

IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY
AT DAR ES SALAAM

APPEAL CASE NO. 20 OF 2017-18

BETWEEN

M/S HUMPHREY CONSTRUCTION LTD.....APPELLANT

AND

PUBLIC PROCUREMENT REGULATORY

AUTHORITY (PPRA).....RESPONDENT

DECISION

CORAM

- | | | |
|------------------------------|---|-----------------|
| 1. Mrs. Rosemary A. Lulabuka | - | Ag. Chairperson |
| 2. Eng. Francis T. Marmo | - | Member |
| 3. Mr. Louis P. Accaro | - | Member |
| 4. Mr. Ole-Mbille Kissioki | - | Secretary |

SECRETARIAT

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

FOR THE APPELLANT

- | | | |
|----------------------------|---|--------------------------------|
| 1. Mr. Makarious J. Tairo | - | Advocate – Locus Attorneys |
| 2. Mr. Humphrey Soka | - | Managing Director |
| 3. Mr. Theophilus J. Kessy | - | Director |
| 4. Ms. Catherine E. Ringo | - | Legal Officer- Locus Attorneys |

FOR THE RESPONDENT

1. Ms. Agnes Mihayo Sayi - Senior Legal Officer - PPRA
2. Mr. Samwel Metili - Project Manager - NHC

This Decision was scheduled for delivery today 23rd November 2017, and we proceed to deliver it.

The Appeal was lodged by M/S HUMPREY CONSTRUCTION LTD. (hereinafter referred to as "the Appellant") against the PUBLIC PROCUREMENT REGULATORY AUTHORITY commonly known by its acronym PPRA (hereinafter referred to as "the Respondent").

The Appeal is against debarment order emanated from termination of Contract No. PA/066/2013-2014/HQ/W/42 for Proposed Construction of Commercial Building on Plot No. 51-71 Block "B" Mtukula-Misenyi District, Kagera Region (hereinafter referred to as "the Contract").

According to the documents submitted to the Public Procurement Appeals Authority (hereinafter referred to as "the Appeals Authority") and oral submission during the hearing, the facts of the Appeal may be summarized as follows:

On 14th January 2015 the Appellant and National Housing Corporation (NHC) signed the above contract which was to be executed within twelve months. The NHC by a letter dated 24th June 2016 informed the Appellant that they intend to terminate the contract due to his failure to resume to works. The Appellant replied to the NHC by his letter dated 14th July 2016 whereby amongst others, he admitted that he could not resume to work

site due to lack of cash flow. On 5th August 2016 the NHC terminated the contract. From there the Appellant heard nothing until 29th August 2017 when he read from the Procurement Journal the Notice of Intention to debar him. The notice showed that the intended debarment arose from termination of contract by NHC. It is further in record that, the Respondent by his letter dated 30th August 2017 required the Appellant to submit his defence in respect of the intention to debar him from participating in public procurement.

The Appellant acted upon the notice published in the Procurement Journal by challenging its procedural irregularities.

On 22nd September 2017, the Appellant replied to the Respondent's Notice of Intention to debar dated 30th August 2017. In the said letter the Appellant did not submit his defence; instead he narrated procedural irregularities in respect of the two notices issued by the Respondent.

On 25th September 2017, the Respondent wrote another letter to the Appellant insisting that they are required to submit their defense. On 18th October 2017 the Appellant informed the Respondent that they are unable to submit their defence due to procedural irregularities on the notice of intention to debar.

On 24th October 2017, the Respondent informed the Appellant that his company has been debarred from participating in the Public Procurement for a period of one year from 19th October 2017 to 18th October 2018.

Dissatisfied by the Respondent's decision to debar him, on 1st November 2017, the Appellant filed this Appeal to the Appeals Authority.

SUBMISSIONS BY THE APPELLANT

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

- i. That, the entire process of debarment starting from issuance of notice to the process of making a decision contravened the Act and its Regulations as follows.
 - a) The notice of intention to debar was issued to public instead of the same being issued to him directly. Thus the Respondent contravened Regulation 96(1) of the Public Procurement Regulations GN. No. 446 of 2013 (hereinafter referred to as GN. No. 446 of 2013) and that he tarnished the Appellant's image;
 - b) That Regulation 96(2) of GN. No. 446 of 2013 requires the notice to include facts constituting the grounds for debarment. To the contrary, the notice issued to the public stated that the proposed debarment arose from termination of contract by NHC without any further facts amplifying the proposal for debarment an act which denied the Appellant's right to defend.
 - c) That due to the violation of Regulation 96(1), the Appellant failed to comply with Regulation 96(4) of GN. No. 446 of 2013 which requires a tenderer to submit his defence within fourteen days from the date of receiving the notice;

- ii. That, the ground used by the Respondent to debar him has never been established; instead the decision to debar him was based on accusations submitted to the Respondent by NHC.
- iii. That, facts constituting the alleged breach of contract were not disclosed to the Appellant; such omission contravened the procedures and denied the Appellant's right to defend himself against the alleged breach of contract.
- iv. That, the Respondent's decision to debar the Appellant contravened the law for not containing summary of facts, findings and reasons for the decision which also contravene the principles of natural justice.
- v. That, the Respondent had no power to determine the debarment proposal of the Appellant submitted by the NHC on 21st August 2017, since the same was beyond the mandatory time frame stipulated by the law.

During the hearing, the Appellant's counsel insisted that both notices issued by the Respondent did not comply with the requirements of Regulation 96(1) and (2) of the GN. No. 446 of 2013 for lack of facts constituting the grounds. He elaborated further that information, evidence and documents for proposal of the debarment from the procuring entity should be served to the Appellant for him to prepare his defence. Failure of which infringes the principal of natural justice, hence the Appellant had nothing to respond to.

The Appellant's counsel further submitted that Regulation 98 of the GN. No. 446 of 2013 provides that the Respondent's decision should be in writing and contains summary of facts, findings and reasons for the decision, to the contrary; the Respondent's letter for debarment lacked the above three basic requirements.

Regarding timeframe within which debarment proposal was submitted, the Appellant's counsel submitted that, the 28 days within which the NHC ought to have submitted the debarment proposal had expired before the same had been lodged. The NHC submitted the debarment proposal a year later that is; 21st August 2017 after becoming aware of the circumstances leading to debarment to wit 5th August 2016 when the contract was officially terminated by NHC. The NHC in this regard contravened Regulation 94(1) of the GN. No.446 of 2013.

Finally the Appellant prayed for the following orders:-

- i. To nullify the debarment decision made by the Respondent;
- ii. To declare the Appellant free and/ or entitled to participate in public procurement proceedings;
- iii. The Respondent to notify all procuring entities that the Appellant is free and entitled to participate in public procurement proceedings;
and
- iv. To grant any other relief as it deems fair and just to grant.

THE REPLIES BY THE RESPONDENT

In response to the Appellant's grounds of Appeal, the Respondent replies may be summarized as follows;

That, the Notice of Intention to debar the Appellant which appeared in the Tanzania Procurement Journal was issued to both the Appellant and the general Public.

That, a separate notice to the Appellant was delivered to the Appellant's postal address and that it contained facts constituting grounds for debarment as stipulated under Regulation 96(2) of the GN. No. 446 of 2013.

That, the ground for debarment was established to the Appellant and he conceded vide his letter dated 14th July 2016, that he had a cash flow problems, thus failed to implement the contract.

That, the facts constituting the breach of the contract were disclosed to the Appellant by a letter dated 30th August 2017. Furthermore, the Appellant requested clarifications from the Respondent by his letter dated 8th September 2017 which was replied by the Respondent on 25th September 2017. Upon receiving the said letter the Appellant wrote another letter to the Respondent complaining about procedural irregularities in serving the notice of intention to debar him instead of defending his case on merits.

That, the Respondent communicated its decision to debar the Appellant by his letter dated 24th October 2017, which contains the summary of findings, facts and the reason thereof.

The Respondent submitted further that, Regulation 94(1) provides that debarment proposal shall be submitted within 28 days from the date of becoming aware of the circumstances giving rise to debarment as correctly submitted by the Appellant. However, as to when the NHC became aware is subjective on other deliberations made by them. In this matter the debarment proposal was submitted by NHC on 21st August 2017 when they officially became aware of the grounds emanated from the termination of the contract made on 5th August 2016.

Furthermore, Section 62 of the Act empower the Respondent to issue guidelines for better carrying out of the provisions of the Act, including guidelines for debarment.

Finally the Respondent prayed to the Appeals Authority for the following orders:-

- i. Dismissal of the Appeal in its entirety for lack of merits, since it has based on procedural irregularity which had not occasioned injustice; and
- ii. Any other reliefs the Appeals Authority deems fit and just to grant.

ANALYSIS BY THE APPEAL AUTHORITY

The Appeals Authority is of the view that the Appeal has two issues calling for determination, and these are:-

- 1.0 Whether the debarment of the Appellant was justified; and
- 2.0 What reliefs, if any, are the parties entitled to.

Having identified the issues, the Appeals Authority proceeded to determine them as follows;

- 1.0 Whether the debarment of the Appellant was justified

In resolving this issue the Appeals Authority revisited the documents submitted before it vis-a-vis the applicable law and observed that the NHC terminated the contract by a letter dated 5th August 2016 while the proposal for debarment of the Appellant was submitted to the Respondent on 21st August 2017. The Appeals Authority observed further that Regulation 94(1) of the GN. No. 446 of 2013 provides for timeframe within which a debarment proposal has to be submitted to the Respondent. The said provision is reproduced hereunder and reads as follows:-

94(1) "A person who wishes to submit a proposal for debarment of a tenderer to the Authority shall do so within twenty eight days of becoming aware of the circumstances or grounds which give rise to the debarment." (Emphasis added)

During the hearing, the Respondent was asked by member of the Appeals Authority to narrate the sequence of events from contract termination to final stage of debarment. In response thereof the Respondent submitted that, termination of contract was made on 5th August 2016 and handing over of site was on 22th August 2016. The proposal for debarment from the NHC was submitted on 21st August 2017. When asked further about the delay for submission of the proposal, the Respondent submitted that the delay for submission of the proposal by NHC was partly due to uncertainty of the grounds for debarment as provided by the law. Furthermore, the Respondent submitted that the NHC was not able to submit the proposal for debarment until they satisfied themselves that the said termination of the contract suffices for debarment of the Appellant. Although, looking at the proposal; it goes without saying that some days has lapsed.

The Appeals Authority disagrees with the Respondent's argument that the NHC was not certain on the grounds for debarment. It is so because in the letter for submission of the debarment proposal dated 21st August 2017, attached with debarment proposal submission form, the NHC indicated clearly that they became aware of the circumstances giving rise to the debarment on 24th June 2016 when they issued the Appellant a notice of intention to terminate the contract. The said letter was followed by termination of the contract letter dated 5th August 2016. The Appeals Authority concurs with the Appellant that the cause of action giving rise to the debarment of the Appellant arose on 5th August 2016 when the contract was terminated. Thus, the NHC ought to have submitted a proposal for debarment to the Respondent on or by 2nd September 2016

pursuant to Regulation 94(1) of the GN. No. 446 of 2013. To the contrary, the NHC submitted the debarment proposal on 21st August 2017 a year later.

The Appeals Authority finds the Respondent's act of debarring the Appellant basing on the proposal submitted far beyond the set time limit to have contravened the requirement of Regulation 94(1) of the GN. No. 446 of 2013 regardless of the validity of the grounds constituting the debarment.

The above notwithstanding, Appeals Authority further considered the Respondent's argument that the Act empowers them to issue guidelines which empower them amongst others to grant extension of time for the submission of the proposal out of time pursuant to Guidelines 6.1(b) and (c) of the Debarment Guidelines issued in 2016. The Appeals Authority revisited the cited guidelines and noted that, the submission of the proposal out of time is allowed upon submission of an application to do so and payment of respective fees to that effect. The Appeals Authority observed that neither an application was so filed nor payment of fees was made by NHC to that effect. The Respondent failed to produce any documentary evidence to substantiate compliance of the same. The only document submitted to the Appeals Authority is a letter from the NHC which indicates that the Respondent on 20th October 2016 wrote to them with regard to notification of the contract termination. The NHC replied on 21st August 2017 by submitting a debarment proposal attached with

debarment proposal submission form without any indication that there was an application for extension of time and the same was granted.

The Appeals Authority observed with surprise as to where the Respondent get powers to extend days that were provided for by the law. Assuming that the application for extension and payment of fees were properly made in accordance with the Respondent's Guidelines, the Appeals Authority finds that much as the Act and its Regulations that deal with debarment of tenderers does not empower the Authority to extend time for submission of proposal for debarment out of time. The issued guidelines for extension of time could not be used to supersede the law.

Accordingly, the Appeals Authority concludes the first issue that the debarment of the Appellant was not justified.

The above determined issue suffices to conclude this Appeal as all matters relating to the issuance of notice have been done out of time limit prescribed by the law. Therefore, the Appeals Authority would not proceed to determine other grounds of the Appeal raised by the Appellant, as the same were done out of time contrary to the requirement of the law.

2.0 What reliefs, if any, are the parties entitled to.

Taking cognizance of the findings above, the Appeals Authority is hereby upholds the Appeal and nullifies the Respondent's decision to debar the Appellant from participating in the public procurement for a period of one year from 19th October 2017 to 18th October 2018. The Appeal Authority

uplifts the debarment and orders the Respondent to communicate this order in the same manner the debarment was effected.

With regard to the prayer by the Respondent that the Appeal be dismissed in its entirety, the same cannot be granted since the Appeal has merit. Each party to bear own costs.

It is so ordered.

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

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

This Decision is delivered in the presence of the Appellant and in the absence of the Respondent this 23rd day of November, 2017.



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MRS.ROSEMARY A. LULABUKA
Ag: CHAIRPERSON

MEMBERS:

1. ENG. FRANCIS T. MARMO.....

2. MR LOUIS ACCARO