

IN THE  
PUBLIC PROCUREMENT APPEALS AUTHORITY  
AT DAR ES SALAAM

CONSOLIDATED APPEALS NOS. 34 & 35 OF 2016-17

BETWEEN

1. M/S LOW'S CREEK TREATED TIMBER (Pty) LTD. }  
2. M/S MAQHILIKA TIMBER (Pty) LTD. .... } APPELLANTS

AND

TANZANIA ELECTRIC SUPPLY CO. LTD. .... RESPONDENT

DECISION

CORAM

1.	Hon. Vincent K.D.Lyimo, J (rtd)	-	Chairman
2.	Eng. Francis T. Marmo	-	Member
3.	Ms. Monica P. Otaru	-	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 APPELLANTS

1.	Mr. Rosan Mbwambo	-	Advocate, Law Associates Advocates
2.	Mr. Gary Wessels	-	Director Low's Creek Treated Timber
3.	Mr. Howard Holley	-	Director- Maqhilika Timbers (PTY)
4.	Ms. Mary Marealle	-	Agent for the Appellant

## FOR THE RESPONDENT

1. Mr. Florence A. Kahatano - Senior Legal Officer
2. Mr. Richard Mrema - Principle Procurement Officer
3. Ms. Grace J. Ngahyoma - Procurement Officer

This Decision was scheduled for delivery today, 1<sup>st</sup> June 2017 and we proceed to do so.

These Appeals were lodged by M/s Low's Creek Treated Timber (Pty) Limited and M/s Maqhilika Treated Timber (Pty) Limited respectively, (hereinafter referred to as "the 1<sup>st</sup> and 2<sup>nd</sup> Appellants"), against the Tanzania Electric Supply Company Limited commonly known by its acronym, TANESCO (hereinafter referred to as "the Respondent"). They have been consolidated for ease of reference.

After the filing of the above Appeals the Public Procurement Appeals Authority (hereinafter referred to as "the Appeals Authority") served the Respondent with the Statements of Appeal notifying and requiring him to submit his replies to the said Appeals. In the course of doing so, the Respondent raised among other issues a Preliminary Objection (P.O.) namely that the Appeals are incompetent in law on the ground that there is no tender capable of any appeal.

During the hearing of the Appeals and before the Respondent could address the issues raised in his P.O. the learned counsel for the Appellants stated that the P.O. raised by the Respondent hinged on point of law and facts, such that the P.O. raised did not fit in the four corners of a P.O. properly so called. The learned counsel denied that there was a point of law capable of determining the Appeals. In that event, the learned counsel sought for an adjournment for two weeks during which he could prepare to respond, stressing that the P.O. be considered as one of the issues that needed to be determined by the Appeals Authority. The learned counsel for the Respondent informed the Appeals Authority that he had been assigned to the case that morning and that he would also need time to study the same before addressing this Appeals Authority. Due to constraint of time, the parties agreed to a shorter

period that the Appeals be dealt with by way of written submissions and framed two main issues for determination as follows:

- i. whether there is a valid tender capable of any appeal;
- ii. whether the Respondent's rejection of the Appellants' tenders was proper in law, and
- iii. What reliefs if any, are the parties entitled to.

By consent, the parties were required to submit respective written submissions simultaneously on 29<sup>th</sup> May 2017. The Decision of the Appeals Authority to issue on 1<sup>st</sup> June 2017. Both parties complied with the Order.

In order that the background to the Decision of the Appeals Authority may be clearly understood, it is pertinent to revisit the sequence of events leading to the present Appeals.

The said Appeals are in respect of Tender No. PA/110/2015/HQ/G/001 (hereinafter referred to as "the Tender") for Supply of Wooden Poles for the Year 2015 under Framework Contract for West and North zones, Lots Nos. 6 and 5 thereof respectively.

After going through the records of proceedings submitted to the Appeals Authority, the facts of the Appeals may be summarized as follows:-

The Respondent through an advertisement in the Daily News newspaper dated 8<sup>th</sup> June 2015, invited tenderers to submit bids for the above Tender comprising seven (7) Lots. The Tender was conducted under the International Competitive Bidding procedures specified in the Public Procurement Regulations, Government Notice No. 446 of 2013 (hereinafter called "G.N. No. 446/2013"). The deadline for the submission of the tenders was 24<sup>th</sup> July 2015; whereby a total of twenty-three (23) tenders were received from various tenderers; amongst whom were the Appellants.

During the evaluation of the tenders to check general responsiveness, seventeen (17) tenders were disqualified for being non-responsive to the Tender Document.

The remaining six (6) tenders including those of the two Appellants qualified for the Technical Evaluation. At that stage, one tender by M/s Vuka Timbers PTY Ltd. was disqualified for failure to comply with the specifications on pole sizes. The remaining five tenders qualified for financial analysis following which the Evaluation Committee recommended award of the Tender for Lot No. 5 to the 2<sup>nd</sup> Appellant and Lot No. 6 to the 1<sup>st</sup> Appellant. The Tender Board at its Meeting held on 23<sup>rd</sup> October 2015, deliberated and approved award of the Tenders as recommended by the Evaluation Committee.

On 8<sup>th</sup> January 2016, the Respondent issued the relevant Notices of Intention to award to the proposed successful bidders. All unsuccessful bidders were notified of their respective reasons for disqualification. M/s Muwa Trading (TZ) Ltd. which had contested for Lot No. 2 applied for administrative review of the Respondent's decision. Thereafter, he filed an Appeal with this Appeals Authority, vide PPAA Appeal Case No. 29 of 2015-16 challenging his disqualification in respect to Lot No. 2 and also raised issues touching on the awards of tenders in Lot Nos. 5 and 6. The 1<sup>st</sup> Appellant herein attended the hearing of the said Appeal as an observer. It is important to note here that Appeal Case No. 29 of 2015-16 was filed on 11<sup>th</sup> April 2016 and the Appeals Authority rendered its Decision on 6<sup>th</sup> May 2016, dismissing the same for lack of merits.

After determination of the above named Appeal, the Respondent negotiated with M/s Vuka Timbers PTY Ltd for Lot No. 2 and signed the respective contract. However, he did not do so in respect to Lot Nos. 5 & 6. From the records, both the Respondent and the two Appellants embarked on negotiations, not only on the scope of the Tender but also on the contract price. On 28<sup>th</sup> February 2017, the Respondent re-advertised the Tender, prompting the Appellants to file Appeal Nos. 24 and 25 of 2016-17 on 16<sup>th</sup> March 2017. When the two Appeals were pending determination, on 29<sup>th</sup> March 2017 the Appellants received from the Respondent, the Notices of rejection of the tenders in Lot Nos. 4, 5 & 6. The rejection notices were dated 13<sup>th</sup> January 2017.

Dissatisfied, the Appellants on 5<sup>th</sup> April 2017 lodged complaints with the Respondent seeking administrative review. The Respondent did not react or issue his written decision as required by law. Thus, on 21<sup>st</sup> April 2017 the Appellants filed these Appeals.

Meanwhile, on 28<sup>th</sup> April 2017 the Appeals Authority issued its Decision in PPAA Appeal Case Nos. 24 and 25 consolidated, whereby the said Appeals were dismissed as it was observed that there was no valid tender for consideration in the eyes of the law. The basis of that Decision was that the Bid Validity Period expired on 7<sup>th</sup> November 2015 and there were no contracts signed as required by law.

As earlier indicated herein above, these two Appeals were filed to challenge the Respondent's decision of rejecting the tenders in Lots Nos. 5 & 6 and the re-advertisement of the same. Upon receipt of the written submissions from the parties and in the light of the P.O raised by the Respondent, this Appeals Authority deemed it proper to determine first if there is a valid tender capable of any appeal before determining whether the rejection of the Appellants' tenders was proper at law. In so doing, the Appeals Authority first considered the submissions by the learned counsel for the Appellants on the first issue.

#### THE APPELLANTS JOINT SUBMISSIONS

The learned counsel for the Appellants has asserted that there is a valid tender capable of being appealed against. That the tender validity period had not expired on 7<sup>th</sup> November 2015 as found or held by the Appeals Authority in its Decision in PPAA Appeal Case Nos. 24 and 25 of 2016-17. The Appellants have relied on documents which, according to them, were in their offices in South Africa by the time Appeal Nos. 24 and 25 were heard. That the tender opening date had been extended from 10<sup>th</sup> July 2015 to 24<sup>th</sup> July 2015. The Appellant stated further that the bid validity period of 120 days provided for in the Tender Document started to run from 24<sup>th</sup> July 2015 and expired on 21<sup>st</sup> November 2015. Consequently, the bid securities expired on 20<sup>th</sup> December 2015. The Appellant contended further that before expiration of the original bid validity period, the Respondent through its letter dated 20<sup>th</sup>

November 2015, pursuant to Regulation 191(4) of GN No. 446 of 2013 requested all the bidders to extend the bid validity period to 31<sup>st</sup> January 2016. The tenderers, the Appellants inclusive, extended the bid validity period to 31<sup>st</sup> January 2016 and the bid securities to 2<sup>nd</sup> March 2016.

The Appellants submitted further that, according to Section 71 of the Public Procurement Act of 2011 (hereinafter referred to as "the Act"), the Respondent was required to complete the evaluation of tenders and obtain all the necessary approvals from the Tender Board within the validity period specified in the Tender Document. In this Tender, all the formalities including comparison and evaluation of tenders, approval of awards by the Tender Board had been completed before 27<sup>th</sup> November 2015 and that the Appellants had been served with the draft contract and minutes of negotiations; meaning that, all the formalities were done before expiry of the validity period.

In support of the foregoing submissions, the Appellants relied on the decisions of the General Court of the Court of Justice of European Union (CJEU); T-553/13, European Dynamics Luxembourg and Evropaiki Dynamiki Vs European Joint undertaking for ITER and the Development of Fusion Energy (European Dynamics case); and T-236/09 Envropaiki Dynamiki-Proigmena Systemata Tilepikoinonion Pliroforikis kai Tilematikis AE vs European Commission (the Commission case). In the European Dynamics case, the tender validity expired before evaluation of tenders was concluded. Nevertheless the evaluation continued and the award was made to the successful bidder. One of the unsuccessful bidders challenged the process and the General Court of Justice of the European Union held that "*nothing in the text of that provision or any other provision that call for tender procedures imposes an obligation to the contracting authority to complete the evaluation of tenders within the validity period of that tender. Whilst it is certainly in the interest of the contracting authority to complete its assessment within the validity period, exceeding that time limit cannot render the procedure unlawful nor can it constitute a ground for cancellation of the evaluation of Tenders*".

The Appellant also cited the decision of the General Court of Justice of the European Union in the European Commission case where it was held that *"the purpose of the validity period of tenders is to ensure that a tenderer does not vary his tender during the evaluation stage and that compliance with that period is not a condition sine qua non for the signature of the contracts at the end of the award process."* The Appellants insisted that, two cited cases clearly indicate that the purpose of tender validity period is to ensure that procuring entity completes comparison and evaluation of tenders and the Tender Board completes review of the recommendations and approves award while the tender is still valid. According to the Appellants, position of the two European cases is the same as the requirement of Section 71 of the Act.

The learned counsel contended further that, much as the law used in determination of the two European cases is different from the laws of this country, the requirements and purposes of specifying validity period are the same. Therefore, the Appellants requested the Appeals Authority to consider the European cited cases and the fact that there was an extension of bid validity period which was done in accordance with the law and if possible to re-consider or reverse its own decision in Appeal Nos. 24 and 25 of 2017.

## RESPONDENT'S SUBMISSIONS

The learned counsel for the Respondent stated that according to Clause 17 of the Instruction to Bidders, the tender validity period for this Tender was 120 days. The Tender Opening took place on 24<sup>th</sup> July 2015; hence the validity period expired on 21<sup>st</sup> November 2015. The Respondent contended further that, according to Section 71 of the Act, procuring entities are required to specify sufficient tender validity period that would enable them to complete the comparison and evaluation of tenders, obtaining necessary approvals from the Tender Board and award the contract while the tenders are still valid. The Tender under Appeal expired before the award was made and there was no extension of the bid validity period.

He submitted further that, the position of the law under Section 71 of the Act is supported by a South African case of Telkom SA Limited Vs Merid Training (Pty) Ltd; Bihati Solutions (Pty) Ltd whereby Southwood J, stated that *"as soon as the validity period of the proposal expired without award being made the tender process was incomplete –albeit unsuccessfully- and the applicant was no longer free to negotiate with the Respondent as if they were simply attempting to enter into a contract"*.

The Respondent contended further that, all processes relating to the Tender came to an end when the tender validity period expired on 21<sup>st</sup> November 2015 because there was no extension of the validity period. Therefore, it was inappropriate for the Appellants to appeal before the Appeals Authority while there is no valid tender in place.

#### ANALYSIS BY THE APPEALS AUTHORITY

In resolving the above contentious arguments by the parties, the Appeals Authority framed the following issue;

- Whether there exists a valid tender capable of any appeal

In resolving the above named issue the Appeals Authority revisited the documents submitted before it and observed that the Tender Opening took place on 24<sup>th</sup> July 2015 and not 10<sup>th</sup> July 2015 as correctly submitted by the Appellant. Furthermore, it was observed that the validity period for this tender was 120 days as clearly specified under Clause 23 of the Bid Data Sheet (BDS) read together with Clause 17 of the Instruction to Bidders. Counting from 24<sup>th</sup> July 2015 when the tenders were opened, the bid validity period ought to have expired on 21<sup>st</sup> November 2015. It was further observed that, before the expiration of the original bid validity period the Respondent vide its letter dated 20<sup>th</sup> November 2015 with Ref No. SMP/MP/PMU/18/299 requested all the bidders to extend the bid validity period and bid securities. The bidders, the Appellants inclusive extended the bid validity period to 31<sup>st</sup> January 2016 and bid securities to 2<sup>nd</sup> March 2016.

The Appeals Authority observed further that the Respondent issued a notice of intention to award the contracts on 8<sup>th</sup> January 2016. The said notice was challenged by M/s Muwa Trading (TZ) Ltd who after being dissatisfied with the Respondent's

decision on administrative review lodged Appeal No. 29 of 2015-16 on 11<sup>th</sup> April 2016. The Appeals Authority issued its Decision on 6<sup>th</sup> May 2016. The records indicate further that the Respondent proceeded to negotiate with the Appellants at different times until on 28<sup>th</sup> February 2017 when they decided to re-advertise the Tender.

From the above, it is an undisputable fact that the specified bid validity period for this Tender was 120 days and the same was extended to 31<sup>st</sup> January 2016. It is also clear that the extension of the bid validity period was done pursuant to Regulation 191(4) of GN. No. 446 of 2013 which requires request for extension to be made before the expiry of initial bid validity period.

The sequence of events indicates that by the time the Respondent issued the Notice of Intention to award the contract (8<sup>th</sup> January 2016), the Tender was still valid as it was within the bid validity period. The Appeals Authority observed further that, the Notice of Intention to award was challenged both at the level of the Accounting Officer and the Appeals Authority. According to Section 100(1) and (4) of the Act, the Accounting Officer and the Appeals Authority are required to suspend the procurement process if there is any complaint/Appeal lodged. It is presumed that the Respondent suspended the procurement process after receipt of a complaint from M/s Muwa Trading (TZ) Ltd. The Appeals Authority also suspended the process until the matter was determined on 6<sup>th</sup> May 2016. Thus, it is clear under the law that the Tenders were still valid until 6<sup>th</sup> May 2016 when the Appeals Authority rendered its Decision.

Assuming that the Respondent required time to finalise his internal arrangements before the issuance of the award letter and the signing of the formal contract, Regulation 233(1) of GN. No 446 of 2013 provides for 28 days to do so. That means the Tenders were valid up to 4<sup>th</sup> June 2016, the latest.

The documents submitted indicate that after the Decision of the Appeals Authority, the Respondent proceeded to negotiate with the Appellants until 28<sup>th</sup> February 2017 when they re-advertised the Tender. The Appeals Authority is of the firm view that the various activities which were taken by the Appellants and the Respondent after 4<sup>th</sup> June 2016 were done beyond the bid validity period and have no support within

the procurement regime. According to Section 71 of the Act, read together with Regulation 191(3) of GN. No. 446 of 2013, procuring entities are required to finalise all tender processes including notifications of the award and finalization of the contract within the tender validity period. For purposes of clarity the said provisions are reproduced herein below:

*Section 71: "The procuring entity shall require tenderers to make their tenders and tender securities including tender securing declaration valid for the periods specified in the tendering documents, sufficient to enable the procuring entity to complete the comparison and evaluation of the tenders and for the appropriate tender board to review the recommendations and approve the contract or contracts to be awarded whilst the tenders are still valid".*

Regulation 191(3): The period fixed by a procuring entity shall be sufficient to permit evaluation and comparison of tenders, for obtaining all necessary clearances and approvals, and for the notification of the award of contracts and finalise a contract but the period shall not exceed one hundred and twenty days from the final date fixed for submission of tenders.

(4): In exceptional circumstances, prior to expiry of the original period of effectiveness of the tenders, a procuring entity may request tenderers to extend the period for an additional specified period of time.

The Appeals Authority considered the Appellants' argument that before the expiry of the tender validity period all the necessary formalities were completed to the extent that they were given a draft contract. The Appeals Authority observes that, at that stage the tender process was yet to be finalized. According to Regulation 191(3) read together with Regulation 233(3) of GN. No. 446 of 2013 as it then was, the tender process is deemed complete when notification of award and acceptance letter is issued. The Appellants were not issued with the acceptance letter and did not sign any contract with the Respondent. Thus, the contention that the tender process was completed before expiration of the tender validity period is unfounded.

The Appeals Authority distinguishes the European cases relied upon by the Appellants as European Union procedures do not impose obligation to the contracting authority to complete the evaluation of tenders and finalization of the contract within the validity period. At home, Regulation 191(3) of GN. No. 446 of 2013 requires

tender process including finalization of the contract to be completed within the tender validity period. Therefore, it is the Appeals Authority's view that where the law explicitly provides for the doing of the specific acts, the law should be adhered to unless there are provisions to the contrary.

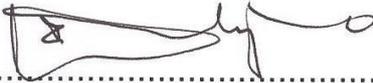
The Appellants also made reference to the Decision in PPAA Appeal Nos. 24 and 25 of 2016-17 that the same were determined without considering the fact that there was an extension of the bid validity period. While the Appeals Authority appreciates the Appellants' submissions on the extension of the tender validity period; it does not agree with them on the proposition that the tenders were still valid at the time the Respondent issued the notices rejecting the tenders. As earlier stated, the tender validity period expired on or before 4<sup>th</sup> of June 2016.

In view of the above, the Appeals Authority's conclusion with regard to this issue is that, since the tender validity period had already expired, there exists no valid tender for consideration or capable for any appeal. In view of the above finding, it is unnecessary for the Appeals Authority to consider the remaining issues as raised by the Appellants. Therefore the Appeals are hereby dismissed. Each party to bear own 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 Appellants and the Respondent this 01<sup>st</sup> June, 2017.



HON. V.K.D. LYIMO (J) RTD  
CHAIRMAN

MEMBERS:

1. Ms. M.P. OTARU 

2. ENG. F.T MARMO 