

IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY

AT DAR ES SALAAM

APPEAL NO. 37 OF 2018-19

BETWEEN

M/S PERFECT INFOTECH INTERNATIONAL

LIMITEDAPPELLANT

AND

DAR ES SALAAM WATER &

SEWERAGE AUTHORITY1ST RESPONDENT

M/S EASY TRACK SOLUTIONS LIMITED.....2ND RESPONDENT

RULING

CORAM

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| 1. Hon. Justice (rtd) Sauda Mjasiri | - | Chairperson |
| 2. Dr. Leonada Mwangike | - | Member |
| 3. Adv. Rosan Mbwambo | - | Member |
| 4. Ms. Florida Mapunda | - | Ag. Secretary |

SECRETARIAT

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

FOR THE APPELLANT

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|---------------------------|---|-------------------------|
| 1. Mr. Ebenezer G. Msuya | - | Managing Director |
| 2. Mr. Albino M. Simbilla | - | Director |
| 3. Mr. Jimmy Mdeka | - | Corporate Sales Manager |

FOR THE 1ST RESPONDENT

- | | | |
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| 1. Ms. Neema Mugassa | - | Legal Officer |
| 2. Ms. Hellen Lubogo | - | Director of Procurement |

FOR THE 2ND RESPONDENT

- | | | |
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| 1. Mr. Ali Sumar | - | General Manager |
| 2. Mr. Yassin Maka | - | Advocate for the second Respondent |

The Appeal was lodged by M/s Perfect Infotech International Limited (hereinafter referred to as "the Appellant") against the Dar es Salaam Water & Sewerage Authority (hereinafter referred to as "the 1st Respondent") and M/s Easy Track Solution Limited (hereinafter referred to as "the 2nd Respondent"). The Appeal is in respect of Tender No.AE-033/2018-2019/G/18 for Supply and Installation of Fleet Management System (hereinafter referred to as "the Tender").

After going through the records submitted by the parties to the Public Procurement Appeals Authority (hereinafter referred to as "the Appeals Authority"), the background of the Appeal can be summarized as follows:-

The Tender was conducted through the Public Procurement Act 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").

On 13th December 2018 the 1st Respondent vide the Daily News and Uhuru newspapers invited interested eligible tenderers to submit their bids with respect to this Tender. The deadline for submission of tenders was set for 7th January 2019 whereby three tenders from M/s Advanced Engineering Solutions Limited, the 2nd Respondent and the Appellant were received.

The received tenders were opened and thereafter subjected to evaluation which was conducted into three stages namely Preliminary, Technical and

Financial Evaluation. The three tenders were found to be responsive to all stages of evaluation and were subjected to price comparison. During that stage, the 2nd Respondent was found to have quoted the lowest evaluated price and were ranked the first. Thus, it was recommended for award of the Tender at a contract price of Tanzanian Shillings One Hundred Seventy Nine Million Seven Hundred Thousand (179,700,000.00) VAT inclusive. The Tender Board through Circular Resolution No. 268 of 2018/2019 approved the award of the Tender to the 2nd Respondent as recommended by the Evaluation Committee.

On 7th March 2019, the 1st Respondent informed all the tenderers, including the Appellant its intention to award the Tender to the 2nd Respondent. Upon receipt of such notification the Appellant on 8th March 2019 requested to be informed reasons for its disqualification. It also questioned the validity of the award proposed to the 2nd Respondent. On 14th March 2019, the 1st Respondent responded to the Appellant's concerns, by informing it that its tender was found to be substantially responsive, save it could have not been awarded the Tender as its price was higher and it was ranked the third. The Appellant was also informed that, the 2nd Respondent was found to have submitted the lowest evaluated tender, thus it was recommended for award of the contract. The Appellant was not satisfied with the responses from the 1st Respondent, thus lodged this Appeal on 25th March 2019.

During the hearing of this Appeal and before the parties proceeded to argue the appeal on merits, they were informed by the Members of the Appeals Authority that there is a point of law in relation to the competence of the appeal, which needed to be determined first. This is whether or not the appeal was properly before the Appeals Authority given the non-compliance with the review mechanism process provided under the Act. Therefore, it called upon the parties to address it on the said point of law before hearing the substantive Appeal.

SUBMISSIONS BY THE APPELLANT ON THE POINT OF LAW

The Appellant contended to have submitted its Appeal as per the requirement of the law. In support of its argument, it contended that after receipt of the notice of intention to award, it requested the 1st Respondent to avail it reasons that led to its disqualification and grounds that led to the award of the tender to the 2nd Respondent. The request was made on 8th March 2019 and the 1st Respondent replied on 14th March 2019. The 1st Respondent indicated that the Appellant was not proposed for award of the Tender for having quoted a higher price and the 2nd Respondent was found to have the lowest evaluated bid, thus it was proposed for the award of the Tender. The Appellant was not satisfied with responses provided by the 1st Respondent, thus opted to file this Appeal.

Members of the Appeals Authority asked the Appellant to clarify if the letter written to the Respondent on 8th March 2019 was a proper complaint in terms of Section 96 of the Act read together with Regulation 105 of GN. No. 446 of 2013. Having considered the requirement of the mentioned provisions, the Appellant conceded to have not filed a complaint to the Respondent. It stated that immediately after receipt of the notice of intention to award it requested to be informed reasons for its disqualification. And after receipt of the said reasons it lodged the Appeal directly to the Appeals Authority. Thus, the Appeal was lodged before a complaint was filed to the Respondent's accounting officer. The Appellant conceded that the appeal has been filed prematurely and that an essential step was omitted.

REPLY BY THE RESPONDENTS ON THE POINT OF LAW

Counsel for both Respondents stated that, since the Appellant had conceded that this Appeal has been filed prematurely for failure to exhaust the review procedures as provided by the law; they prayed that the Appeal be dismissed with costs.

ANALYSIS BY THE APPEALS AUTHORITY

The Appellant readily conceded to have lodged the Appeal prematurely for failure to exhaust the procurement review process. Under the law, a tenderer who is dissatisfied with a procurement process is required to submit a complaint to the accounting officer of the respective procuring entity pursuant to Section 96 of the Act read together with Regulations 105 and 106 of GN. No. 446 of 2013. Regulation 105 (3) provides guidance on what should be contained in the complaint or application for administrative review. This includes details of the disputed tender process, provision of the law or that of the Tender Document which have been breached and remedies sought. Section 96 and Regulation 106 provide guidance on what should be done by the accounting officer after receipt of the complaint and this imposes an obligation to issue a decision within seven working days. A tenderer who is then dissatisfied with the decision of the accounting officer or if the accounting officer fails to issue a decision within the specified time limit, is allowed by virtue of Sections 96(7) and 97(2) of the Act to lodge an Appeal to the Appeals Authority.

From the record of this Appeal, it is crystal clear that the Appellant after receipt of the notice of intention to award did not lodge a complaint to the Respondent's Accounting Officer in terms of Section 96 and Regulation 105 of GN. No 446 of 2013. The Appellant's letter dated 8th March 2019 to the Respondent indicated that it only sought to be informed reasons for its disqualification and grounds that led the award to be proposed to the 2nd Respondent. The Appellant was required after being served with reasons for its disqualification on 14th March 2019, to lodge a formal complaint to the Respondent's Accounting Officer pursuant to Section 96 of the Act and Regulation 105. To the contrary, the Appellant lodged its Appeal directly to the Appeals Authority.

The Appellant's act of lodging an Appeal directly to the Appeals Authority before submitting a complaint to the Respondent's accounting officer contravened the requirement of the law.

The Appeals Authority is of the settled view that, the Appeal was lodged prematurely and the same cannot be entertained.

Therefore, the Appeal is hereby dismissed.

As the point of law was raised *suo motu* by the Appeals Authority, each party is to bear its own costs. Order accordingly.

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

This Ruling is delivered in the presence of the parties this 30th day of April 2019.



HON. JUSTICE (RTD) SAUDA MJASIRI
CHAIRPERSON

MEMBERS:

1. DR. LEONADA MWAGIKE 

2. ADV. ROSAN MBWAMBO 