

IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY
APPEAL CASE NO. 10 OF 2016-17
BETWEEN
M/S ASBHI COMPANY LIMITED.....APPLICANT
AND
KIGOMA DISTRICT COUNCIL.....RESPONDENT.

RULING

CORAM

- | | |
|-------------------------------------|-------------|
| 1. Hon. Vincent K.D Lyimo, J. (rtd) | -Chairman |
| 2. Eng. F.T Marmo | -Member |
| 3. Mrs. Rosemary A.Lulabuka | -Member |
| 4. Mr. Ole-Mbille Kissioki | - Secretary |

SECRETARIAT

- | | |
|---------------------------|----------------|
| 1. Ms. Violet S. Limilabo | -Legal Officer |
| 2. Mr. Hamisi O. Tika | -Legal Officer |

FOR THE APPELLANT

- | | |
|------------------------------|---------------------------|
| 1. Mr. Noel Chikwindo | - Advocate, Pax Attorneys |
| 2. Mr. Salvius Rwechungura | - Advocate, Pax Attorneys |
| 3. Mr. Ibrahim N.M.Nyambacha | - Managing Director |

FOR THE RESPONDENT

1. Ms. Hanji Yusuph Godi Godi -District Executive Director
2. Mr. Iddi A. Ndabhona - District Solicitor
3. Eng. Leo Respicius -District Water Engineer
4. Ms. Christina Katole -Head- Procurement Management Unit.

This Ruling was scheduled for delivery today 5th January 2017, and we proceed to do so.

The Appeal at hand was lodged by M/s Asabhi Company Limited (hereinafter referred to as "the Appellant against the Kigoma District Council (hereinafter referred to as "the Respondent").

The said Appeal is in respect of Tender No. KDC/043/2013-2014/ W/2 for the Supply of materials and equipment and construct water supply schemes including Intake structures, Treatment plants, Pumping stations, rising mains, Storage tanks, Distribution network and domestic points for water supply scheme at former Kalinzi Village in Kigoma District (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 facts of the Appeal may be summarized as follows:-

The Respondent floated this tender in 2014 and the Appellant was amongst the bidders who participated in the tender process. After the conduct of the evaluation process, the Appellant was invited by the Respondent for negotiations, an indication that the Appellant was the lowest evaluated bidder preferred for the award of the contract. Following the negotiations, the Appellant was never issued with the

requisite notice of intention to award the contract nor the letter of acceptance. In the meanwhile, following completion of various internal processes the Respondent submitted a draft contract to the Attorney General's Chambers for vetting. While the draft contract was pending vetting, the Respondent received from the Regional Secretariat an official letter with Ref. No. DB.131/282/01.G/143 dated 14th November, 2014 reminding it of the directives previously issued by the Ministry, Prime Ministers' Office Regional Administration and Local Governments. By virtue of the said letter, all procuring entities were required to desist from the award or execution of new contracts if the funds for the new contracts had not been provided for and contained in the Budget for the Financial Year 2014/15. As a result, the Respondent took no further action in respect to the above tender, pending further directives from the Ministry. No such directives were forthcoming until the expiry of the tender validity period and on 5th August 2016 the Ministry subsequently granted approval to the Respondent to proceed with the project.

Following the approval from the Ministry, the Respondent's Tender Board convened its meeting on 18th August 2016 to deliberate the matter. At the said Tender Board Meeting, it was observed that the scope of the project had substantially changed from the time the tender was advertised to the period the approval from the Ministry was obtained. Furthermore, the Tender Board observed that the 120 days bid validity period for the tender had already expired and no extension of time had been made. The Tender Board directed that proper guidance be sought from the Public Procurement Regulatory Authority (PPRA) on the best way forward. On that same day, the Respondent's Tender Board through its letter Ref. KDC/F1/86-II/105 sought for clarification from PPRA.

In response to the Tender Board's letter referred to above, on 22nd August 2016, the PPRA advised the Respondent to analyse the needs for the project afresh and to re-advertise based on the reasons contained in the request for advice put forward by the Tender Board. The matter was taken up by the District Full Council which rejected the advice from PPRA and resolved signing of the contract with the Appellant, a matter which was not supported by the Respondent's Accounting Officer. Subsequently, the Respondent's Accounting Officer through his letter Ref. No. KDC/D.3/71-111/36 dated 20th October 2016, referred matter to the Ministry for guidance. And on 25th October 2016, the Ministry vide its letter with Ref. AH.298/418/01 responded by requiring both the Respondent and the Regional Secretariat to comply with the directives from PPRA.

On 31st October 2016, the Respondent through the Daily News newspaper, re-advertised the tender. Aggrieved by the decision, on 28th November 2016, the Appellant lodged his Appeal to this Appeals Authority.

Pursuant to Section 97(4) of the Act, the Appeals Authority notified the Respondent accordingly.

SUBMISSIONS BY THE APPELLANT

The Appellant filed seven grounds of Appeal as follows:-

1. That, they participated in the disputed tender and were considered to have won it. That's why the Respondent had invited them for negotiation meeting. The Respondent is therefore bound to award the contract to them as the winners.

2. That, the Respondent is refusing to award the contract to them based on assertion that the bid validity period of the tender had expired. A ground which is unfounded. The Respondent would have extended the bid validity period rather than rejecting their tender.
3. That, the reason advanced by the Respondent that tender board authorization period had expired is unjustifiable; and is not applicable in the circumstance. The Respondent would have invoked Regulation 62(1) of the Public Procurement Regulations, GN. No. 446 of 2013, (hereinafter referred to as "the GN.NO.446/2013"), to extend the authorization time without changing the terms and conditions of the original contract since the scope of the services has not varied significantly as alleged.
4. That, the reason advanced by the Respondent that there is a great change in design (scope of the work) is unjustifiable and disputable. The Appellant is ready and willing to perform the task with the same agreed contractual amount; and the same shall not be subjected to any change.
5. That, the Respondent's accounting officer ought not to have rushed into re-advertising the tender without considering that the Appellant had incurred a lot of cost (*sic*) in the successfully completed tender; and that he had been waiting to sign the contract with the Respondent since May, 2015.
6. That, the Appellant had been assured by the Respondent that the Ministry has approved the contract to be signed and that he has been waiting for such an event for long time. Furthermore, the

Appellant had been making a number of preparations for execution of the contract. The Appellant has also lost a number of similar tenders in other areas while waiting signing this contract.

7. That, the Respondent's accounting officer has neglected to respond to two complaints addressed to him by the Appellant regarding the tender.

Finally, the Appellant prays for the following orders-

- i. Suspension of the current tender process and re-advertisement.
- ii. The Respondent to sign contract with the Appellant from the point they stopped.
- iii. Any order the Appeals Authority may deem fit to grant.

REPLIES BY THE RESPONDENT.

On 7th December 2016, the Respondent filed responses to the Appeals Authority in the course of which it raised a Preliminary Objection (PO) founded on the *locus standi* of the Appellant's representative filing the Appeal. The said PO which was contained at paragraph 10 of the Respondent's replies stated as follows -

That, the purported Managing Director, Ibrahim Nyambacha appearing in the Statement of Appeal is not amongst the directors of the Appellant nor does he possess power to claim anything for the company, and that the legally recognized person by the Appellant one Maneno Bangi, with the power of Attorney never complained against anything regarding the tender.

In view of this PO, and as a matter of procedure, the Appeals Authority deemed it necessary to resolve the PO first before embarking on the merits of the Appeal.

RESPONDENT'S SUBMISSIONS ON THE PO

In support of his PO, the Respondent submitted that based on the tender documents there are three basic documents which found the tender itself; namely the Power of Attorney, Bid Submission Form, and the Bid Securing Declaration. Under the Power of Attorney, one Maneno Bangi a technical director with the Appellant company had been granted the unrestricted authority and power to process the tender including execution of the contract. The said Maneno Bangi is the person who signed the other two documents, viz the Bid Submission Form and the Bid Security Declaration. Maneno Bangi had been appointed as the lawful attorney for the Appellant Company. In addition, during the bid process, the Appellant's bid submitted to the Respondent contained four names of the Appellant's directors namely: i. Maneno Bangi, ii. Ibrahim Nanai Matayi, iii. Stephen Daniel Nyakuruta and iv. Lilian Mlimira.

The Respondent indicated that the person who submitted and filed this Appeal bears the name and signature of one Ibrahim Nyambacha, who is not reflected as one of the Appellant's directors. The signature affixed to the Appeal documents is not that of Maneno Bangi and the said Ibrahim Nyambacha is a stranger to these proceedings. From the documents and list of directors submitted to the Respondent during the bid process, Ibrahim Nyambacha does not exist and even if he does, he has no mandate to act for the Appellant. Maneno Bangi has not complained at all in respect of this tender.

In sum, the Respondent asserted that this Appeal was instituted by a person other than Maneno Bangi and the Appeal before the Appeals Authority is improperly filed and should therefore be dismissed for lack of *locus standi*.

THE APPELLANT'S REPLIES TO THE SUBMISSIONS ON PO

In responding to the PO, the learned counsel for the Appellant submitted that this Appeals Authority should not consider the same for the following reasons:-

First, that the Respondent has not followed principles or rules of raising Preliminary Objections. The Respondent ought to have specifically pleaded it rather than raising it in the statement of reply in the manner he did, arguing that the Respondent had taken the Appellant by surprise intending to defeat the course of justice.

Second, that the Appellant has a *locus standi* in presenting this Appeal before the Appeals Authority. The learned counsel argued and was supported by one Ibrahim Nyambacha that the person who filed the Appeal is the Managing Director of the Appellant Company. He is the donor of the power of Attorney. The learned counsel implored the Appeals Authority to find that the said Nyambacha goes by the official names of Ibrahim Nanai Matayi Nyambacha and that these names have been used interchangeably and thus was competent to lodge the Appeal. The learned counsel went to the extent of stating that his client was ready to swear an affidavit including other documentary evidence to show that the person in the names and style of Ibrahim Nyambacha and Ibrahim Nanai Matayi is one and the same person.

Further, the learned counsel stated that Maneno Bangi, the technical director of the Appellant Company was outside the country for studies and in his absence, Ibrahim Nyambacha has the powers to act.

In conclusion, the learned counsel informed the Appeals Authority that interms of Rule 24 (2) of the Public Procurement Appeals Rules, G.N.NO. 411 of 2014 (hereinafter referred to as the GN.No. 411/2014) the Appeals Authority is not bound by strict rules of evidence or court procedures. It may therefore invoke the said provision to hear the Appeal in order to do justice.

The Appellant therefore prayed for the dismissal of the PO and hearing of the Appeal to proceed.

ANALYSIS BY THE APPEALS AUTHORITY ON THE PO

In the course of making their submissions before this Appeals Authority, the learned counsel for the Appellant had asserted that the PO raised by the Respondent did not follow principles of POs and that the same intends to defeat the course justice to the Appellant.

In view of the above, the Appeals Authority deemed appropriate to the analyse of the PO to ascertain whether there are set legal principles which guide on the modality of submitting a PO. In the course of doing so, the Appeals Authority revisited the Civil Procedure Code Act, Cap 33 R.E 2002 and observed that there are no rules or principles regarding the filing of the POs. Court practise in Tanzania has set clear principles in which a preliminary objection can be raised at any point in time before a judgement is pronounced. In view of the above, the Appeals Authority observed that the Respondent was right in pin pointing out the PO,

whether it be in the statement of replies or as a separate document to be filed since the law does not command the modality.

With regard to the submissions that the PO intended to surprise his client, the Appeals Authority observes that the Appellant was not taken by surprise as claimed. The Respondent's PO which was contained in his replies to the grounds of Appeal, were saved to the Appellant seven days prior to the hearing of the Appeal by the Appeals Authority together with the notice for hearing.

In this regard therefore, the Appeals Authority is of the views that the argument that the Appellant was taken by surprise cannot be supported and the assertion by the learned counsel that the PO intended to defeat justice has no legs to stand on.

The Appeals Authority is of the settled view that a PO can be raised at any point in time provided that the respective Appellant or Respondent is accorded the right to defend and address the issues in dispute.

The term preliminary objection is one that contains a point of law which if argued successfully, is sufficient to dispose off the suit. And that a preliminary objection cannot be raised if any fact contained therein has to be ascertained. In other words, if an objection raised contains both factual and legal issues which have to be ascertained, it will not qualify to be termed as such. See the decision of Law, J.A. in the case of *Mukisa Biscuit Manufacturing Co. Ltd. Vs. West End Distributors Ltd (1969) EA 696*. The corollary is that a P.O. may not be raised if any fact has to be ascertained. This is the rule to be found in the case above cited.

Having heard the arguments by the parties on the PO, the Appeals Authority is of the view that the PO is centred on one main issue namely: Whether the Appellant has *locus Standi*.

Having framed the issue as above, the Appeals Authority proceeded to determine it by considering various documents submitted during the bid process.

To start with, the Appeals Authority revisited the Appellant's Power of Attorney and observed that the power to execute all deeds regarding the tender was vested unto one Maneno Bangi. The Appeals Authority further revisited the Appellant's bid in which the names of the Appellant's directors were contained and observed that the Appellant had four directors contained in the bid as correctly submitted by the Respondent supra. However, the name Ibrahim Nyambacha, who contends to be among the directors of the Appellant, is nowhere to be found. When asked by the Members of the Appeals Authority during the hearing regarding this glaring anomaly, the learned counsel for the Appellant submitted that Ibrahim Nyambacha is the same as Ibrahim Nanai Matayi save that his fourth name Nyambacha was not contained in the submitted bid to the Respondent. To verify the authenticity of the argument by the learned counsel for the Appellant, the Appeals Authority scrutinized the signatures contained in the Appellant's Statement of Appeal and compared the same with that one contained in the Power of Attorney and observed that the said signatures differ very significantly. If it be true that, Ibrahim Nanai Matayi is one and the same with Ibrahim Nyambacha, the signatures ought to be similar. The Appeals Authority is of the firm view that Ibrahim Nanayi Nyambacha is a strange person to both the procurement proceedings and the present Appeal

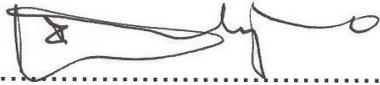
With regard to the Rule 24 (2) of the Appeals Rules cited by the Appellant as well as PPAA Forms 1 and 2, the Appeals Authority is of the settled view that the applicability of the Rules relates to production of evidence or procedures. What is being contended at this Appeals Authority is the right of the Appellant's representative to prosecute the Appeal. Furthermore, the Appeals Authority is of the view that the legally authorized person contained under PPAA Forms entails the persons who have been mandated to do so and not otherwise. It should be noted also that, our jurisprudence allows the grantor of the Power of Attorney to take part in any proceedings instead of the grantee. In the event the grantor decides to step into the shoes of the grantee, the power so granted to the grantee automatically ceases to have effect. In this case, the purported Appellant's director is neither reflected as being among the Appellant's directors in Tender document. There is no doubt that the learned counsels for the Appellant seriously misconceived the rules and principles enshrined in the bid document.

It follows therefore that the Appellant's representative did not have the standing before this Appeals Authority. Consequently, the PO is hereby upheld and the Appeal is dismissed.

Each party to bear own costs.

Right of Judicial Review as per Section 101 of the Public Procurement Act 2011 explained to parties.

This Ruling is delivered in the presence of the Appellant and the Respondents this 5th January, 2017.



JUDGE (Rtd) V.K.D LYIMO
CHAIRMAN

MEMBERS

1. MRS. ROSEMARY A. LULABUKA 

2. ENG. FRANCIS MARMO 