

IN THE  
PUBLIC PROCUREMENT APPEALS AUTHORITY  
AT DAR ES SALAAM.

APPEAL CASE NO. 44 OF 2014-15

BETWEEN

M/S MKONGOWO TRADING COMPANY LTD.... APPELLANT

AND

TWIGA BANCORP LTD.....RESPONDENT

RULING

CORAM

- |                                     |   |               |
|-------------------------------------|---|---------------|
| 1. Hon. Vincent K.D Lyimo, J. (rtd) | - | Chairman      |
| 2. Mrs. Rosemary A. Lulabuka        | - | Member        |
| 3. Mr. Louis P. Accaro              | - | Member        |
| 4. Eng. Aloys J. Mwamanga           | - | Member        |
| 5. Mrs. Toni S. Mbillinyi           | - | Ag. Secretary |

SECRETARIAT

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

#### FOR THE APPELLANT

1. Mr. Respicius Ishengoma - Advocate, BIN Attorneys
2. Mr. Peter R. Ngowo - Managing Director

#### FOR THE RESPONDENT

1. Mr. Daniford Chuchuka - Legal Counsel, Twiga Bancorp
2. Mr. Deus Sangu - Head, Procurement Management Unit.

#### FOR THE OBSERVER

1. Mr. Dickson R. Ituwe – General Manager, Mapocho General Trading Co
2. Mr. Joel R. Kajitueli - Legal Officer, Mapocho General Trading Co

This Ruling was scheduled for delivery today 12<sup>th</sup> June, 2015 and we proceed to do so.

This Appeal was lodged by M/s MKONGOWO TRADING COMPANY LIMITED (hereinafter referred to as “the Appellant”) against the TWIGA BANCORP LIMITED (hereinafter referred to as “the Respondent”) in respect of Tender No. PA/099/2015/G/02 floated by the Respondent for Supply of Bank Printed Materials (hereinafter referred to as “the tender”).

The Respondent upon receiving notification of the Appeal and as he was required to submit written replies, the Respondent raised two points of preliminary objection to wit;

a) That this Appeal is bad and untenable in law for being brought prematurely before this honourable Authority; and

b) That this Appeal is hopelessly time barred

In that regard, members of the Authority were obliged to resolve the Preliminary Objection so raised before addressing the substantive appeal.

In order to appreciate the nature of the contentions under the Preliminary Objection, the Public Procurement Appeals Authority (hereinafter referred to as "the Appeals Authority"), considered the written submissions as well as the oral submissions by the parties at the hearing and the facts of the Appeal may be summarized as follows:

On 30<sup>th</sup> September 2014, the Respondent through the Guardian Newspaper, invited tenderers to submit tenders for the supply of bank printed materials and the deadline for submission of the tenders was 20<sup>th</sup> October 2014. In that respect, five tenders with their respective tender prices were received from the following firms listed below: -

S/NO	Tenderers Name	Quoted price in Tshs
1.	M/s Mkongowo Trading Co. Ltd	66,819,000.00
2.	M/s Five Star Printers Ltd	103,004,060.00
3.	M/s Fast Delivery Co.	55,815,000.00
4.	M/s CI Group	236,700,000.00
5.	M/s Mapocho General Trading Co.	49,642,600.00

The above tenders were then subjected to evaluation whereby M/s Fast Delivery Co was recommended for award of the tender. The decision by the Respondent to award the tender to M/s Fast Delivery Co was successfully contested by the Appellant in PPAA Appeal No. 32 of 2014/2015. In allowing the said Appeal, this Appeals Authority ordered the Respondent to re-evaluate the tender in accordance with the law. The decision of the Appeals Authority was issued on 9<sup>th</sup> March 2015.

On 16<sup>th</sup> March 2015 the Respondent appointed a new evaluation team which was required to conduct an evaluation for three days starting from 17<sup>th</sup> March, 2015. After completion of the evaluation process the award of contract was recommended to M/s Mapocho General Trading Company. The Tender Board at its meeting held on 26<sup>th</sup> March 2015

approved the award as recommended by the evaluation committee.

On 30<sup>th</sup> March 2015, the Respondent through a letter referenced PA/099/2015/HQ.01/G/02 informed the tenderers including the Appellant of its intention to award the tender to M/s Mapocho General Trading Company. Having received no complaints after issuing the notice of intention to award, on 22<sup>nd</sup> April 2015 the Respondent communicated the letter of acceptance to the successful tenderer and letters of regret to all unsuccessful tenderers.

On 6<sup>th</sup> May 2015, the Appellant lodged this Appeal to the Appeals Authority claiming to have received the notice of intention to award on 29<sup>th</sup> April 2015 together with the regret letter which informed him that the contract has already been awarded to M/s Mapocho General Trading Company. In its statement of Appeal, the Appellant raised the following grounds of Appeal;

- i) That the tender had been awarded to a company which did not comply with the tender requirement as it lacks capacity to execute the intended work. As a result the said firm intends to subcontract part of the work to another company.
- ii) That the Respondent deliberately forged the dates of sending notice of intention to award to the Appellant for

purposes of preventing it from challenging the award made.

As indicated above, as soon as the Appeals Authority was seized of this appeal, it notified the Respondent who subsequently filed the preliminary objections referred to above.

#### RESPONDENT'S SUBMISSIONS ON THE PRELIMINARY OBJECTION.

The Respondent's submissions can be summarized as follows:

- a) The Appeal is bad and untenable in law for being brought prematurely before this honourable Authority

With regard to the first point of Preliminary Objection the Respondent submitted that, the Appellant had contravened Section 60(3) of the Public Procurement Act Cap 410 of 2011 (hereinafter referred to as 'the Act'). The said provision gives right to a tenderer to lodge complaint to the Accounting Officer within fourteen days if dissatisfied with the notice of intention to award.

According to the Respondent, a notice of intention to award was written on 30<sup>th</sup> March 2015 and posted to the Appellant via registered mail (RD028096803TZ) on 31<sup>st</sup> March 2015. Thus, counting from 31<sup>st</sup> March, 2015, the Appellant had fourteen

days to lodge a complaint to the Respondent's accounting officer if he was dissatisfied with the notice of intention to award the tender to M/s Mapocho General Trading Company. In the event that the Appellant was dissatisfied with the decision of the accounting officer; the Appellant should have applied for administrative review by the Accounting Officer, after which he could lodge an appeal to Appeals Authority. The Respondent stated that the Appellant failed to exercise his right as provided under Section 60(3) of the Act which should be read together with Reg. 231(9) of the Public Procurement Regulations GN No. 446 of 2013 (hereinafter referred to as "GN No. 446/2013"). The said sub regulation prohibits a tenderer who was duly served with the notice of intention to award pursuant to Section 60(3) of the Act from lodging any complaint thereof if he failed to exercise his rights within the prescribed period. He submitted that the Appellant waived his right to challenge the award made after failing to do so within 14 days from the date he was served with notice of intention to award. To that effect, the Respondent considered this Appeal to be prematurely lodged to this Authority.

b) The Appeal is hopelessly time barred

The Appeal is considered to be time barred because it has been lodged to the Appeals Authority beyond the required time. The Appellant was required to lodge a complaint to the Respondent's accounting officer within fourteen days of becoming aware of the circumstances giving rise to the

complaint (notice of intention to award). The Respondent's accounting officer would be required to issue a decision within fourteen days and upon being dissatisfied with the decision issued, the Appellant could have 14 days to lodge a complaint to this Appeals Authority.

The Appellant lodged his complaint directly to the Appeals Authority on 6<sup>th</sup> May, 2015. The Respondent considered such a complaint to have been lodged out of time as the same ought to have been lodged to the accounting officer within fourteen days of receiving notice of intention to award before the same is lodged to this Appeals Authority. Thus, the Respondent prayed that the Appeal be dismissed for lack of merits.

#### RESPONSES BY APPELLANT ON THE PRELIMINARY OBJECTION

In response to the Respondent's submissions, the Appellant submitted as follows;

The Appellant denied that, the Appeal is neither prematurely lodged to this Authority nor time barred, since the same was lodged after the Appellant had received the notice of intention to award and a letter of regret from the Respondent. The two letters were received by the Appellant on 29<sup>th</sup> April 2015. After receiving the two letters the Appellant was of the view that, they were late to lodge his complaint to the Respondent's accounting officer pursuant to Section 60(3) of the Act.



However, the only avenue the Appellant had was to lodge the complaint directly to the Appeals Authority as the award letter had already been communicated to the successful tenderer and the procurement contract was already in force.

Furthermore, the Appellant submitted that, it is not true that he was served with the notice of intention to award on 31<sup>st</sup> March 2015. The Appellant asserted that, he received notice of intention to award and a letter of regret on 27<sup>th</sup> April, 2015 after receiving a phone call which required him to collect the said letters from the Respondent's office. Moreover, on 29<sup>th</sup> April 2015 he received copies of the same letter from the post office and lodged the Appeal on 6<sup>th</sup> May 2015. Hence, it cannot be argued that the Appeal is prematurely before this Authority or lodged out of time. Thus, the Appellant prayed that the points of preliminary objection raised be dismissed.

#### ANALYSIS BY THE AUTHORITY ON THE PRELIMINARY OBJECTION

Having gone through the filed documents together with the oral submissions by the parties, the Authority is of the firm view that one basic issue calls for consideration, and that is whether the Appeal is properly before it. It should be noted that, while the Respondent framed his objection based on two preliminary points of law, the preliminary objections should be in the alternative, since an Appeal cannot be lodged prematurely and at the same time to be time barred.

In the course of resolving the above framed issue, the Appeals Authority has observed that Section 60(3) of the Act relied upon by the Respondent requires tenderers upon receiving the notice of intention to award, to file their complaint to the accounting officer within fourteen days from the date of receipt of such notice. The said Section 60(3) provides as follows;

“Upon receipt of notification, the accounting officer shall, immediately thereafter issue a notice of intention to award the contract to all tenderers who participated in the tender in question giving them fourteen days within which to submit complaints thereof, if any”  
(Emphasis supplied)

From the wording of the above extract, it is clear that the law presupposes that after a complaint is filed with the accounting officer, the said officer has to resolve it and issue a decision in writing. In this particular case, the Respondent having issued notice of intention to award, did not receive any complaint and upon expiration of the prescribed period, proceeded to award the contract. As at the time of filing of this Appeal, the contract was already in force. According to the Respondent, the Appellant was required to lodge his complaint to the Respondent’s accounting officer after receiving the notice of intention to award which was issued on 31<sup>st</sup> March 2015. The

Appellant on his side contended that, the complaint could not be lodged to the accounting officer as the notice of intention to award was received on 29<sup>th</sup> April 2015 which was beyond the fourteen days within which he was required to lodge a complaint. Hence, the only avenue was for him to lodge complaint directly to the Appeals Authority. However, as it shall soon be clear, the assertions by the Appellant that he received the notice of intention to award on 29<sup>th</sup> April 2015 cannot be but false.

The Appeals Authority revisited facts of this Appeal in order to establish as to when the notice of intention to award was served to the Appellant. The Appeals Authority relied on the postage envelope which the Appellant produced and showed to the members of the Appeals Authority. The Appellant asserted that, he had received a call from the Respondent's Office on 24<sup>th</sup> April 2015 requiring him to go and collect his letters. That since it was late on Friday, he went to the Respondent's office on 27<sup>th</sup> to pick up the said letters. He said, he received the two letters in originals and that on 29<sup>th</sup> April 2015 that is when he went to the post office and received the said envelope, which to his dismay, contained the copies of the notice of intention to award together with the letter of award to the contractor. And that is why he asserted that the Respondent had forged the dates to prevent him from pursuing his rights.

The Appeals Authority noted that the letter of intention to award was written on 30<sup>th</sup> March 2015 and the said letter was posted to the Appellant via registered mail on 31<sup>st</sup> March 2015. This was evidently clear as envelope bears a stamp of the post office which clearly indicates that the said letter was posted on 31<sup>st</sup> March 2015 and was issued with registered document number referred to above. The same envelope bears the postal stamps dated 1<sup>st</sup> April 2015 and 2<sup>nd</sup> April 2015 and has a hand written word "RTN" implying that there was an intimation notice issued as a 1<sup>st</sup> reminder dated 23 April 2015. The Appellant could not reconcile his assertions that he had collected the letters from the post office on 29<sup>th</sup> April 2015 with the clear stamp marks showing that the letters were to be collected from the post office early as 2<sup>nd</sup> April 2015.

From the above facts it is crystal clear that the notice of intention to award was posted to the Appellant on 31<sup>st</sup> March 2015. The Appellant did not collect the registered letter from the post office in time and did not adduce any cogent evidence for failure to do so. Based on the above findings the Appeals Authority observes that, the Appellant is presumed to have received notice of intention to award the tender on 2<sup>nd</sup> of April 2015.

In addition, Regulation 231(8) of GN 446 provides as follows;

“The notification is considered to be dispatched if it is properly addressed or otherwise directed and transmitted to the successful tenderer or conveyed to an appropriate authority for transmission to such tenderer, by a mode authorized by regulation 12”.  
(Emphasis added)

Of importance, the Appeals Authority observes that the documents posted to the Appellant were correctly addressed to him through the correct postal address and the Appellant has not asserted otherwise. From the above provision the Appeals Authority is of the view that, the notice of intention to award is deemed to have been communicated when it is transmitted or conveyed to an appropriate Authority for transmission. Although the said provision refers the communication to the successful tenderer on the basis of the principle of *Ejusdem generis* the presumption can be extended to unsuccessful tenderers as well.

We have already indicated that the Appellant did not collect the notice of intention to award as required and we agree with the Respondent's submission that failure to lodge complaint to the accounting officer as required by Section 60(3) of the Act amounts to loss of the right to challenge the award. Moreover, Regulation 231(9) of GN 446 clearly prohibits tenderers to

lodge complaints if they fail to exercise their right as provided by the law. Regulation 231(9) is reproduced herein under as follows;

“A tenderer who is dully served with the notice of intention to award a contract pursuant to section 60(3) of the Act but does not submit a complaint to the accounting officer within the prescribed time shall be considered to have waived his right to appeal”. (Emphasis supplied)

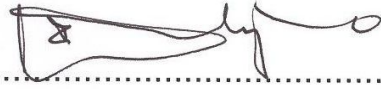
Therefore, having clearly established that the notice of intention to award was transmitted to the Appellant within time, the Authority is of the settled view that the Appellant had waived his right of filing a complaint to the accounting officer and has no right to appeal.

In view of the above finding, it is the firm view of the Appeals Authority that this Appeal is not properly before it.

The preliminary objection is upheld and consequently the Appeal is struck out. Each party to bear its own costs.




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

This Ruling is delivered in the presence of the Appellant and the Respondent 12<sup>th</sup> June 2015.



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JUDGE (rtd) V.K.D. LYIMO  
CHAIRMAN

MEMBERS:

1. MRS. R. A. LULABUKA.  .....
2. ENG. A. J. MWAMANGA.  .....
3. MR. L. P. ACCARO.  .....