

IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY
AT DAR ES SALAAM

APPEAL CASE NO. 145 OF 2013

BETWEEN

M/S NATIONAL MICROFINANCE BANK LIMITED.....APPELLANT

AND

ACCOUNTANT GENERAL1ST RESPONDENT

PUBLIC PROCUREMENT REGULATORY
AUTHORITY2ND RESPONDENT

M/s CRDBINTERESTED PARTY

RULING

CORAM

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|--------------------------------|---------------|
| 1. Hon. A.G. Bubeshi, J. (rtd) | -Chairperson |
| 2. Mr. K.M. Msita | -Member |
| 3. Mrs. N.S.N. Inyangete | -Member |
| 4. Ms. E. J. Manyesha | -Member |
| 5. Ms. F.R. Mapunda | -Ag.Secretary |

SECRETARIAT

- | | |
|----------------------|-----------------|
| 1. Ms. Violet Simeon | - Legal Officer |
| 2. Mr. Hamisi Tika | -Legal Officer |

FOR THE APPELLANT

1. Ms. Joyce E.Mosele -Advocate, K&M-Advocates
2. Mr. Stanley Mmanyi -NMB Relationship Officer
3. Ms. Eliza Msuya -NMB, Senior Relationship Manager
4. Mr. Edwin Mhande -Advocate, NMB
5. Ms. Prolimina Oisso -Legal Officer, K&M.Advocates

FOR THE 1ST RESPONDENT

1. Mr. Nyandalu G.Chaya -Head PMU-AcGen
2. Mr. E.A.Mwankenja- Principal Legal Officer, Ministry of Finance
3. Mr. Innocent R. Anthony - Member PMU- AcGen
4. Ms. Mwantum I.Sultan - Legal officer, Ministry of Finance

FOR THE INTERESTED PARTY

1. Mr. Richard K. Rweyongeza – Advocate, R.K Rweyongeza and Co. Advocates
2. Mr. Bennett Bankobeza - Manager Institutional Banking – CRDB Bank
3. Haiko Shayo- Relationship Manager Institutional Banking – CRDB Bank
4. Mr. Solainus P. Ndunguru - Legal officer CRDB
5. Ms.Theodora Primus - Legal officer

This Ruling was scheduled for delivery today 20th May, 2013 and we proceed to deliver it.

The Appeal at hand was lodged by M/S NATIONAL MICROFINANCE BANK LIMITED commonly known by its acronym NMB (hereinafter to as "the Appellant") against the Accountant General (hereinafter referred to as ACGEN) and the Public Procurement Regulatory Authority (hereinafter referred to as "the Respondents"). After notification of this Appeal to other bidders who had participated in the tender process, M/s CRDB opted to join this Appeal as the Interested Party.

The said Appeal is in respect of Tender No. IE /031/ 2012-2013/HQ/NC/16 for Provision of Banking Services to the Government of the United Republic of Tanzania. The said tender had seven Lots and the Appeal at hand is confined to Lot No. 1 which was for Provision of Banking Services in Dar es Salaam (hereinafter to be referred to as "the tender").

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

The tender was publicly invited through the Daily News and the Guardian newspapers dated 18th October, 2012 and also the

East African Newspapers of 22nd and 28th October, 2012 respectively.

The said tender was to be conducted through National Competitive Tendering Procedures specified in the Public Procurement (Goods, Works, Non- Consultant Services and Disposal of Public Assets by Tender) Regulations, 2005 hereinafter to be referred to as ("the GN 97 of 2005").

The deadline for submission of the tenders was set for 16th November, 2012 whereby eight tenders were submitted for Lot No. 1 as shown herein below;

S/ No	Tenderer's Name	Lot No.	Bid price	Bid Security	VAT
1.	M/s NBC	1,2,3,4,5,6 and 7	<ul style="list-style-type: none"> • Tshs.500/= per transaction 	Tshs. 10,000,000/- from NBC	Not indicated
2.	M/s Stanbic Bank	1	Tshs. <ul style="list-style-type: none"> • 18,000/= per transaction per annum if manual transfer is used or • Tshs. 12,000/= per transaction per annum if Internet Banking Service is used 	Tshs. 10,000,000/= from Stanbic Bank	Inclusive

3.	M/s DCB	1	<ul style="list-style-type: none"> • Cost of salary per transaction per annum is Tshs. 12,000/= • Cost of pension per transaction per annum is Tshs. 12,000/= • Cost of Banking Services per annum Tshs. 14,400,000/= • Cost of monthly statement per annum is Tshs. 120,000/= • Confirmation to auditors Tshs. 15,000/= per annum • certificate of Balance Tshs. 15,000/= <p>Sms Banking</p> <ul style="list-style-type: none"> • Balance inquiry Tshs. 18,000/= per annum • Min statement 15,000/= per annum • Alert message 15,000/= per annum • Domestic Money transfer 30,000/= per annum <p>Cheques</p> <ul style="list-style-type: none"> • Cheque book 3,600,000/= per annum 	Banker's cheque of Tshs. 10,000,000/= from DCB	Exclusive
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			<ul style="list-style-type: none"> Inward cheque clearance 60,000/= <p>SUMMARY</p> <ul style="list-style-type: none"> Tshs. 18,372,000/= per annum for all unit transaction 		
4.	M/s CITI BANK	1	<ul style="list-style-type: none"> Payment of salary Tshs. 128 per transaction Payment of Pension Tshs. 128 per transaction Payment of suppliers Tshs. 128 per transaction 	Bid Guarantee from CRDB Bank of Tshs. 10,000,000/=	Exclusive
5.	M/s NMB	1	<ul style="list-style-type: none"> Cost of paying Civil Servant Tshs.0 Cost of paying Pensioner Tshs.0 Cost of Banking Services Tshs.0/= The Government will be paid off payment of Tshs. 1,000,000,000/= is Straight Through Processing (STP) will be used. 	Bank Guarantee of Tshs. 10,000,000/= from NMB	Inclusive

			<ul style="list-style-type: none"> • Lot No 1 will be free of charge if NMB will be awarded all the 7 Lots 		
6.	M/s Bank M	1	<ul style="list-style-type: none"> • Civil Servant Tshs. 500/= per transaction per month or 6000/= per transaction per annum • Pensioner Tshs. 500 per transaction per month or 6000/= per annum • Other Banking Services free of charge 	Bank Guarantee of Tshs.10,000,000/= from Bank M	Inclusive
7.	M/s Standard Chartered Bank	1	<ul style="list-style-type: none"> • Civil Servant Tshs. 150,000,000/= per annum • Pensioner Tshs. 100,000,000/= per annum • Other Banking Services Tshs. 15,000,000/ <p>Total cost 312,700,000/=</p>	Bid Securing Declaration	Inclusive
8.	M/s CRDB	1	<ul style="list-style-type: none"> • Civil Servant Tshs. 1,200/= per transaction for Customers with CRDB account per annum • Civil Servant Tshs. 6000/= per transaction 	Bank Guarantee of Tshs. 10,000,000/= from CRDB.	

			<p>for Customers with accounts outside CRDB per annum</p> <ul style="list-style-type: none"> • Pensioner Tshs. 1,200/= per transaction for Customers with CRDB account per annum • Pensioner Tshs. 6,000/= per transaction for Customers with accounts outside CRDB per annum • Other Banking Services– Account monthly fees- Tanzanian shilling30,000/= • Dollar Account Tshs. 96,000/= per annum • Pound Account Tshs. 60,000/= per annum • Euro Account Tshs. 96,000/= <p>Total unit costs per annum 349,752/=</p>		
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The said tenders were subjected to evaluation which was carried out in three stages; namely Preliminary, Detailed and Financial evaluation.

During Preliminary Evaluation, tenders were assessed for commercial responsiveness and technical responsiveness. At the commercial responsiveness stage tenders were checked for completeness of the Bid and compliance with the Eligibility Criteria.

During that stage of evaluation, three tenderers namely M/S CITI Bank, M/S NMB and M/S CRDB Limited were found to be substantially responsive to the requirements of the Tender Document, while tenders of six tenderers were disqualified for failure to comply with the requirements of the Tender Document.

Having passed the Preliminary Evaluation stage, the three remained tenders were then subjected to Detailed Evaluation whereby the tender of M/S CITI Bank was disqualified for indicating only one pay station in Dar es salaam instead of four stations, as it would be difficult for payment of salaries on 23rd of every month with only one station. They were also disqualified for failure to demonstrate capability of providing timely banking services due to few paying stations.

The remaining two tenders were then checked for correction of arithmetic errors whereby the tender by M/S NMB was found to

have quoted zero prices. The Evaluators observed that according to the law of contract, any contract without consideration is considered to be "null and void ab initio"; thus, the tender by M/S NMB lacked legal force and therefore they decided to disqualify it.

Having disqualified the tender by M/S NMB, the tender by M/s CRDB Bank was found to be the lowest evaluated tender and was therefore recommended for the award of contract for Lot No. 1.

The Tender Board through Circular Resolution No. 055/2012-2013 dated 19th December, 2012 approved the recommendations of the Evaluation Committee for Provision of Banking Services for Lot No. 1 to M/s CRDB Bank.

On 24th December, 2012, the 1st Respondent vide letter referenced PMU/ACGEN/IE/031/2012-2013/HQ/NC/16 communicated the award of tenders to the Successful Tenderers, namely, M/s CRDB Bank PLC with respect to Lot No. 1 and the National Microfinance Bank PLC with respect to Lots No. 2, 3, 4, 5, 6 and 7 respectively.

Having received the notification of award with respect of Lots Nos. 2 to 7, the Appellant vide a letter referenced NMB/CWB/MOF/01 dated 02nd January, 2013 wrote to the Permanent Secretary, Ministry of Finance raising their concerns for Lot No. 1 of which the Appellant considered themselves to have quoted the lowest price of all the tenders but its fate and decision was yet to be availed to them.

On 21st January, 2013, the 1st Respondent vide a letter referenced PMU/ACGEN/2011-2012/03 informed the Appellant, among other things, that their tender with respect of Lot No. 1 was not substantially responsive as per the Instructions to Bidders (hereinafter referred to as "the ITB")

The Appellant being dissatisfied with the response of the 1st Respondent over Lot No.1, vide their letter referenced NMB/CWB/ MOF/01, dated 24th January, 2013 informed the 1st Respondent that they had intended to launch an official appeal to them disputing the award of Lot No. 1 to another Bank.

On 5th February, 2013, the Appellant vide a letter referenced NMB/CEO/CS/MOF/006 lodged their official request for review of the tender to the 1st Respondent.

Having received the complaint, on the same date, the 1st Respondent vide a letter referenced PMU/ACGEN/IE/031/2012-13/HQ/NC/16/03 informed the Appellant that they were working on their concern and that they will be notified of the outcome upon their deliberation.

On the same date, that is on 5th February, 2013, the 1st Respondent vide a letter referenced PMU/ACGEN/IE/031/2012-13/HQ/NC/16/02 wrote to the 2nd Respondent (PPRA) requesting for advice on how best they can handle the concerns raised by the Appellant towards this disputed tender.

On 13th February, 2013, the 2nd Respondent vide a letter referenced PPRA/IE/031/40 informed the 1st Respondent that by virtue of the Public Procurement Act (hereinafter to be referred to as "the Act") neither the Procuring Entities nor the Public Procurement Regulatory Authority (hereinafter to be referred to as "the 2nd Respondent") have been vested with powers to entertain an appeal once the procurement contract had entered into force by virtue of Regulation 111(4) of GN No. 97 of 2005, and that the body responsible to determine their complaint was

the Public Procurement Appeals Authority (hereinafter to be referred to as "the Authority").

Having received the letter from the 2nd Respondent, the 1st Respondent vide a letter referenced PMU/ACGEN/IE/031/2012-13/HQ/NC/16/05 dated 6th March, 2013 wrote to the Appellant informing them that since the procurement contract had already entered into force, their powers to entertain their complaint had ceased.

Having received the 1st Respondent's letter rejecting to entertain their complaint; and upon being dissatisfied with the said rejection, the Appellant vide a letter referenced NMB/CEO/CS/EM/ACGEN/45 dated 14th March, 2013 applied for an administrative review to the 2nd Respondent.

Having received the complaint by the Appellant, the 2nd Respondent vide a letter referenced PPRA/IE/031/46 informed them that the organization mandated to review a complaint after the procurement contract had entered into force is the Public Procurement Appeals Authority and that they should refer their complaint to it.

On 16th April, 2013, the Appellant lodged their Appeal to the Authority as notified.

Having notified the Respondents of the Appeal and other tenderers who participated in this disputed tender, and required them to submit their written replies, they raised Preliminary Objections on grounds that the appeal had been filed out of time and that the Appellant has no cause of action against the 2nd Respondent.

As a matter of procedure, the Authority was obliged to resolve the Preliminary Objections raised before addressing the merits of the Appeal.

During the hearing of this appeal, the Successful Tenderer for Lot No.1, M/s CRDB joined in, to safeguard their interests; however, the 2nd Respondent did not appear but adopted their written replies to form part of their response to the Appellant's submissions.

The Authority therefore allowed the 1st Respondent to submit their arguments on the Preliminary Objections they had raised.

THE 1ST RESPONDENT'S SUBMISSIONS ON THE PRELIMINARY OBJECTIONS.

Having stated their Preliminary Objection, the 1st Respondent proceeded to expand it as follows;

That, the outcome of tender under appeal, and other lots, was communicated to the Successful tenderers on 24th December, 2012.

That, in the said communication, the Appellant was informed that they were successful with respect to Lots 2,3,4,5,6 and 7.

Having received the notification letter from the 1st Respondent, the Appellant wrote three distinct letters to them with different contents. One letter accepted and thanked the 1st Respondent for awarding them the six lots named above and also requested for clarification on the fate of their tender in respect of Lot No. 1.

The other two letters from the Appellant expressed their intentions to appeal and the notice to appeal respectively after they have learnt that they were not successful with respect of Lot No.1.

On 5th February, 2013, the Appellant submitted their official request for review to the 1st Respondent for Lot No. 1 on ground that they were the lowest tenderer for this Lot and that award to any other tenderer was not justified.

Having received the Appellant's letters, the 1st Respondent vide their letter referenced PMU/ACGEN/IE/031/2012-13/HQ/NC/16/03 dated 5th February, 2013, informed the Appellant that their request for review was under process and that they will be notified of the outcome accordingly.

While they had communicated to the Appellant as per their request, on the same date the 1st Respondent sought for an advice from the 2nd Respondent on how best they can handle the Appellant's request for review.

The 2nd Respondent acted on the letter from the 1st Respondent as already indicated above.

Having received this advice from the 2nd Respondent, the 1st Respondent, on 6th March, 2013, informed the Appellant that their powers to entertain their complaint had ceased pursuant to Section 80(3) of the Act, read together, with Regulation 111(4)

of the GN No.97 of 2005 because of entry into force of the procurement contract by virtue of Section 55(7) of the Act.

The 1st Respondent submitted further that, Section 82(2)(a) and (b) of the Act, provides categorically on where the aggrieved tenderer has to go when they are aggrieved by the decision of the Procuring Entity upon entry into force of the procurement contract. That the proper avenue for the Appellant therefore, was this Authority. However, their referral was required to be made within 14 days, from the date they became aware of the circumstances giving rise to their complaint. This position of the law was also provided for under Clause 51.1 of the Instructions to Bidders (hereinafter to be referred to as "the ITB").

That, contrary to the requirements of the law as stipulated above, the Appellant lodged their appeal to this Authority on 16th April, 2013 while they had become aware of the circumstances on 7th March, 2013 when they received the 1st Respondent's letter of 6th March, 2013, which informed them that their powers to entertain their complaint have been ousted by the law.

That, the Appellant ought to have lodged their appeal before this Authority on 21st March, 2013 to meet the 14 days requirement

stipulated under the law and not otherwise. This clearly indicated that, the Appellant's appeal has been lodged out of time without having any justifiable reason for their delay. Further, they did not even apply for an extension of time to lodge their appeal out of time if at all they had justifiable cause.

This appeal therefore, lacks legal force to mandate this Authority to entertain it.

The 1st Respondent therefore, prayed for the dismissal of this appeal with costs.

SUBMISSIONS BY THE 2ND RESPONDENT ON PRELIMINARY OBJECTIONS.

The 2nd Respondent's Preliminary Objections were;

- a) the Appeal is incompetent due to lack of cause of action against the 2nd Respondent
- b) That the appeal has been filed out of time contrary to the requirements of Section 82(2) of the Act.

In expounding their Preliminary Objections the 2nd Respondent submitted as follows;

- a. The Appeal is incompetent due to lack of cause of action against the 2nd Respondent

That, the Appellant's allegations that all correspondences and/ or letters between the Appellant and the 1st Respondent were copied to them, thus they were aware of the matter and that the Appellant was prejudiced are baseless.

That, Regulation 111(1) of GN No. 97 of 2005 requires the Appellant when submitting their complaint to the Accounting Officer to copy the same to them. Likewise, Regulation 111(4) of GN No. 97 of 2005 requires the Accounting Officer to submit to them a copy of the decision in respect of complaint handled by them.

That, the law requires that issues dealt with at the level of the Procuring Entity relating to the procurement complaints be copied to them and not the vice versa.

That, sometimes tenderers and Procuring Entities prefer to copy them issues related to procurement since they are an oversight body.

That, the letter written to the 1st Respondent referenced PPRA/IE/031/40 dated 13th February, 2013 was not copied to the Appellant because they were responding to the request by the 1st Respondent for advice they had requested for, related to the tender under dispute. However, the fact that the said letter was not copied to the Appellant did not prejudice them because at the time the said letter was written, the Appellant was already time barred to file their appeal since the communication of award to the Appellant and other tenderers was already made by the 1st Respondent vide their letter referenced PMU/ACGEN/IE/031/2012-13/HQ/NC/16 dated 24th December, 2012, which was received by the Appellant on 28th December, 2012.

That, the Appellant became aware of the circumstances giving rise to their complaint on 28th December, 2012, and that they ought to have come to the Authority to lodge their appeal within 14 days.

They concluded their argument on this point by submitting that, since the procurement process was between the 1st Respondent and the Appellant, then they were not by any means involved in

the procurement process of the tender under appeal, hence the Appellant has no cause of action against them.

b. That the appeal has been filed out of time contrary to the requirements of Section 82(2) of the Act.

With regards to this point, the 2nd Respondent submitted that the Appellant was notified of the award of the tender for Lots 2 to 7 on 28th December, 2012.

That, according to Section 82(2) (b) of the Act, where the complaint cannot be entertained because of entry into force of the procurement contract, the Appellant was supposed to submit their complaint within 14 days from the date of becoming aware of the circumstances giving rise to a complaint to the Authority.

The 1st Respondent vide their letter referenced PMU/ACGEN/IE/031/2012-13/HQ/NC/16/05 dated 06th March, 2013, informed the Appellant that by virtue of Section 80(3) of the Act, they had ceased to entertain their complaint.

They concluded that, according to the requirement of the law and following the 1st Respondent's decision, the Appellant could have lodged their appeal to the Authority within the prescribed time by the law. This requirement however, was not adhered to by the Appellant. This appeal therefore, has been lodged out of time and the same should be struck out.

APPELLANT'S REPLIES ON THE PRELIMINARY OBJECTIONS.

The Appellant's replies on the Preliminary Objections may be summarized as follows;

That, Regulation 97(2) of the GN No. 97 of 2005, qualifies what have been provided for under Section 55(7) of the Act by requiring the signing of the procurement or disposal contract after an award has been communicated to the Successful tenderer.

However, there is no contract to date which has been signed between the 1st Respondent and the Successful tenderer with respect of Lot No. 1 as contended by the Respondents.

Regulation 97(3) of GN No. 97 of 2005 clearly stipulates that the procurement or disposal contract enters into force when the contract is signed by the supplier, service provider, contractor or asset buyer and by the Procuring Entity, but to date the said contract has yet to be signed by the parties because negotiations are still in process between the 1st Respondent and the successful tenderer. This also is substantiated by the fact that, to date, tender securities by unsuccessful tenderers are yet to be returned.

That, since the contract is not in force, and that they are the current service providers of the disputed tender until 30th June, 2013, then, there is no contract in place between the 1st Respondent and the Interested Party as contended by the Respondents.

That, the law prohibits running of the two contracts concurrently within the same entity having the same contents and conditions pursuant to Regulation 105 (1) of GN No. 97 of 2005. They wonder as to how can the Respondents argue that there is a contract between the 1st Respondent and the Interested Party

while their contract has been extended by the 1st Respondent to them until 30th June, 2013.

The 1st Respondent was required to entertain their complaint but instead, they were using various tactics to delay the Appellant from appealing to other relevant avenues.

Despite that, the Appellant submitted that, of the two letters they had received from the 1st Respondent, one informed them that they were working with the matter, while the other letter dated 06th March, 2013, did not address the promise they had made before, that is they were working on their request.

They further submitted that, they were within the time when they were lodging their appeal to the Authority counting from the date when they had received the letter from the 2nd Respondent dated 2nd April, 2013, and that, the computation of time should have commenced from date when they had received the 2nd Respondent's letter and not otherwise.

On issue of an extension of time, the Appellant submitted that the Public Procurement Appeals Rules GN No. 205 of 2005, is

silent on the matter and that there is no room for such an extension which, one could have applied.

In conclusion, they prayed that the Preliminary Objections be dismissed and the matter be heard on merits.

It is worth to mention that, while deliberating on the Preliminary Objections raised by the Respondents and the Interested Party in this Appeal, the Authority observed that there was some information which required to be analyzed in order to determine whether the contract had come into force, particularly as it had been indicated in the letter of award that negotiations were to be conducted. Thus, this necessitated the Authority to hear the parties' submissions on the merits of the appeal.

SUBMISSIONS BY THE APPELLANT ON MERITS OF THE APPEAL

The Appellant's arguments on the merits of the Appeal may be summarized as follows;

That, on 17th October, 2012, the Ministry of Finance through the Department of the Accountant General advertised an Invitation for Bids for the Provision of Banking Services to the Government of the United Republic of Tanzania.

That, the said tender had seven lots divided according to geographical locations whereby the services would be provided by the successful tenderer(s).

That, according to the terms of the Bid Data Sheet, the Minimum number of lots a tenderer could tender was all seven lots.

That, on 16th November, 2012, they responded to the Invitation by submitting their tender in accordance with the terms of the Invitation, for all seven lots.

That, on 24th December, 2012 they received a letter referenced PMU/ACGEN/IE/031/2012-2013/HQ/NC/16 from the 1st Respondent notifying them that the contract for the provision of Banking Services for Lots No. 2,3,4,5,6 and 7 has been awarded to them.

That, having received the notification of award with respect of the above lots, vide a letter referenced NMB/CWB/MOF/01 dated 02nd January, 2013 they wrote to the Permanent Secretary, Ministry of Finance raising their concern for Lot No. 1 of which they considered themselves to have quoted the lowest price of all the tenders but its fate and decision was yet to be availed to them.

That, on 21st January, 2013, the 1st Respondent vide a letter referenced PMU/ACGEN/2011-2012/03 informed them, among other things that, their tender with respect of Lot No. 1 was not substantially responsive as per the ITB.

That, they were aggrieved with the reasons given by the 1st Respondent and vide their letter referenced NMB/CWB/ MOF/01, dated 24th January, 2013 informed them that they intended to launch an official appeal to them disputing the award for Lot No. 1 to another Bank, since they were the lowest tenderers and that they had conformed to clause 35.1 of the Tender Document, Section F, which provided for the criteria for award.

On 05th February, 2013, vide their letter referenced NMB/CEO/CS/MOF/006, lodged their official request for review of the tender to the 1st Respondent.

That, having received their complaint, the 1st Respondent, on the same date, vide their letter referenced PMU/ACGEN/IE/031/2012-13/HQ/NC/16/03 informed them that they were working on their concern and that they will be notified of the outcome upon their deliberation.

That, to their surprise, the 1st Respondent vide a letter referenced PMU/ACGEN/IE/031/2012-13/HQ/NC/16/05 dated 06th March, 2013, informed them that their power to entertain their complaint had ceased since the procurement contract had already entered into force.

That, they are the current Service Providers of the disputed tender and that there is no any existing contract between the 1st Respondent and the Interested Party for the services they are rendering; they wondered as to how can two contracts run concurrently while Regulation 105(1) of the GN. No. 97 of 2005 prohibits such an act. They wondered further that, if at all the

contract between them was in place why then the 1st Respondent did invite the Interested Party for negotiations.

That, on the basis of above and the contradicting letters dated 05th February, 2013, and that of 06th March, 2013, they proceeded further to the 2nd Respondent seeking for an administrative review.

That, on 02nd April, 2013, the 2nd Respondent responded to the Appellant's application for review by rejecting it through their letter referenced PPRA/IE/031/40 dated 13th February, 2013 addressed to the 1st Respondent which advised them not to review the complaint because a letter of acceptance had already been issued to the Successful tenderer pursuant to Section 80(3) and Section 55(7) of the Act and that their powers have been ousted.

That, all correspondences and/or letters between the Appellant and the 1st Respondent were copied to the 2nd Respondent and that, the 2nd Respondent was aware of the subject matter but in their letter dated 13th February, 2013 sent to the 1st Respondent, the same was not copied and/or served to them, consequently prejudicing them.

That, based on the above ground, the 2nd Respondent has been joined to this appeal due to their role they have played over this matter.

That, they are aggrieved by the two decisions of the Respondents, for their failure to follow the legal procedures for adjudication of Administrative review as required by the Act in handling their application for review.

That, the administrative review procedure carried out by the Respondents, if any, was not fair, equitable or transparent and was in contravention of the law.

That, the 1st Respondent did not follow proper procurement procedures as required by the Act, in that, the Evaluation Criteria used to declare their tender to be substantially non responsive was unfair and contravened the law.

That, the 1st Respondent's failure to award the tender to them would result into direct loss to the Government worth Tshs. 1,000,000,000/= (one billion) as an outcome of the Appellant's

discount they offered associated with the award of all seven Lots to them.

The Appellant therefore prayed for;

- a. A declaration that the 1st and the 2nd Respondents did not comply with the law in adjudicating their application for Administrative Review.
- b. A declaration that the 1st Respondent acted unlawfully in declaring their tender to be substantially non-responsive.
- c. Nullify the decision of the 1st Respondent and direct them to re- evaluate the tender in a fair, equitable and a transparent manner.
- d. Any other relief(s) the Authority shall deem just and fit to grant.

REPLIES BY THE 1ST RESPONDENT ON THE MERITS OF THE APPEAL

The 1st Respondent's arguments on the merits of the Appeal may be summarized as follows;

That, the tender under appeal was invited vide the Guardian, Daily news and the East African newspapers on 17th, 18th and 22nd October, 2012 and not 17th October, 2012 as submitted by the Appellant.

That, their invitation to tender was for eligible service providers to provide banking services to the Government of Tanzania on Lots, 1, Dar es salaam, 2. Pwani, Morogoro and Tanga, 3. Dodoma, Singida, Tabora and Kigoma, 4. Iringa, Mbeya, Rukwa, Katavi and Njombe, 5. Mwanza, Mara, Shinyanga, Kagera, Simiyu and Geita, 6.Lindi, Mtwara and Ruvuma, 7. Arusha, Kilimanjaro and Manyara. Therefore, it is not true that the Lots were invited according to the geographical locations as contended to by the Appellant.

That, they dispute explanations by the Appellant that the Banking Services, the subject of the said bids are to- date being provided by the Appellant under the existing contract. The 1st Respondent submitted that the said contract had expired on 28th February, 2013 but prior to the said date the 1st Respondent agreed to extend the contract on reason that the new contract

according to their award required more time for preparation and its finalization.

That, the Appellant was the successful tenderer in Lots No. 2,3,4,5,6 and 7 out of all lots advertised and a letter communicating the said award was communicated to them and acknowledged with thanks to the Government. The Appellant however, was not successful in Lot No. 1 which was awarded to another successful tenderer.

That, it is true that the Bid Data Sheet allowed the tenderer to tender for all seven lots but the tender procedure required to subject each tender to evaluation process to determine the successful tenderer. The Bid Data Sheet (hereinafter to be referred to as "the BDS") did not provide that a tenderer had to be successful in all lots.

That, the tender was awarded to the lowest evaluated tenderer and not to the tenderer who submitted the lowest price.

That, the Appellant's letter dated 24th January, 2013 notifying them of their intention to launch an appeal was not an official application, but the Appellant requested it to be construed as an official appeal. That, their letter of intention to launch an

official appeal towards the disputed tender was raised while the contract had already entered into force and that, according to the Act, and the advice by the 2nd Respondent to them, their mandate to entertain the said Appeal were ousted by the law.

That, there was no contradiction in their letters dated 05th February and 06th March, 2013 respectively addressed to the Appellant, since, one contained a promise to notify them of their decision while the other dated 06th March, 2013 informed the Appellant that their complaint could not be entertained.

That, they had complied with the law and procedure in the entire tender process, and that, the Respondents would have entertained their complaints had they been brought before the communication of the award.

That, the Appellant was required to fill in the scheme of requirements and the prices that had value but they filled in zero prices, which could not give the realistic scheme in the tender document. The Appellant's quotation had also violated the law of the contract which demonstrates that the Appellant did not qualify for award in Lot No. 1 for lack of consideration.

That, their award of tender to the Interested Party for Lot No.1 was justified, since, the evaluation results found the Appellant to be substantially non responsive.

That, the negotiations called for in their award letter was intended to identify the methodologies, commencement date of the project and submission of the Performance Security and not otherwise.

That, the Appellant was not prejudiced in any manner for not being copied with the advice from the 2nd Respondent. The 2nd Respondent sent the letter to them because they were the ones who had requested that advice and not the Appellant. Therefore, the 2nd Respondent had no any other role to play in this tender.

The 1st Respondent therefore prayed for dismissal of the Appeal with costs.

SUBMISSIONS BY THE 2ND RESPONDENT ON THE MERITS OF THE APPEAL.

The 2nd Respondent's arguments may be summarized as follows;

That, since, the contract had entered into force, the Respondents powers to entertain the complaint by the Appellant were ousted.

That, they had never prejudiced the Appellant in this matter, however, the Appellant failed to state how they have been prejudiced, notwithstanding the proper guidance they were given.

That, their advice to the 1st Respondent and the Appellant on the appropriate procedures to be followed was proper and the Appellant ought to have followed it.

That, the assertion by the Appellant that they did not follow the proper procedures should not be accepted at all in this matter.

The 2nd Respondent finally prayed that;

- i. The Appeal be struck out since there is no cause of action against them.
- ii. A declaration that the Appellant erred on procedures to be followed on applications for administrative review where the procurement contract is already in force.

iii. Any other relief(s) as the Authority may deem fit to grant.

INTERESTED PARTY'S SUBMISSION

The Interested parties' arguments in opposing this appeal were preceded by their concern to the Authority that they were not accorded an opportunity to be heard on the Preliminary objections they had raised to wit;

- i. That the Appeal has been filed out of time
- ii. That, this appeal is incompetent because there was no valid application for review before the Procuring entity.

Without prejudice to the above, the Interested Parties' arguments may be summarized as follows;

That, they were among the tenderers who participated in this disputed tender

That, they complied with all details provided for in the Tender Document.

That, the tender was opened in accordance with the procedure outlined in the Tender Document.

That, their tender was accepted by the 1st Respondent vide a letter referenced PMU/ACGEN/IE/031/2012-13/HQ/NC/16 dated 24th December, 2012

That, with the acceptance of their tender, the contract had come into force by virtue of Section 55(7) of the Act, and that they have already set up the machinery for the execution of the contract including appointing personnel at different levels and they have acquired corresponding equipments together with setting up the relevant and corresponding systems.

That, the right to appeal, is a right governed by law. Section 79(1) of the Act, categorically, specifies that the tenderer is to specify what loss or injury is going to suffer or had suffered when they seek for review.

That, the Appellant's purported review letter dated 05th February, 2013, to the 1st Respondent, has never indicated any loss or injury that they had suffered or were likely to suffer. To

the contrary, the Appellant had indicated that it is the 1st Respondent who will suffer loss. That in itself does not grant the Appellant powers to appeal.

That, there may be some irregularities made by the 1st Respondent in the process but not all irregularities may give rise to an appeal. Whenever one complains, the same should be associated with loss suffered or to be suffered in future in connection with the tender process. All these have not been shown in this Appeal by the Appellant.

That, there is a problem in the Appellant's Appeal as to what per se they are complaining about, since their statement lodged before this Authority is contradictory. For example, while in their Notice of Appeal they are saying that they are challenging the decision of the 2nd Respondent given through the 1st Respondent, while in their Statement of Appeal they are challenging the decision of the 1st Respondent dated 06th March, 2013.

That, there was no decision given by the 2nd Respondent to entitle the Appellant to appeal to the Authority. If at all, the Appellant had a complaint to lodge, the proper decision was that

given by the 1st Respondent on 06th March, 2013 and not otherwise.

That, Appellant quoted Zero shillings in their tender. Zero was not a discount as contended by them, rather, it was a technical advantage the Appellant was using to induce the 1st Respondent.

That, the Appellant claims' are vague and they have failed to indicate the loss they had suffered or are likely to suffer and that setting aside the award to the Interested Party will occasion an irreparable loss to them.

They therefore prayed for the dismissal of the Appeal with costs.

ANALYSIS BY THE AUTHORITY

Having gone through the documents submitted and having heard the oral arguments from parties, the Authority is of the view that the Appeal is based on the following issues:

- Whether the Appeal is properly before the Authority;
- Whether the Appellant was unfairly disqualified

- Whether the award of Tender to M/s CRDB was proper at law
- To what reliefs, if any, are the parties entitled to.

Having identified the issues in dispute, the Authority proceeded to resolve them as hereunder:

1.0 Whether the Appeal is properly before the Authority

In resolving this issue the Authority considered the Respondent's arguments on the Preliminary Objections which centered on the jurisdiction of this Authority to entertain the appeal.

In course of so doing, the Authority deems it proper to revisit Section 82(2)(a) and (b) of the Act which was relied upon by the Respondent in that it was not complied to by the Appellant when filing their complaint to this Authority. The said provision provides as follows;

S. 82(2) "A supplier, contractor or consultant entitled under section 79 to seek review may submit a complaint or dispute to the Public Procurement Appeals Authority: -

- (a) if the complaint or dispute cannot be submitted or entertained under section 80 or 81 because of entry into force of the procurement contract and provided that the complaint or the dispute is submitted within fourteen days from the date when the supplier, contractor or consultant submitting it became aware of the circumstances giving rise to the complaint or dispute or the time when the supplier, contractor or consultant should have become aware of those circumstances; (Emphasis added)
- (b) if the head of the procuring entity does not entertain the complaint or dispute because the procurement contract has entered into force, provided that the complaint or dispute is submitted within fourteen days after the delivery of the decision not to entertain the complaint or dispute”.

In order to ascertain the validity of the Respondent’s arguments that the Appellant was required to lodge their complaint directly to this Authority after being notified that the 1st Respondent could not entertain their dispute, the Authority revisited the facts of this Appeal and observes that, the Respondent notified

the Appellant on 6th of March, 2013 that they were not able to entertain the complaint as their powers had ceased by virtue of Section 80(3) of the Act and Regulation 111(4) of GN No. 97/2005. Having received the said letter, the Appellant filed their complaint to the 2nd Respondent on 14th March, 2013. The 2nd Respondent vide their letter dated 2nd April, 2013 informed the Appellant that they could not entertain their complaint since the procurement contract was already into force.

During the hearing, the Appellant was asked to explain why they filed their complaint to the 2nd Respondent and not to this Authority after receipt of the 1st Respondent letter of 6th March, 2013. They explained that they did so as they believed that the procurement contract was not in force as yet since they are the current service providers and their contract has been extended to 30th June 2013; hence, it was not possible for two contracts to run concurrently. Thus, to them the procurement contract had not come not come into force as it was not been signed as per Regulation 97(2) and (3) since the negotiation are still on progress.

From the above facts the Authority observes that, there are conflicting arguments regarding the entry into force of the procurement contract. Having noted so, the Authority deems it prudent to resolve the main contention of whether there was a procurement contract between the 1st Respondent and the Interested Party to warrant the invocation of Section 82(2)(a) of the Act. In resolving contentions of parties, the Authority deemed it proper to frame the following sub issues;

- Whether there was a procurement contract between the 1st Respondent and the Interested Party at the time this Appeal was lodged.
 - Whether the Appeal at hand was lodged within time as prescribed under the law.
- a) Whether there was a procurement contract between the 1st Respondent and the Successful Tenderer at the time this Appeal was lodged.

In resolving this sub-issue, the Authority noted that, in their submissions, the Respondents relied heavily on Section 80(3) of the Act read together with Regulation 111(4) of the GN 97 of 2005 to indicate that the procurement contract had entered into force between the 1st Respondent and the Interested Party. Hence, the power of the procuring entity to entertain the

complaints were ousted. For the sake of clarity the Authority deemed it proper to revisit the said provisions which read as follows;

S.80(3)“ the head of a procuring entity or of the approving authority shall not entertain the complaint or dispute or continue to entertain a complaint or dispute after the procurement contract has entered into force” (Emphasis added).

Reg.111(4)“the head of a procuring entity or of the approving authority shall not entertain the complaint or dispute or continue to entertain a complaint or dispute after the procurement contract has entered into force” (Emphasis added).

Having revisited these provisions, the Authority noted that, they oust the jurisdiction of the procuring entity to entertain the complaint or dispute after the procurement contract has entered into force.

According to Section 55(7) of the Act the procurement contract enters into force when the acceptance letter has been communicated to the successful tenderer. For purposes of clarity the Authority reproduces Section 55(7) of the Act which provides as follows;

“the procurement contract shall enter into force when a written acceptance of a tender has been

communicated to the successful supplier, contractor or consultant". (Emphasis supplied).

The Authority further revisited the Regulation 97(2) and (3) of GN No. 97 of 2005 cited by the Appellant in their submissions in order to ascertain whether it bears the same meaning provided for under Section 55(7). The said sub-regulation reads as follows;

97(2) "Notwithstanding the provisions of sub-regulation (4), the solicitation documents may require the supplier, service provider, asset buyer whose tender has been accepted to sign a written procurement contract or disposal contract conforming to the tender and in such cases, the procuring entity (the requesting public authority) and the supplier, service provider, contractor or asset buyer shall sign the procurement or disposal contract within 28 calendar days after the notice referred to in sub-regulation (1) has been dispatched to the supplier, service provider, contractor or asset buyer and the procuring entity".

97(3)"subject to sub-regulation (4), where a written procurement contract is required to be signed pursuant to sub-regulation (1) of this Regulation, the procurement or disposal contract enters into force when the contract is signed by the supplier, service provider, contractor or asset buyer and the procuring entity" (Emphasis added).

From the above quoted sub-regulations of the GN No. 97 of 2005, the Authority noted that, they contain different positions from that of Section 55(7) of the Act. This is due to the fact that, whilst under section 55(7) the procurement contract enters into force after a written acceptance has been communicated to the successful tenderer, under Regulation 97(2) and (3) the procurement contract enters into force after being signed by both parties.

Having noted the conflict of the law regarding the entry into force of a procurement contract, the Authority is of the considered view that, whenever such a situation arises between the parent law and its Regulations, then, the parent law is to prevail over its Regulations.

That said, the Authority is of the firm view that the contract enters into force once the written acceptance of a tender has been communicated to the successful tenderer pursuant to Section 55(7) and not otherwise.

Having reached the above position, the Authority deems it proper to revisit the documents submitted by the 1st Respondent in order to ascertain whether there was any acceptance letter which was communicated to the successful tenderer (interested party) in respect of Lot No. 1.

In course of so doing, the Authority noted that, the 1st Respondent vide their letter referenced

PMU/ACGEN/IE/031/2012-13/HQ/NC/16 dated 24th December, 2012, with the heading NOTIFICATION FOR CONTRACT AWARD OF TENDER NO IE/031/2012-13/HQ/NC/16 FOR PROVISION OF BANKING SERVICES TO THE UNITED REPUBLIC OF TANZANIA, informed the Successful Tenderer that their tender had been approved by their Tender Board vide their circular resolution No. 055/2012-2013.

The letter reads in part as follows;'

"...kindly, be informed that, the Accountant General's Tender Board, through resolution No. 055/2012-2013 dated 19th December, 2012, has approved the award of contract to M/S CRDB BANK PLC for the Provision of Banking Services to the Government of the United Republic of Tanzania for Lot No. 1...

This notification will be followed by negotiation process between you and the client for the purposes of ironing out key issues ..." (Emphasis added)

From the above quoted letter, it is the considered view of the Authority that, the letter was communicating the award of the disputed tender as approved by the 1st Respondent's Tender Board to the successful tenderer.

The Authority noted further that, apart from communicating the acceptance of award to the successful tenderer, the said letter also included a phrase calling upon the Successful tenderer for negotiations of key issues which were not clearly identified. This indicates that the successful tenderer was awarded the tender before negotiations were conducted. From that fact, the Authority finds the 1st Respondent to have erred in law by contravening Regulation 95 of GN. No. 97 of 2005 which requires negotiations to be conducted prior to approval of award by the Tender Board.

The Authority is of the further view that, despite the above pointed anomaly by the 1st Respondent, the negotiation clause in itself does not vitiate the intention of the said letter to communicate the award of the contract to the Successful Tenderer pursuant to Section 55(7) of the Act.

That said, the Authority is of the firm view that the procurement contract had already entered into force at the time the Appellant lodged their complaint before the 1st Respondent and the 2nd Respondent.

- b) Whether the Appeal at hand was lodged within time as prescribed under the law

In resolving this sub-issue, the Authority considered the parties arguments *vis-a-vis* the applicable law and the Tender Document.

To start with the Authority revisited the Respondent's submission that, the Appeal at hand had been filed out of time as prescribed under Sections 82(2) (a) and (b) of the Act, since the communication of award to the successful tenderer was made on 24th December, 2012. The 1st Respondent contended further that, they had informed the Appellant that their power to entertain their complaint had ceased as of 6th March, 2013. Therefore, the Appellant ought to have filed their Appeal to this Authority within fourteen days from 06th March, 2013, but to the contrary they lodged their Appeal on 16th April, 2013 which is almost 40 days from the date when they became aware of the circumstances giving rise to their dispute.

In reply thereof, the Appellant submitted that, they became aware of the 2nd Respondent's decision on 2nd April, 2013 when they received a letter which informed them that neither of the Respondents had been mandated by the law to entertain their Appeal once the procurement contract had already entered into

force. The Appellant submitted further that, their Appeal has been filed within fourteen days as required by the law since they became aware of the circumstances giving rise to the Appeal after they received the letter from the 2nd Respondent on 2nd April 2013.

In order to resolve these conflicting views by the parties, the Authority revisited the documents submitted and observed that, at the time when the 1st Respondent informed the Appellant that their powers to entertain their complaint had ceased, the communication of award in respect of the disputed tender had already been made to the successful tenderer way back on 24th December, 2012 vide a letter referenced PMU/ACGEN/IE/031/2012-13/HQ/NC/16.

The Authority observes further that, there were various correspondences between the 1st Respondent and the Appellant up to 6th March, 2013, when the former informed the latter that they could not entertain their complaint as their jurisdiction had been ousted.

Having considered the submissions by parties and the facts of this Appeal, the Authority is of the view that the issue at hand is when did the Appellant's right to appeal accrue.

In resolving the contentious issues between the parties the Authority revisited Section 82(2)(a) of the Act cited earlier on which requires a complaint to be lodged to this Authority within fourteen days from the date they became aware of the circumstances giving rise to the Appeal. According to the facts of this Appeal the circumstances giving rise to this Appeal arose on 6th March, 2013 when the 1st Respondent informed the Appellant that they could not entertain their complaint for want of jurisdiction. The Authority finds the above mentioned date to be the date in which the course of action arose since the 1st Respondent declared to have no jurisdiction after they were advised by the 2nd Respondent not to entertain any complaint after an award has been communicated to the successful tenderer as it was already done on 24th December, 2012.

That said, the Authority is of the firm view that the Appellant ought to have lodged their Appeal directly to this Authority within fourteen days from 6th March, 2013 as it is the date when

the 1st Respondent declared to have no jurisdiction to entertain the matter.

The Authority finds the Appellant to have erred in law for filing their complaint to the 2nd Respondent since after entry into force of a procurement contract, this Authority has sole original jurisdiction to entertain all the complaints arising thereafter.

The Authority rejects the Appellant's argument that their cause of action arose after receipt of letter dated 2nd April, 2013 from the 2nd Respondent on the reason that the said letter reiterates what was stated in the 1st Respondent letter of 6th March, 2013 that is, after entry into force of a procurement contract the powers of both Respondents ceased to have effect in entertaining procurement disputes.

That said, the Authority is of the firm view that, the Appellant was required to file their complaint directly to this Authority within fourteen days from the date they received the letter of 6th March, 2013. The Appellant's act of filing their Appeal on 16th April, 2013 has contravened the requirement of Section 82(2)(a) of the Act as their Appeal has been filed out of time, that is 40

days after becoming aware of the circumstances giving rise to the Appeal.

Furthermore, the Authority considered the Appellant's argument that the 2nd Respondent had erred in law for not copying them with their letter of 13th February, 2013 that was addressed to the 1st Respondent informing them not to entertain the Appellant complaint as the procurement contract was already in force and observes that, the 2nd Respondent's failure to copy the Appellant with the said letter did not in any way prejudice them as they contend.

The Authority observes further that, there is no provision in the law which obliges the 2nd Respondent to copy their correspondences to the third parties taking into account the said communication was between the 1st Respondent and the 2nd Respondent.

Moreover, it was not the responsibility of either the 1st Respondent or the 2nd Respondent to inform the Appellant where to go since the law is very clear and the Appellant ought to have

known the proper procedures. Thus, their ignorance of the law cannot in any way be blamed on the Respondents.

The Authority wishes to enlighten the Appellant that, the dispute settlement mechanism under Part VII of the Act, provides for two avenues which a tenderer may follow in submitting procurement complaints or appeals.

Under the first avenue, the dissatisfied tenderer is required to invoke the three stages of review where a complaint or dispute arises before a procurement contract enters into force. In such a situation, a dissatisfied tenderer has to start the review procedures by invoking Section 80 of the Act which requires a complaint to be submitted first to the accounting officer. Upon being dissatisfied with the accounting officer's decision or if the accounting officer fails to issue a decision within the prescribed time, the tenderer has the right to file their complaint to PPRA pursuant to Section 81 of the Act. In case they are dissatisfied with the PPRA's decision or PPRA fails to issue a decision within the stipulated time, then, the tenderer has the right to file their appeal to this Authority pursuant to Section 82 of the Act.

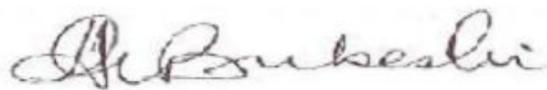
The second avenue comes into play only when the procurement contract has entered into force as per Section 55(7) of the Act. The dissatisfied tenderer is required to invoke Section 82(2)(a) and (b) of the Act above cited, which requires a tenderer to refer their complaint or dispute directly to this Authority within the prescribed time. This being the case, the Appellant ought to have come directly to this Authority after receiving the 1st Respondent's letter dated 06th March, 2013.

In view of the above findings, the Authority's conclusion on this sub-issue is that, the Appeal was lodged out of time contrary to what has been prescribed under Section 82(2) (a) and (b) of the Act. Hence, the Appeal is not properly before the Authority. Therefore, the Authority has no jurisdiction to entertain the same.

Accordingly, the Appeal filed is hereby rejected and the Authority sees no basis to proceed with the merits thereof as framed in issues two, three and four. Thus, having rejected the Appeal, the same is ordered struck out and each party to bear their own costs.

Right of Judicial Review as per Section 85 of the PPA/2004 explained to parties.

Ruling is delivered in the presence of the Appellant, the Respondent and the Interested Party this 20th of May, 2013.



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JUDGE (rtd) A. G. BUBESHI
CHAIRPERSON

MEMBERS:

1. MR. K.M. MSITA



2. MRS.E.J. MANYESHA



3. MRS. N.S.N. INYANGETE

