

IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY
AT DAR ES SALAAM
APPEAL NO. 40 OF 2018-19

BETWEEN

M/S HYGIENE & PESTS MANAGEMENT (T) LTD..... APPELLANT

AND

M/S PROPER CONSULT (T) LIMITED.....RESPONDENT

RULING

CORAM

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| 1. Hon. Justice (rtd) Souda Mjasiri | - | Chairperson |
| 2. Eng. Stephen Makigo | - | 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. Bernard Ngatunga | - | Advocate, GKM Attorneys |
| 2. Mr. George Lwakatare | - | Managing Director |
| 3. Ms. Millicent Leonard | - | Director |

FOR THE RESPONDENT

- | | | |
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| 1. Ms. Sia Ngowi | - | Advocate, Mafuru &
Company Advocate |
| 2. Mr. Richard Kipingu | - | Legal Officer, Mafuru
& Company Advocate |

The Appeal was lodged by M/s Hygiene Pests Management (T) Ltd (hereinafter referred to as "the Appellant") against M/s Proper Consult (T) Limited (hereinafter referred to as "the Respondent"). The Appeal is in respect of Quotation for the Provision of Cleaning, Sanitary and Ground Maintenance at PSSSF Tower and Parking Arcade for the Financial Year 2019/2020 (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:-

On 18th January 2019, the Respondent invited three bidders who have framework agreement with Government Procurement Services Agency (GPSA) to submit their quotations in relation to the Tender. The deadline for the submission was set for 22nd January 2019 whereby three quotations were received from all invited tenderers including the Appellant. The quotations were evaluated and the award was recommended to M/s Rose Millenium Gardeners and Office Cleaners Ltd at the contract sum of TZS 5,200,000/-.

On 30th January 2019, the Respondent informed all the tenderers, including the Appellant its intention to award the Tender to M/s Rose Millenium Gardeners and Office Cleaners Ltd. The Appellant on 19th February 2019 lodged a complaint to the Respondent challenging its disqualification on the grounds that quotations were not opened in public as it was specified in the invitation and that the award was proposed to a tenderer who failed to comply with criteria specified in the Statement of Requirements. On 4th February 2019, the Respondent informed the Appellant that the Quotation has been cancelled due to unavoidable circumstances; and that tenderers would be notified once the new quotation is floated.

On 12th February 2019 the Respondent re-started the Tender process by inviting four shortlisted firms from GPSA, the Appellant inclusive, to submit

their quotations. The deadline for the submission was set for 19th February 2019. The Appellant did not bid at this time. However, according to the documents on record, after the completion of the evaluation process the Appellant was recommended for the award of the Tender.

On 28th February 2019, the Respondent notified the Appellant about its intention to award the Tender to it at the contract price of TZS 5,200,000/- per month VAT inclusive. On 13th March 2019, the Appellant informed the Respondent that the awarded contract price is lower than its quotation and that it would not be able to cover the running expenses. It therefore, requested for negotiation of the contract price. On 21st March 2019, the Respondent informed the Appellant that, it intends to award the Tender to M/s Rose Millennium Gardeners and Office Cleaners Ltd at a contract price of TZS 5,200,000/-.

Dissatisfied, on 25th March 2019 the Appellant lodged an application for administrative review to the Respondent challenging amongst others annulment of the award proposed to it and new award proposed to the successful tenderer. On 28th March 2019 the Respondent issued its decision which rejected the Appellant's application for review. Dissatisfied further, the Appellant lodged this Appeal on 29th March 2019.

The Appeals Authority served the Statement of Appeal to the Respondent. In the course of submitting its replies; it raised a Preliminary Objection (PO) on the point of law, *in limine litis* that, under the provisions of Section 2(1), (a), (b) and (c), Section 3, Section 88(5),(6) and (7) of the Public Procurement Act of 2011, the Respondent not being a procuring entity, the Appeals Authority is not vested with jurisdiction to adjudicate upon the matter or determine this Appeal.

The Appeals Authority when reviewing the Appeal record observed that there is another important point of law for consideration before hearing the appeal on merit. The point of law relates to the Appellant's *locus standi* to

Appeal to this Appeals Authority. Therefore, it called upon the parties to address it on the issues of jurisdiction and *locus standi*.

Since the first point of law was raised by the Respondent, the Appeals Authority invited it to start its submissions. The counsel for the Respondent instead of addressing the points of law, informed the Appeals Authority that she was holding a brief of advocate M. Mafuru who could not appear for hearing as he was not well and that he has gone to the hospital. No doctor's report was submitted. The Appeals Authority informed the parties that Section 97(6) of the Public Procurement Act of 2011, as amended (hereinafter referred to as "the Act") stipulates time limit within which Appeals lodged before it are to be determined. Due to time constraint emanating from the requirement of Section 97(6), the Appeals Authority could not reschedule the hearing session; instead it accorded the counsel for the Respondent an hour break for preparing arguments on the points of law. The parties agreed to that effect. However, when the session resumed, counsel for the Respondent insisted that, she was not ready to proceed with the hearing. The Respondent did not enter an appearance either.

The Appeals Authority having satisfied itself that the Respondent was duly served with the notice of hearing and that it accorded one hour to the counsel holding brief for Mr. M. Mafuru for preparation on the POs could not adjourn the session. It proceeded to determine the points of law *ex parte*.

SUBMISSIONS BY THE APPELLANT

Starting with the PO that the Respondent is not a procuring entity, and that the Appeals Authority lacks jurisdiction to adjudicate over the matter, the counsel for the Appellant submitted that the PO is baseless and did not have a leg to stand on. Expounding his arguments learned counsel submitted that the Respondent's invitation for quotation issued on 18th January 2019 stipulated in clear terms that the Respondent is managing

PSSSF Tower on behalf of the Public Service Social Security Fund (PSSSF). The wording of the Invitation for quotation shows that the Respondent had floated the disputed tender as an agent of PSSSF. Thus, it cannot at this juncture deny the involvement of public funds in this tender. Therefore, the Appellant prayed that the PO be dismissed.

With regard to the Appellant's *locus standi*, the learned counsel submitted that, the Appellant was among the tenderers who participated in this tender; hence, upon being aggrieved by the Respondent's conduct, it opted to seek for administrative review and subsequently lodged this Appeal. When asked by the Members of the Appeals Authority to clarify if it had participated on both quotations floated by the Respondent, the counsel submitted that, there was only one quotation and that the same was not cancelled. Instead, the Respondent cancelled the award proposed to M/s Rose Millennium Gardeners and Office Cleaners Ltd. The Respondent through a Notice of intention to award dated 28th February 2019 intended to award the said Tender to the Appellant. The counsel submitted further that, if the Respondent had floated two quotations, then the Appellant could not have been proposed for award of the tender since it had participated on the first floated quotation which is purported to have been cancelled. The Respondent's act of intending to award the Tender to the Appellant substantiate that there was only one quotation. In summing up his argument the counsel insisted that the Respondent had floated one quotation which had resulted in this Appeal. Thus, the Appellant has a *locus standi* to appear before the Appeals Authority.

ANALYSIS BY THE APPEALS AUTHORITY

In determining the points of law raised, the Appeals Authority framed the following two issues;

1. Whether the Appeals Authority has jurisdiction to entertain the Appeal; and

2. Whether the Appellant has *locus standi* to Appeal to this Appeals Authority.

Having identified the issues the Appeals Authority resolved them as follows:-

1.0 Whether the Appeals Authority has jurisdiction to entertain the Appeal

In substantiating the validity of this PO, the Appeals Authority revisited Section 3 of the Act and noted that the term procuring entity has been defined to mean *"a public body and any other body, or unit established and mandated by the government to carry out public functions"*. The Appeals Authority reviewed the documents submitted and observed that, the Respondent is a private entity incorporated under the laws of Tanzania. However, the firm has been engaged as a property manager managing PSSSF Tower as indicated in the opening paragraph of the Invitation for Quotation issued on 18th January 2019 by the Respondent. The paragraph states that:-

"the Proper consult (T) Ltd is appointed Property Manager, managing Public Service Social Security Fund(PSSSF) Tower and Parking Arcade building on behalf of the Fund. The property Manager has set aside fund for the operation of the PSSSF Tower and Parking Arcade for the financial year 2019/2020. It is intended that part of the proceeds of the fund will be used to cover eligible payment under the contract for which this invitation to submit quotation is issued'.

The above quoted paragraph stipulates in clear terms that the Respondent has been engaged as a property manager, managing the PSSSF Tower and Parking Arcade on behalf of the PSSSF. It further stipulates that part of the proceeds of the fund would be used to cover payment of the contract in which the quotation was floated. Based on the wording of the Invitation for Quotation, the Appeals Authority is of the settled view that, the intended contract intends to be financed by the government since its fund emanates

from the proceeds obtained out of a public asset. Thus, in terms of Section 2(1) of the Act, though the Respondent is not a government entity, but for the purpose of this Tender it ought to comply with the requirement of the Act.

Section 2(1) of the Act provides as follows:-

" This Act shall apply to-

- a) All procurement and disposal by tender undertaken by a procuring entity except where it is provided otherwise in this Act;*
- b) Non-government entities for procurement financed from specific public finances; and*
- c) Public Private Partnership projects in their relevant stages".*

The Appeals Authority therefore, is of the firm view that, it has the jurisdiction to preside over the matter. Thus, the PO raised by the Respondent regarding this issue is hereby overruled.

2.0 Whether the Appellant has *locus standi* to Appeal to this Appeals Authority

In resolving this issue, the Appeals Authority revisited Sections 95, 96 and 97 of the Act read together with Regulation 104 of the Public Procurement Regulations of 2013, as amended (hereinafter referred to as "GN.No.446 of 2013") as well as Rule 5 of the Public Procurement Appeals Rules GN. No. 411 of 2014 (hereinafter referred to as "the Appeals Rules"). The said provisions allow an aggrieved tenderer to file its complaint to the accounting officer of the respective procuring entity and finally appeal to this Appeals Authority in case of any grievance.

Section 3 of the Act provides a definition as to who is a tenderer by stating that:-

"any natural or legal person or group of such persons participating or intending to participate in procurement proceedings with a

view to submitting a tender in order to conclude a contract and includes a supplier, contractor, service provider or asset buyer".

In going through the documents submitted, we observed that, the Respondent on 18th January, 2019 invited three tenderers to submit their quotation for this Tender. The deadline for submission was set for 22nd January 2019 whereby the invited tenderers including the Appellant submitted their quotations. On 4th February 2019 the Respondent cancelled the quotation due to unavoidable circumstances. The record indicates further that, on 12th February 2019 the Respondent floated a new quotation and invited the tenderers who participated in the cancelled quotation. The deadline for submission was on 19th February, 2019. The invited tenderers submitted their quotations save for the Appellant.

From the above facts, it is crystal clear that the Appellant did not participate in the second floated quotation which is a subject of this Appeal. The Appellant participated on the first floated quotation which was later cancelled. It is clear from the wording of section 3 of the Act that the Appellant is not a tenderer in terms of that definition as it had neither participated nor intended to participate in the second floated quotation. Thus, it ought not to have filed a complaint to the Respondent or appeal to this Appeals Authority. It is the Appeals Authority's view that, once the Tender is cancelled or rejected pursuant to Section 19 of the Act and Regulation 16 of GN.No. 446 of 2013, the same cease to exist.

In view of the above findings, and taking into account the position of the law as to which party is allowed to file a complaint to the accounting officer and in case of grievances appeal to the Appeals Authority, the Appeals Authority is of the settled view that, the Appellant lacks *locus standi* to Appeal to this Appeals Authority as it is not a tenderer with respect to the second floated quotation.

Therefore, the Appeal is hereby dismissed. We make no order as to 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 3rd day of May 2019.



HON. JUSTICE (RTD) SAUDA MJASIRI
CHAIRPERSON

MEMBERS:

1. ENG. STEPHEN MAKIGO 

2. ADV. ROSAN MBWAMBO 