

**IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY
AT DAR ES SALAAM
APPEAL CASE NO. 15 OF 2016-17**

BETWEEN

**M/S UPENDO GROUP LTD &
NGOTE ENTERPRISES CO. LTD JV.....APPELLANT
AND
MPANDA MUNICIPAL COUNCILRESPONDENT**

RULING

CORAM

- | | | |
|--------------------------------------|---|-----------|
| 1. Hon. Vincent K.D. Lyimo, J. (rtd) | - | Chairman |
| 2. Eng. Francis T. Marmo | - | Member |
| 3. Ms. Monica P. Otaru | - | Member |
| 4. Mr. Ole-Mbille Kissioki | - | Secretary |

SECRETARIAT

- | | | |
|---------------------------|---|----------------------|
| 1. Ms. Florida R. Mapunda | - | Senior Legal Officer |
| 2. Mr. Hamisi O. Tika | - | Legal Officer |

FOR THE APPELLANT

- | | | |
|------------------------------|---|-------------------|
| 1. Mr.Cassiano Lucas Kaegele | - | Managing Director |
| 2. Mr. Filbert Lumbert | - | Engineer |
| 3. Mr. Selapius Mdamu | - | Advocate |

FOR THE RESPONDENT

1. Eng. Albert S. Kyando - Municipal Engineer
2. Ms. Josephine Chilongozi - Legal Officer
3. Ms. Hobokela Mwakagamba - Ag. Head of PMU
4. Mr. Malaka M. Morisho - Legal Officer

This Ruling was scheduled for delivery today, 08th February, 2017 and we proceed to do so.

This Appeal was lodged by M/s Upendo Group Limited & Ngote Enterprises Co. Ltd, JV (hereinafter referred to as “**the Appellant**”) against Mpanda Municipal Council (hereinafter referred to as “**the Respondent**”). The Appeal is in respect of Tender No. LGA/101/2016/2017/WB/W/01 for Upgrading of Various Mpanda Town Roads (7.7Km) to Bitumen Standard (hereinafter referred to as “**the Tender**”).

After going through the records submitted by the parties in this Appeal, the facts may be summarized as follows:

The Respondent vide the Daily News and Mtanzania newspapers dated 30th August 2016 and 31st August 2016 respectively, invited tenderers to submit bids in respect of the above named Tender. The deadline for submission of tenders was 20th September 2016, whereby three tenders were received from the following firms;

1. M/s Bharya Engineering & Contracting Company Limited;
 2. M/s Upendo Group Ltd & Ngote Enterprises Co. Ltd, JV;
- and

3. M/s Nyakirang'ani Construction Limited.

The above tenders were then subjected to evaluation which was conducted in three stages namely; Preliminary, Detailed and Post-Qualification evaluation. After completion of the evaluation process, evaluators recommended award of the Tender to the Appellant at the proposed contract price of TZS 6,879,159,400/-.

The Tender Board at its meeting held on 5th October 2016, before approval of the award, directed due diligence to be conducted on the Appellant's firm for purposes of verifying their capability to perform the intended contract.

On 13th October 2016 due diligence was conducted as directed and it was observed that, the Appellant not only lacked the requisite experience on works of similar nature, they also lacked some important facilities like paver machine and Asphalt Plant Machine. In addition thereto, they had submitted a bid security that was issued by a Microfinance institution rather than a Bank, contrary to the Tender Document's requirement. On 5th December 2016, the Tender Board ordered the said Tender be re-advertised due to the Appellant's failure to comply with the Tender Document.

On 7th December 2016 the Respondent vide its letter with Ref. No. KTV/MMC/2016/17/WB/W/03 informed the Appellant that its tender has been disqualified for failure to comply with the requirements of the Tender Document. The Appellant was further informed that, the said Tender would be re-advertised as none

among the tenderers were substantially responsive to perform the said works.

Dissatisfied, on 13th December 2016, the Appellant lodged an official complaint on the Respondent challenging amongst others, reasons given for their disqualification and re-advertisement of the said Tender. On the same day the Respondent vide a letter with Ref. No. KTV/MMC/2016/2017/WD/W/04 issued his decision dismissing the Appellant's complaint in its entirety.

Dissatisfied, on 28th December 2016, the Appellant applied for further review to the Respondent. On 4th January 2017, the Respondent vide its letter with Ref. No. KTV/MMC/2016/2017/WB/W/05 issued its second decision which dismissed the Appellant's complaint. The Respondent informed the Appellant that, they were not supposed to re-submit their complaints; instead they were required to pursue other remedies as required by the law.

Aggrieved, on 17th January 2017, the Appellant lodged this Appeal. In the course of filing its replies, the Respondent raised a point of Preliminary Objection (PO) to wit; the Appeal is hopelessly statutory time barred and consequently prayed for the dismissal of the same.

On the date of hearing, the Appeals Authority deemed it proper to determine the PO before addressing the merits of the Appeal.

RESPONDENT'S SUBMISSIONS ON THE PO

The Appeal is hopelessly time barred

In support of his first point of PO, the Respondent submitted that, basing on various correspondences between its office and the Appellant, the Appeal was filed out of time. The Respondent narrated that the Appellant was informed of the disqualification as well as the intention to re-advertise the Tender on 7th December 2016. The Appellant challenged the Respondent's decision via a letter dated 13th December 2016. The Respondent issued its decision on that same day. That on 28th December 2016, the Appellant filed a second complaint with the Respondent. In reply, on 4th January 2017, the Respondent informed the Appellant that they were required to comply with the law by filing an Appeal instead of yet another complaint.

The Respondent submitted further that, the Appellant after receiving the Respondent's decision dated 13th December 2016, ought to have lodged their appeal to the Appeals Authority within seven working days, pursuant to Section 97 of the Public Procurement Act of 2011 (as amended) read together with Rule 9 of the Public Procurement Appeals Rules of 2014. To the contrary, that the Appeal was lodged on 17th January 2016 after lapse of 23 days and without prior leave to file the appeal out of time. Thus, the Respondent prayed for dismissal of the Appeal.

APPELLANT'S REPLIES TO THE PO

Initially, the Appellant submitted that, the Appeal was properly before the Appeals Authority as it was lodged within time. The

Appellant submitted that, the Respondent's letter to re-advertise the Tender dated 7th December 2016 was received by them on 9th December 2016. They challenged this decision via their letter dated 13th December 2016 which was received and replied to by the Respondent on that same day. The Appellant however contended that they received the said letter on 17th December 2016. The Appellant contended further that, the Respondent's decision indicates that it was referring to upgrading of 77Km roads while the Tender was for upgrading of 7.7 Km roads. Furthermore, the Appellant contended that the Respondent's decision referred to a different tender number from the Tender, hence the 28th December 2016 letter was to request for clarification which was given via the Respondent's letter of 4th January 2017 received by them on 9th January 2017. Thus, the Appellant persisted that the cause of action arose on 9th January 2017.

Upon examination, the Appellant admitted that they ought to have lodged their complaint within seven working days after receipt of the Respondent's decision dated 13th December 2016.

DECISION OF THE APPEALS AUTHORITY

In view of the above admission, the Appeals Authority agrees with the submissions by the Respondent that the Appeal was lodged out of time and without leave to do so. Consequently, the P.O is hereby upheld and the Appeal is hereby dismissed. It is so ordered. Each party to bear its own costs.

Right of Judicial Review as per Section 101 of the Act is open.

This Ruling is delivered on 08thFebruary 2017 in the presence of parties.

V.K.D. LYIMO, J. (RTD)

CHAIRMAN

MEMBERS:

1. MS. MONICA P. OTARU 

2. ENG. FRANCIS MARMO 