

**IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY
AT DAR ES SALAAM**

APPEAL CASE NO. 34 OF 2013-14

BETWEEN

MR. BENEDICTO S.B.MAHELA.....APPELLANT

AND

PUBLIC PROCUREMENT

REGULATORY AUTHORITYRESPONDENT

DECISION

CORAM

- | | |
|--------------------------------------|-----------------|
| 1. Hon. Augusta G. Bubeshi, J. (rtd) | -Chairperson |
| 2. Mr. Kesogukewe M. Msita | -Member |
| 3. Mrs. Nuru N.Inyangete | -Member |
| 4. Mr. Haruni S. Madoffe | -Member |
| 5. Mr. Ole-Mbille Kissioki | - Ag. Secretary |

SECRETARIAT

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

THE APPELLANT.

Mr. Benedicto S.B.Mahela - Consultant

FOR THE RESPONDENT.

1. Mr.Robert Kitalala -Head, Procurement Management Unit
2. Mr. Marco Samwel Maneno -Legal Officer
3. Mr. Fineas Manasseh -Procurement Supplies Officer
4. Ms. Giftness David -Director, Informationsion System

This decision was scheduled for delivery today 13th May, 2014 and we proceed to deliver it.

The appeal at hand was lodged by **MR. S. B. MAHELA** (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 said Appeal is in respect of Tender No. AE/018/2013-14/HQ/C/04 for the Provision of Individual Consultancy Services for Implementation of a System for Checking and Monitoring Procurement Activities in Tanzania. (hereinafter referred to as "**the tender**").

According to the documents submitted to the Public Procurement Appeals Authority (hereinafter referred to as "**the Appeals Authority**"), as well as oral submissions by the parties during the hearing, the facts of the Appeal may be summarized as follows:

The Respondent vide the East African Business Week News paper dated 17th-23th February, 2014, invited Individual Consultants to submit their Expression Of Interest (hereinafter referred to as "**the EOI**") and Curriculum Vitae (hereinafter referred to as "CV") for the tender.

The deadline for submission of the EOI and the CV's was 5th March, 2014, whereby thirty four EOI and CVs were received. However, the Appellant's EOI and CV were rejected on the ground that he submitted them after 10.00 am, which was the deadline for the submission.

Being dissatisfied by rejection of his EOI, on 6th March, 2014, the Appellant sought for administrative review with the Respondent's Accounting Officer.

On 20th March, 2014, the Respondent's Accounting Officer delivered his decision by dismissing the complaint for lack of merits. On the same date, the Respondent through an e-mail communicated his decision to the Appellant. On receipt of the Accounting Officer's decision, the Appellant replied to him contending that his decision was delivered beyond the time limit stipulated under the law; and that he was preparing to appeal to the next level.

On the 21st March, 2014, the Appellant lodged his Appeal to this Authority.

SUBMISSIONS BY THE APPELLANT

The Appellant's arguments as deduced from documents availed to this Authority, as well as oral submissions and responses to questions raised by the Members of the Authority during the hearing, may be summarized as follows;

That, on 4th March 2014, the Respondent issued EOI and detailed CV's for the tender comprising the Instructions to Consultants (ITC) and terms of reference (ToR).

That, on 5th March, 2014, at 09.45 am, the Appellant arrived at PPF tower building, where the Respondent's Offices are located, in order to submit his proposal to the Secretary of the Respondent's Tender Board.

That, there was a technical fault in the lift in the entire PPF tower building. The said problem remained unresolved for ten (10) minutes while the Appellant remained stranded in the lift, that is, from 09.46 to 09.55 am.

That, when the lift's fault was partially resolved, they were advised by technicians to walk upstairs to their respective destinations instead of using the lift.

That, the Appellant started walking from the 4th floor to the 8th floor, whereby he arrived at the office of the Respondent's Secretary of the Tender Board at 10.00 am. However, he could not find him. Upon asking about his whereabouts, he was advised by one member of Respondent's Procurement Management Unit that the Secretary had gone to room No. 5 in the same floor.

That, he proceeded to room No.5 and reached there at 10.01 am whereby, he signed the attendance sheet and his EOI together with his CV were received by the Secretary. However, the Secretary did not register the time and the date on which the said documents were received.

That, apart from the Secretary's failure to register his tender, the Appellant was not given a receipt which would have indicated the time on which his Expression of Interest and CV were received.

That, Clauses 5 and 6 of the EOI and detailed CVs read together with Clause 7 of the Instruction to Consultancy (hereinafter referred to as "**the ITC**") indicated that, the place for tenderers to submit their EOI and CV's was at the office of the

Respondent's Secretary to the Tender Board and not room No.5 of the 8th floor.

That, his EOI and the CV were submitted on time but the Secretary was not available to receive them for reasons best known to himself.

That, the change of the venue specified in Clauses 5 and 6 of the EOI and Clause 7 of the ITC was illegal, since, the said changes were not communicated to Consultants before the deadline for the submission of tenders.

That , the Respondent's failure to register and record his EOI and CV curtailed his constitutional right to participate in the tender contrary to Article 13 of the Constitution of the United Republic of Tanzania of 1977, as amended.

That, the refusal by the Respondent to register his tender discriminated him contrary to the requirement of Article 13(3) of the Constitution cited above.

That, the Respondent did not follow Regulation 13(3) and (4) of GN.NO.446 for changing the place for the submissions of the tenders without informing all tenderers to that effect.

That, the Respondent's change of place for the submission of the EOI was a deliberate move which intended to exclude other tenderers including the Appellant contrary to Article 18(1) of the Constitution.

That, the Respondent was not transparent in the tender receiving process contrary to Section 47(1) (a) and (b) of the Public Procurement Act No. 7 of 2011 (hereinafter referred to as "**the Act**").

That, the Respondent did not strive to achieve the highest standards of equity and breached the Appellant's basic rights provided for under Section 73(2) of the Act and Regulation 195(2) of GN.No.446 of 2013.

That, the technical faults in the lift was not intentional and that it was beyond human control.

That, he is dissatisfied with the integrity and fairness of the Respondent for failure to receive and open his tender.

That, the Respondent's Accounting Officer did not deliver his decision within fourteen days prescribed under Section 48(1) of the Act.

That, in view of the above, the Appellant thought that, his rights have been abrogated; and that, the law was not complied with by the Respondent.

The Appellant therefore, prayed for the following orders:

- i. That, the procurement proceedings be suspended pending determination of this appeal.
- ii. That, the receipt and opening of the EoI and detailed CV's be declared null and void.
- iii. That, the Appellant's rejection of EoI and detailed CVs be declared null and void.
- iv. That, the Appellant's EoI and detailed CV be opened and the same be included with other EoI and detailed CVs; and the same be considered as if it were opened on 5th March, 2014. OR

- v. That, the procurement proceedings be nullified and re-started afresh in a fair and transparent manner and give all consultants equal opportunity to compete in the tender as provided for under Section 47 of the Act.

- vi. That, he be compensated Tshs. 600,000.00 as appeal filing fees, transport and hotel charges as per the following breakdown.
 - a) Appeal filing fees Tshs. 120,000.00
 - b) Hotel charges and Transport costs Tshs. 480,000/-

- vii. Any other relief(s) the Appeals Authority deems fit to grant.

REPLIES BY THE RESPONDENT

The Respondent's arguments as deduced from documents availed to this Authority, as well as oral submissions and responses to questions raised by the Members of the Authority during the hearing, may be summarized as follows;

That, the facts that, the Appellant arrived at the Respondents office at 09:45 on 5th March, 2014 is known to himself and not the Respondent.

That, the assertion that, there was a technical fault in the lift within the building was speculative, since, the Respondent neither controls nor takes charge of the lifts.

That, the Appellant entered the Respondent's main entrance at 10:06 am and not 10:00 am as claimed, which as captured by the Respondent's script of the CCTV Camera. However, the Appellant did not follow proper procedures as a visitor, when he entered the Respondent's office. Rather, he purported to be familiar with **the** office.

That, it is true that, the Appellant signed the attendance form which showed the list of consultants who attended the tender opening ceremony but the Respondent did not receive his EOI and CV since they were submitted after the deadline.

That, the Appellant was informed by Respondent's officials that, he was late but he decided to put his tender on the table where

other tenders were opened. The Respondent however, could not open it since it was submitted late.

That, the procedures to issue a receipt which the Appellant wanted, would have been applicable only if the EOI would have been submitted within the deadline for the submission of the tenders. The said procedures are not applicable where the EOI is received after the deadline as per Section 73 (2) of the Act. Furthermore, the receipt is issued only when the envelopes containing the bids are too large to be placed in the tender box as per Regulation 195 (2) of GN.No.446 of 2013.

That, since, the Appellant's tender did not meet the deadline, then, there was no room for him to sign the submission form No. 8 as a record of receipt of his detailed CVs.

That, the Respondent's Accounting Officer delivered his decision within fourteen days stipulated under the law and that, the said decision was communicated to the Appellant on the same date on which it was delivered, that is on 20th March, 2014 through an e-mail.

That, Clause 5 of the EOI required consultants to submit their EOI to the Respondent's Secretary to the Tender Board, Wing 801, 8th floor, PPF Tower; and that the opening was to be done at the same address immediately after the deadline. Therefore, there was no change of venue as contended by the Appellant. However, even if there was such a change of venue as contended by the Appellant, such change could not have caused the Appellant's delay, since at the time the Appellant entered the Respondent's offices that is, 10.06 am, he was already out of time.

That, the Respondent did not violate Clauses 5 and 6 of the EOI and Clause 7 of the ITC as claimed, since the tender opening ceremony took place in room 5 which was within the address indicated for tender opening.

That, the Appellant's EOI was submitted after the deadline for submission and hence it was not considered and the same was subject to be returned to him unopened.

That, since, the law does not provide the time limit within which the late submitted tenders are to be returned unopened, the

Respondent was waiting for the finalization of the tender process, for the Appellant's tender to be returned.

That, the tender process has been suspended to await the outcome of this Appeal.

That, the Appellant's prayers for compensation are not justified and the same should not be granted.

The Respondent therefore, prayed for the dismissal of the Appeal in its entirety for lack of merits.

ANALYSIS BY THE AUTHORITY

Having gone through the documents submitted and having heard the oral submissions from parties, the Authority deemed necessary to frame the following issues;

1. Whether the Appellant's tender was submitted within the time limit provided for in the invitation to tender.

2. 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. Whether the Appellant's tender was submitted within the time limit provided for in the invitation to tender.

In resolving this issue, the Authority revisited the arguments by parties, the tender advertisement and the Instructions to Consultants vis-a-vis the Applicable law. In the course of doing so, the Authority observed that, Clause 7 of the Instruction to Consultants provided in no uncertain terms that, the proposals were to be submitted at the designated place for receipt not later than 10.00 am on 5th March, 2014.

The said Clause reads as hereunder;

Clause 8 “If you decide to submit a proposal, **it must be received at the place designated for receipt of proposal not later than 10.00 hours local time** on Wednesday 5th March, 2014”.

The Authority further revisited Clause 5 of the tender advertisement relied upon by the Appellant to ascertain as to what/where was the designated place for delivery of the tender. In doing so, the Authority observed that, the designated place provided for under Clause 7 of the Instructions to Consultants was the Respondent’s Secretary to the Tender in person and not his office or otherwise. For purposes of clarity the Authority reproduces the said Clause as hereunder;

Clause 5 “Interested individual consultants **are requested to submit written Expression of Interest**, one (1) original Detailed Curriculum Vitae (CV) and three (3) copies of the Detailed CV **in writing by 10.00 hours local time on Wednesday 5th March, 2014.** The Expression of Interest**and shall be submitted to the Secretary, PPRA Tender Board, PPF Tower, Wing**

**801, Junction of Ohio and Garden Avenue,
P.O.BOX 49 Dar es salaam". (Emphasis Added)**

From the above provisions, the Authority is of the considered view that, no specific room to deliver the tender was mentioned. Rather the Applicants were required to submit their tenders to an address and person/ officer, to wit, Secretary PPRA Tender Board, the said officer was to be found at PPF Tower Wing 801 Junction of Ohio and Garden Avenue, this means as is common practice in all public offices, any visitors' first point of call is at the reception desk. At the reception desk the visitor would be recognized and directed where specifically to go. In the Authority view since the Respondent did not indicate a specific room in which the Secretary of the Tender Board was going to be. It behoved upon the Appellant to report to the reception desk to be guided where exactly the Secretary to the Tender Board was to be. The Appellant misdirected himself by misinterpreting Secretary as indicated in Clause 5 above to mean the Secretary's office.

The Authority is of the further considered view that, the Appellant's act of going to the Secretary of the Tender Board's office without an instruction to that effect or a directives from the Respondent's reception desk was in contravention of the

instructions contained in the tender advertisement, the requirement of the Expression of Interest and the Instructions to the Consultants cited above.

The Authority hastens to observe that, the Appellant conceded both in his Statement of Appeal and during the hearing of the Appeal that he submitted his tender to the Secretatry of the Tender Board at 10.01 am instead of 10.00 am. In view of this, the Appeals Authority has no doubt that, the Appellant's EOI and his CV were submitted after the time limit set by the Respondent.

Further more the Respondent took time to show CCTV script to prove that, the Appellant entered their premises at 10.06 am. The Appeals Authority studied tha said script closely. It is the Authority's observation in this respect that, the above script did not provide sufficient proof with respect to the time that the Appellant entered the Respondent's premises. All it showed was the Appellant coming from somewhere within the Respondent's premises and proceeding to the reception desk at 10.06 am.

With respect to the Appellant's claim that his delay was caused by defects in the lift at the Respondent's premises, he confessed

that this is not anybody's fault. Even if the Respondent was responsible for the state of the lifts, the Appeals Authority is of the considered view that, the Appellant as an experienced Consultant as claimed by himself during the hearing, ought to have exercised due caution and reasonableness in planning to deliver his tender by giving himself ample time and space so as to avoid being caught in awkward and unpredictable circumstances as it happened in this case.

The Authority wishes to enlighten the Appellant that, although the Respondent did not issue a receipt on receiving his Expression of Interest to show time in which the said tender was received, or the Respondent's failure to indicate the time on the Appellant's envelope, the said anomalies could not in themselves negate the fact that, his tender was submitted beyond the time provided for, under the law.

In view of the above findings, the Authority's conclusion with regard to the first issue is that the Appellant's tender was not submitted within the time limit provided for in the invitation to tender

2. To what reliefs, if any, are the parties entitled to.

Having resolved the issue in dispute, the Authority considered the prayers by the parties.

To start with, the Authority considered the prayers by the Appellant cited above and observed that, since he did not submit his tender on time as specified by the Respondent; and since the rejection for receipt of his tender was justified, the Authority rejects his prayers in their entirety for lack of merits.

With regard to the prayer by the Respondent that, the Appeal be dismissed for lack of merits, the Authority agrees with the Respondent based on its findings and conclusion on the first issue above.

Accordingly, on the basis of the aforesaid findings, the Authority dismisses the Appeal for lack of merits and orders each party to bear their own costs.

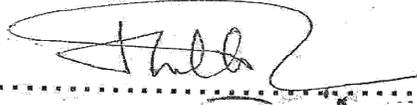
Right of Judicial Review as per Section 101 of the PPA/2011 explained to parties.

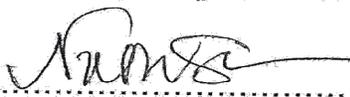
Decision delivered in the presence of the Appellant and in the Respondent this 13th May, 2014.



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JUDGE (rtd) A. BUBESHI
CHAIRPERSON

MEMBERS:

1. MR. K.M.MSITA.....

2. MRS. NURU.N.INYANGETE.....

3. MR. H.S.MADOFFE.....