st October 2014 but was later extended to 19th November 2014. A total of nine (9) tenders were received from the following firms listed below –

S/N	NAME OF THE BIDDER	QUOTED PRICE IN TSHS (VAT EXCLUSIVE)
1.	M/s Suma JKT	3,158,330,500/00
2.	M/s Jassie and Company Ltd	2,948,862,291/38
3.	M/s MNM Engineering Services Ltd	2,537,871,945/00
4.	M/s Exactline Group Ltd	2,515,132,100/00
5.	M/s CMG Construction Ltd	2,746,855,965/00
6.	M/s CF Builders	2,474,255,586/00
7.	M/s Deep Construction	2,809,000,000/00
8.	M/s KS Builders Ltd	2,640,000,000/00
9.	M/s VC Tanzania Ltd	2,685,562,300/00

The tenders were then subjected to the evaluation process which was conducted in three stages; viz preliminary examination detailed and price comparison. Eventually, M/s MNM Engineering Services Ltd. was the lowest evaluated tenderer and was recommended for award of the tender at a contract price of Tshs. 2,533,269,995/00 VAT exclusive.

The Tender Board at its meeting held on 27th November 2014, deliberated on the recommendations by the evaluation committee and approved the award of the tender to the Appellant as the successful tenderer.

On 5th February 2015, the Respondent by its letter Ref. No. PWTI/C/HP/VOL.I/127 notified all tenderers of its intention to award the tender to the Appellant at a contract price of Tshs 2,533,269,995/00 VAT Exclusive.

On 16th March 2015, the Appellant company received from the Respondent a letter Ref. No. PWTI/C/HP/VOL.I/151 in which the Appellant was informed that it had not met the donor's requirements. And in addition, the tender had been rejected pursuant to Regulation 11(3) and 16 (2) (e) of G.N No. 446/2013. In the same letter referred to herein, the Respondent informed the Appellant that its tender had been disqualified because -

- 1) His quoted price exceeded the allocated budget for the project; and
- 2) His company had not submitted statutory annual returns to BRELA for the years; 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999,

2000, 2001, 2002, 2002, 2003, 2004, 2005, 2009, 2010, 2011, 2012 and 2013.

The Appellant through his letter Ref. No. MNM/15/2015 dated 26th March 2015, disputed the disqualification and rejection of the tender asserting that -

- i. As the Respondent had issued the letter of intention to award the tender after the evaluation process, it meant that its tender had technically and financially complied with the project's requirements.
- ii. Submission of statutory annual returns to BRELA was not among the criteria set out in the Tender Document. In addition the Appellant asserted that before the date of rejection of the tender he had already filed the statutory annual returns to BRELA for the years 2014/2015.

The Respondent did not reply to the Appellant's letter and consequently on 17th April 2015 the Appellant by its letter Ref. No. MNM/PPRA//01/04/2015 lodged its complaint to the Public Procurement Regulatory Authority (herein after called "PPRA"). Similarly the PPRA did not reply to the Appellant's complaint and

as a result, the Appellant by its letter Ref. No. MNM/PPAA/01/2015 dated 27th April 2015, submitted a letter of complaints to the Appeals Authority. Thereafter, on 11th May 2015, the Appellant lodged this Appeal.

As earlier indicated hereinabove at page 2 this Authority now embarks on the Analysis to determine tenability of the Appeal.

ANALYSIS BY THE APPEALS AUTHORITY

In ascertaining whether the appeal is properly before this Authority, the Appeals Authority reviewed the documents submitted to it in terms of sections 95 (1), 96 (1), (6) and (7) and 97 (1), (2) and (3) of the Act. Whereas sec. 95(1) provides for tenderer's rights to seek review during the procurement process, on the other hand sec. 96 (1) (6) (7) gives guidance as to how a complaint can be submitted to the Accounting Officer and Section 97(1) (2) and (3) provides for circumstances in which a complaint can be submitted to the Appeals Authority. For ease of reference the extracts of the said legislation have been reproduced in extenso herein below.

Sec. 95.-(1) any tenderer 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 by this Act may seek a review in accordance with sections 96 and 97.

(2).....N.A.

(3).....N.A.

96.-(1) Any complaint 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.

(2) to (5)....N.A.

(6) The accounting officer shall, within fourteen days after the submission of the complaint or dispute deliver a written decision which shall;

a) State the reasons for the decision; and

b) If the complaint is upheld in whole or in part indicate the corrective measure to be taken.

97.-(1) A tenderer who is aggrieved by the decision of the accounting officer may refer the matter to the

Appeals Authority for review and administrative decision.

(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 fourteen working days from the date of communication of the decision by the accounting officer.

(3) A tenderer may submit a complaint or dispute directly to the Appeals Authority if the complaint or dispute cannot be entertained under section 96 because of entry into force of the procurement or disposal contract, and provided that the complaint or dispute is submitted within fourteen days from the date when the tenderer submitting it become aware of the circumstances giving rise to the complaint or dispute or time when that tenderer should have become aware of those circumstances.

In order to satisfy itself if the Appeal was lodged in compliance with the above provisions of the law, the Appeals Authority has observed that the Appellant was duly notified of the Respondent's intention to award the tender on 5th February 2015. While the Appellant was awaiting the acceptance letter, to the contrary, he received Respondent's letter Ref. No. PWTI/C/HP/VOL.I/151 dated 16th March 2015 on rejection of the tender together with the reasons for the said rejection. Part of the said letter is quoted as follows;

“...Regrettably, we have been made to understand that your company did not meet donor's requirements and thus disqualified due to the following aspects:

1. That your estimates quote exceeded the budget allocated for the projects and
2. that your company has not submitted statutory annual returns to BRELA for the following years 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2002, 2003, 2004, 2005, 2009, 2010, 2011, 2012 and 2013. Thus its actual existence is highly doubtful.

Pursuant to Regulation 11 (3) and 16 (2) (e) of G.N No. 446/2013, this serves to inform you that the tender for the proposed construction of two (2) dormitories and rehabilitation of modern canteen has been rejected”.

Aggrieved by such a decision the Appellant lodged complaint to the Respondent’s Accounting Officer on 26th March 2015, disputing the grounds for his disqualification more so after he had learnt that its company had complied with the criteria set in the Tender Document. Furthermore, the Appellant disputed the requirement on the filing statutory annual returns to BRELA since it was not part of the Tender Document.

The Appeals Authority has observed further that while a procuring entity has the power to reject any or all of the tenders, such rejection as per Sec. 59 are administrative actions which precede the respective letters of intention to award. As indicated, this was a donor funded project, whereby the Respondent and prospective bidders had to meet specific timelines and conditions for the disbursement of funds. The Appeals Authority has noted that prior to the complaint by the Appellant, M/s C.F Builders Ltd by his letter dated 3th February 2015, contested the Respondent’s

decision to disqualify his tender on the basis of lack of business licence and essential equipments. This Appeals Authority was not informed why the Respondent delayed to respond to the Appellant's complaint together with that of M/s C.F Builders Ltd. within the specified time provided for under Section 96 (6) of the Act.

The Appellant instead of lodging complaint to the Appeals Authority he lodged complaint to PPRA on 17th April 2015 which has no locus in the matter. Subsequently the Appellant submitted a letter of his complaint to the Appeals Authority on 27th April 2015. It was noted that, despite submitting a complaint letter on 27th April 2015, the Appellant neither paid the prescribed appeal filing fees nor filled in the requisite PPAA Form No. 2 prescribed under Rules 10 (1) and 14 (1) (2) of G.N No. 411/2014. The referred Rules above are reproduced hereunder for ease of reference;

“R. 10 (1) The Appeal under Rule 9 shall be in writing or electronic form and shall be filled in accordance with PPAA Form No. 2 as set out in the first Schedule to these Rules

“R. 14(1) The appellant shall, at the time of filling his appeal, pay fees as set out in the Second Schedule to these Rules.

(2) The Appeals Authority shall not entertain any appeal unless the appropriate fees have been paid.

In view of the above provisions of the law, it is obvious that the Appeal was officially lodged when the Appellant had paid the prescribed appeal filing fees and filled PPAA Form No. 2 on 11th May 2015. Therefore, counting from 9th April 2015, when the Appellant ought to have received the Respondent’s Accounting Officer’s decision, fourteen (14) working days of filing an Appeal to the Appeals Authority lapsed on 29th April 2015. When the Appeal was lodged on 11th May 2015, some days had already lapsed from the statutory 14 working days meaning that the Appellant was completely out of time and acted contrary to Section 97 (1) (2) (a) of the Act, *op.cit.*

The Appeals Authority has noted that, like other laws on limitation, the PPA/2011 and its Regulations contain provisions for applications of extension of time as contained under section 98 of

the Act and Rule 11 of the Appeals Rules G.N No.411/2014. The Appellant filed the above Appeal without adhering to the laid down procedures and without leave to do so.

Accordingly, the Appeals Authority's conclusion is that this Appeal is not properly before the Appeals Authority for being lodged out of time and without leave to do so. The same is hereby struck out.

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



This Ruling is delivered this day 17th June 2015.



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JUDGE (rtd) V.K.D. LYIMO

CHAIRMAN

MEMBERS:

1. MRS. R. A. LULABUKA 
2. ENG. A. J. MWAMANGA 
3. MR. L. P. ACCARO 