

IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY
AT DAR ES SALAAM
APPEAL CASE NO. 35 OF 2018-19
BETWEEN
M/S RICH JUNIOR ENGINEERING
COMPANY LIMITEDAPPELLANT
AND
TANZANIA RURAL AND URBAN ROADS AGENCY....RESPONDENT

DECISION

CORAM

- | | |
|-------------------------------------|----------------|
| 1. Hon. Justice (rtd) Souda Mjasiri | - Chairperson |
| 2. CPA. Fredrick Rumanyika | - Member |
| 3. Dr. Leonada Mwangike | - Member |
| 4. Ms. Florida Mapunda | - Ag.Secretary |

SECRETARIAT

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

FOR THE APPELLANT

- | | |
|-----------------------------|--------------------------------|
| 1. Mr. Audax V. Kahendaguza | -Advocate, Auda & co. Advocate |
| 2. Mr. Pascal Mshanga | -Advocate, Auda & co. Advocate |
| 3. Eng. Richard M. Meela | - Managing Director |

THE RESPONDENT

1. Mr. Meleck Y. Silaa -Regional coordinator -TARURA, Kilimanjaro
2. Mr. Shaban H. Mdagano -Head of Legal Services - TARURA
3. Mr. Baraka L. Mtebe -Procurement Officer- TARURA, Kilimanjaro
4. Mr. Maximillian F. Kabairuka-Chairman, delegated, TARURA Tender Board- Kilimanjaro
5. Mr. Mohamed Msemu -Legal Officer-TARURA, Kilimanjaro

This Appeal was lodged by M/s Rich Junior Engineering Company Limited (hereinafter referred to as "the Appellant") against the Tanzania Rural and Urban Roads Agency commonly known by its acronym TARURA (hereinafter referred to as "the Respondent"). The Appeal is in respect of Tender No. AE/092/2018/2019/KLI/W/46 for the Construction of Box Culvert at Kyarongo River with access Roads along Kifura- Orera (340996) Feeder Road (hereinafter referred to as "the Tender"). The Tender was conducted using National Competitive Bidding method specified under the Public Procurement Act, No. 7 of 2011 as amended (hereinafter referred to as "the Act") and the Public Procurement Regulations GN. No. 446 of 2013 as amended (hereinafter referred to as "GN. No. 446 of 2013").

After going through the record of appeal submitted to the Public Procurement Appeals Authority (hereinafter referred to as "the Appeals Authority"), the background of the Appeal may be summarized as follows:

The Respondent through the Daily News newspaper, Public Procurement Regulatory Authority's Journal and TARURA Website of 27th November 2018 invited tenderers to participate for the Tender. The deadline for the submission of tenders was set for 11th December 2018, whereby eighteen tenders were received.

Tenders were then subjected to evaluation which was conducted into three stages, namely; preliminary, detailed and post qualification. During preliminary evaluation one tender was disqualified for being found non responsive to the requirements of the Tender Document. The remaining seventeen tenders were subjected to detailed evaluation. All tenders were found to be compliant and were subjected for ranking of their evaluated prices.

According to the record, the first, second and third ranked tenderers were post qualified and found to be non responsive to the requirements of the Tender Document. Consequently, the fourth ranked tenderer M/s Rich Junior Engineering Company Limited (the Appellant) was successfully post qualified and the Evaluation Committee recommended that it be awarded the Tender at a contract price of TZS. 219,704,750/- VAT exclusive. The Tender Board at its meeting held on 25th January 2019 disapproved the award recommendation for the reason that there were allegations against the tenderer for submitting a false document in the previous Tender No.AE/092/2017-18/SMDC/W/08/LOT 8 for Rehabilitation of Msanga-Chome road floated by the Respondent in the year 2017/2018. Thus, the Tender Board referred the matter to the Accounting Officer for the status of the said allegation.

On 1st February 2019, the Respondent's Accounting Officer through its letter reference No. TRR/KIL.REC.CF.20/1/01 requested the Prevention and Combating of Corruption Bureau (PCCB) to avail its office with the status of investigation in relation to the allegation that was made against the Appellant on 21st May 2018. The PCCB vide a letter ref. No. PCCB/KIL/8/7/VOL/XXXII/218 dated 4th February 2019 informed the Respondent that it would avail it the results of the investigation once finalized.

The Tender Board at its meeting held on 8th February 2019, deliberated on the matter after it had received the Accounting Officer's comments and resolved that the Tender be re-evaluated. Therefore, it returned the report to the Procurement Management Unit (PMU) for re- evaluation. It is on record that the Evaluation Committee opted to go for the fifth ranked tenderer M/s JHS Enterprises Ltd. Thereafter, the Tender Board on 15th February 2019 approved the award recommendation through a circular resolution.

The Respondent through its letter dated 25th February 2019, informed the Appellant that it intends to award the Tender to M/s J.H.S. Enterprises Ltd. The Appellant was further informed that its bid was not successful because of the allegations pending at the PCCB.

Dissatisfied, on 1st March 2019 the Appellant applied for administrative review to the Respondent, challenging the reason for its disqualification. On 4th March 2019, the Respondent informed the Appellant that the procurement process had been suspended pending determination of the complaint. However, it did not respond to the complaint. Consequently,

on 19th March 2019, the Appellant filed the Appeal to this Appeals Authority.

Upon receipt of notification of the Appeal, the Respondent raised a preliminary objection on two points of law that is:-

The Appeal is pre-mature and incompetent:-

- (a) For failure of the Appellant to submit his complaints or application for administrative review to the Accounting Officer to determine the dispute between the Procuring Entity and the tenderer, the Appellant herein, pursuant to Section 96 of the Act and Regulation 105(1) of GN. No.446 of 2013; and
- (b) The Appellant has misapplied the provisions relating to application for administrative review in responding to the notice of intention to award the contract issued to the tenderers contrary to Regulation 105(2) of the GN. No. 446 of 2013.

In that regard, the Appeals Authority asked the parties to address it on both the preliminary objections and the substantive appeal.

THE RESPONDENT'S SUBMISSIONS ON THE PRELIMINARY OBJECTION (PO)

Regarding the first PO that the Application for administrative review is premature; the Respondent submitted that, the Appellant failed to submit an application for administrative review to the Accounting Officer pursuant to Section 96(4) of the Act. The Respondent argued further that TARURA is established under GN. No. 211 of 2017, according to the said Government Notice, the Accounting Officer has been defined to

mean the Chief Executive Officer. The Appellant's application for administrative review was submitted to the Regional Coordinator who is not the Accounting Officer of the Respondent. The Respondent's argument was based on Regulation 47(c) of GN. No. 446 of 2013 which provides that a complaint is not among the matter to be delegated, thus the Appellant ought to have lodged the complaints to the Accounting officer and not the delegated Regional Coordinator. Therefore, the Appellant failed to abide with the requirement of Regulation 47 of GN. No.446 of 2013.

In relation to the second PO, the Respondent submitted that the Appellant has misapplied the provision of Regulation 105 (2) of GN. No. 446 of 2013 in its application for administrative review. The Respondent argued that the Appellant submitted an application for administrative review and not a complaint. Thus, it did not follow the procedure provided for under Regulation 105(2) of GN. No. 446 of 2013. The Appellant ought to have filed the complaint and not an application for administrative review. According to the Respondent, a complaint and an application for administrative review were two different things. Therefore, the Respondent prayed for the dismissal of the Appeal with costs, since the Appellant failed to comply with the procedure of filing a complaint.

REPLY BY THE APPELLANT ON THE PRELIMINARY OBJECTIONS

On the first PO, the Appellant argued that Mr. Meleck Silaa, the Regional Coordinator- TARURA Kilimanjaro had identified himself throughout the Tender process as the Accounting Officer. His acts as an Accounting Officer were also signified by the Notice of Intention to award and the Respondent's letter which suspended the procurement process after the

Appellant lodged a complaint to him. The same person signed the notice to award which was issued under Section 60(3) of the Act.

In addition, the Appellant's counsel argued that the Notice of Intention to award did not indicate that the procurement functions were delegated to the Regional Coordinator. The Appellant argued further that the Respondent's 1st PO has been raised as a means of intending to deny the Appellant access to justice. According to Rule 24(2) of the Public Procurement Appeals Rules, Government Notice No 411 of 2014 as Amended (hereinafter referred to as "the Appeals Rules") which states that, the Appeals Authority shall use little formalities and technicalities in its proceedings. Therefore, the Respondent is not allowed to use such technicality. Thus, the Respondent's assertion of delegated powers is not true. In concluding his arguments, the Appellant's advocate stated that, the PO so raised is not a pure point of law since it calls for some facts for the same to be proved.

With regard to the second PO on misapplication of Regulation 105 (2) of GN.No.446 of 2013, the Appellant argued that, the Respondent's PO is a pure play of words.

The counsel submitted further that, there is no format of drafting a complaint or application for administrative review by the aggrieved bidder. He referred to Section 88(4) of the Act that refers to a complaint and administrative review. The Appellant also referred to Section 39 of the Interpretation of Laws Act, Cap 1, which provide that words in subsidiary regulation shall have the same meaning as the main Act. The complaint is lodged to the Procuring Entity for it to be reviewed; the Respondent is estopped from saying that a review is different from a

complaint. The Respondent's own words in the suspension letter is an indication of the facts that the words are interchangeably used. Finally the Appellant prayed that the PO is misconceived and should be dismissed with costs.

In his rejoinder, the Respondent's counsel submitted that the Appellant has failed to submit whether it complied with the procedure or not. Also that, the law under Regulations 105(3) of GN.No.446 of 2013 provides what should be contained in an application for administrative review.

ANALYSIS BY THE APPEALS AUTHORITY ON THE PRELIMINARY OBJECTIONS

In relation to the first PO, that is the Appeal is pre-mature before the Appeals Authority. We took cognizance of the arguments by the parties and observed that the PO does not fall under the position of the law as stated in *Mukisa Biscuit Manufacturing Company Ltd v. West End Distributors Ltd.* (1969) EA 696. It was held that:

"A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained."

The PO so raised needs the Appeals Authority to ascertain the facts for the same to be substantiated, since the nature of the objection centers on the delegation of authority. Therefore, it is of the settled view that the same is not a pure point of law and has no basis.

On the second PO that is the Appellant has misapplied the provision relating to application for administrative review, the Appeals Authority revisited Sections 60(3), 88(5), 96(1) of the Act as well as Regulation 105(1)(2) of the GN. No.446 of 2013. It was observed that complaint and application for administrative review have been used interchangeably to mean one and the same thing. A dissatisfied tenderer is required under the law to lodge complaints to the Respondent's Accounting Officer within the time limit prescribed by the law for review by the Accounting Officer. The Respondent's letter dated 4th March 2019 to the Appellant stated that the Tender has been suspended pending determination of the complaint or appeal, thus the Respondent's argument has no basis. The Appeals Authority is of the view that, since the application for review to the Respondent and the Appeal thereafter were filed within the time prescribed by the law then the PO has no basis and is hereby dismissed.

In relation to the substantive appeal the parties made the following submissions:-

SUBMISSIONS BY THE APPELLANT ON THE MERITS OF THE APPEAL

The Appellant's grounds of appeal may be summarised as follows:

1. That, the Respondent grossly erred in fact and law for disqualifying the Appellant's tender on the ground that there was an ongoing allegation to the PCCB, while such accusation was just a mere allegation and the appellant has not been found guilty of the alleged offence. During the hearing the Appellant's counsel argued that, one is presumed innocent until proven guilty pursuant

to Article 13(6)(b) of the Constitution of the United Republic of Tanzania 1977 as amended. Thus the Respondent's decision was based on an allegation that had not yet been proved.

2. That, the Respondent erred in law for disqualifying the Appellant's tender based on the ground that there was an allegation made to the PCCB while it had already met all the required specifications provided in the Tender Document pursuant to Regulations 203(1)(2), 204(1) and (2) (a)-(k) of the GN. No. 446 of 2013. The said Regulations provide that the tender evaluation shall be consistent to the terms and conditions under the criteria provided in the Tender Document. The Respondent is not allowed to use extrinsic evidence in evaluating the tender as per Regulation 206(1) of the GN.No.446 of 2013. The Appellant stated that allegations to the PCCB were not stated in the Tender Document. He referred to Appeal Case No. 26 of 2013/14 between *Hammers Incorporation Limited and Cashwenut Industry Development Trust Fund*, whereby the Appeals Authority was of the view that, *the Appellant's disqualification using criteria which was not stated in the Tender Document contravened the law*. The Appellant prayed to the Appeals Authority to adopt the decision since it was wrong for the Respondent to disqualify the Appellant after it had complied with all the requirements stated in the Tender Document. The reference to the allegation pending before the PCCB came to the knowledge of the Appellant upon receiving the Notice of Intention.

3. That, the Respondent relied on allegation of a commission of an undisclosed offence.
4. That, the allegation to the PCCB could not be used to disqualify the tenderer, since the PCCB is not an authority vested with powers to deal with tenderers behaviour in the tendering process. The said power has been vested to the Public Procurement Regulatory Authority and Contractors Registration Board. The said authorities have procedures to be complied with including tenderers right to be heard and the decision of the said authorities could be challenged by a dissatisfied tenderer.
5. Finally, the Appellant prayed for the following orders:-
 - i. To annul the Respondent's decision to disqualify the Appellant's tender;
 - ii. To order the Respondent to award the Tender to the Appellant;
 - iii. To order the Respondent to pay costs on this Appeal to the Appellant as per the following breakdown:
 - (a) Appeal filing fees TZS. 300,000/-
 - (b) Legal consultation, drafting, preparation and dispatching two letters @ TZS. 200,000/- = 400,000/-
 - (c) Legal fees TZS. 8,000,000/-
 - (d) Return air tickets from Kilimanjaro to Dar es Salaam for two persons TZS. 1,000,000/-
 - (e) Expected time to stay in Dar es Salaam on the hearing date and to wait for determination of the appeal inclusive 2 days @TZS. 80,000= TZS. 800,000/-
 - iv. The Respondent to pay general damages at a tune of TZS. 20,000,000/-

- v. Any other remedy the Appeals Authority deems fit to grant.

REPLY BY THE RESPONDENT

The Respondent's reply to the grounds of appeal may be summarised as follows:

The counsel for the Respondent argued that, there is a pending allegation against the Appellant at PCCB for submitting a false document in relation to Tender No.AE/092/2017-18/SMDC/W/08/LOT 8 for Rehabilitation of Msanga-Chome road floated by the Respondent in the year 2017/2018. According to the counsel for Respondent's, the Appellant submitted a forged bank statement in the previous tender alleging to have an account in a certain bank with some amount of money, but when it sought for clarification from the said bank, it was stated by the Bank that the appellant did not have the specified amount of money. The Respondent submitted further that when the Evaluation Report was submitted to the Tender Board for deliberation, one member recollected that there were allegations made to the PCCB against the proposed tenderer for submitting a false document in relation to the previous tender (supra). The counsel submitted further that the Tender Document provided criteria for tender evaluation, but the Tender Board and the Accounting Officer has power to do what they did pursuant to Section 41 of the Act.

That, the Respondent had powers to ascertain on the integrity of the tenderers who participated in the tender, because it cannot award a tender to a bidder who lacks integrity even if the same is not mentioned in the Tender Document. In so doing, the Tender Board used its

independent power and it ordered the Accounting Officer to seek the status of the investigation from the PCCB.

That, the Tender Board referred the Evaluation Report to the PMU for re-evaluation on what has been deliberated.

In relation to the Appellant's remedies, the Respondent submitted that, the remedies claimed by the Appellant in part 5 (i) and (ii) of the statement of appeal are not among the remedies the Appeal Authority is empowered to issue and those remedies claimed under Part 5(iii) have no supporting documents.

Finally, the Respondent prayed for the following orders:

- i. The appeal be dismissed for lack of merits;
- ii. The Appellant to compensate the Respondent a sum of TZS. 10,000,000/- being costs incurred in this matter; and
- iii. Any other relief the Appeals Authority deems fit to grant

ANALYSIS BY THE APPEALS AUTHORITY

The Appeals Authority having gone through the record of appeal, Tender proceedings including various documents and the oral submissions by the parties, is of the view that the Appeal is centred on two main issues for determination. These are:-

1. Whether the Appellant's disqualification was justified, and
2. What reliefs, if any, are parties entitled to

Having identified the issues, the Appeals Authority proceeded to resolve them as hereunder:-

1. Whether the Appellant's disqualification was justified

In resolving this issue the Appeals Authority revisited the Evaluation Report, Minutes of the Tender Board meeting and the Tender Document vis-a-vis the applicable law. In doing so, it was observed that the Appellant was successfully post qualified and recommended for award of the Tender after the first, second and third lowest evaluated bidders were found to be non responsive to the requirement of the Tender Document. However, when the findings were tabled to the Tender Board for its deliberation, it disapproved the recommendations for the reason that there were allegations against the Appellant for submitting a false document in the previous financial year 2017/2018, in respect of Tender No.AE/092/2017-18/SMDC/W/08/LOT 8 for Rehabilitation of Msanga-Chome road, the matter which is under investigation by the PCCB.

During the hearing Members of the Appeals Authority asked the Respondent to clarify if the PCCB findings in relation to the allegation have been concluded and whether or not the matter has been reported to the PPRA in order for the appellant to be blacklisted. The Respondent indicated that the matter has not been concluded and no information was provided that the matter was reported to PPRA. The Appeals Authority is of the considered view that the allegation of submitting a false document is a serious one and raises the issue of integrity in respect of the party in question. However no conclusive findings were presented by the Respondent on the said allegations. The Appeals Authority observed further that the letter from the PCCB indicated that the matter was still under investigation. The Appeals Authority is therefore not in a position to reach a conclusion on the allegations made. If the findings were conclusive under a due diligence exercise or

the appellant was charged and convicted with a criminal offence the matter would have been reported to PPRA for necessary action. Sections 83(1) (2)(a)(b)(3)(a) and 62(1)(3)(a) of the Act provide as follows:

“S. 83 (2) Where a procuring entity is satisfied, after due diligence, that any person or firms to which it is proposed that a tender be awarded, has engaged in fraudulent, collusive, coercive or obstructive practices in competing for the contract in question, the procuring entity shall-

(a) reject a proposal for award of such contract; and

(b) report any person or tenderer, including its directors to the Authority for debarment and blacklisting in accordance with section 62 of the Act.”

(3) Where a procuring entity is satisfied after determination by a court or Appeals Authority, as the case may be, that corrupt, fraudulent, collusive, coercive or obstructive practices were engaged in by any person or tenderer in procurement, award of contract or the execution of that contract, the procuring entity shall-

(a) report any person or tenderer, including its directors, to the Authority for debarment and blacklisting in accordance with section 62 of the Act

“S. 62(1) The Authority shall have power to blacklist a tenderer for a specified time from participating in public procurement proceedings and notify all procuring entities on such actions.”

(3) A tenderer shall be debarred and blacklisted from participating in public procurement or disposal proceedings if-

(a) fraud or corrupt practices is established against the tenderer in accordance with the provisions of this Act."

Accordingly, the Appeals Authority's conclusion with regard to the first issue is that the Appellant's disqualification was not justified given the circumstances.

2. What reliefs, if any, are parties entitled to

The Appeals Authority considered the prayer by the Appellant that the Tender be awarded to it and observed that after taking serious consideration on the re-evaluation process and in view of the fact that the whole process of re-evaluation which led to the award of the tender to J.H.S Enterprises Ltd is not clear and no report is available to ascertain what transpired, the Appeals Authority is of the firm view that a re-tendering process should take place.

Given our findings on first issue, the appeal is hereby allowed. The tender process should re start afresh. We make no order as to costs.

It is so ordered.

This Decision is binding and can be enforced 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 the Respondent this 24th day of April 2019.



HON. JUSTICE (RTD) SAUDA MJASIRI
CHAIRPERSON

MEMBERS:

1. CPA. FREDRICK RUMANYIKA



2. DR. LEONADA MWAGI KE.....

