

IN THE PUBLIC PROCUREMENT APPEALS AUTHORITY

APPEAL CASE NO. 7 OF 2020-21

BETWEEN

M/S AKAMA HOLDING COMPANY LIMITED..... APPELLANT

AND

VICE CHANCELLOR OF THE UNIVERSITY

OF DAR ES SALAAM..... RESPONDENT

RULING

CORAM

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|-------------------------------------|-----------------|
| 1. Hon. Justice (rtd) Souda Mjasiri | - Chairperson |
| 2. Adv. Rosan Mbwambo | - Member |
| 3. Ms. Ndeonika Mwaikambo | - Member |
| 4. Ms. Florida Mapunda | - Ag. Secretary |

SECRETARIAT

- | | |
|------------------------|------------------------|
| 1. Ms. Agnes Sayi | - Senior Legal Officer |
| 2. Ms. Violet Limilabo | - Legal Officer |

FOR THE APPELLANT

- | | |
|-------------------------|-------------------------------------|
| 1. Mr. Ferdinand Makore | - Advocate- Legal Fountain Advocate |
| 2. Mr. Frank C. Chacha | - Advocate- Legal Fountain Advocate |



3. Mr. Stephen Magige - Managing Director- Akama Holding Co. Ltd
4. Mr. Kashete S. Sizya - IT- Akama Holding Co. Ltd

FOR THE RESPONDENT

1. Mr. Petro Eusebius Mlewa - Advocate -University of Dar es Salaam
2. Ms. Otilia N. Rutashobya - Advocate -University of Dar es Salaam
3. Mr. Charles N. Tarimo - ICT Manager
4. Mr. Nerey H. Mvungi - Principal Investigator
5. Mr. Jeremiah Masunga - Procurement Officer

The Appeal was lodged by **M/s Akama Holding Company Ltd** (hereinafter referred to as "**the Appellant**") against the **Vice Chancellor of the University of Dar es Salaam** (hereinafter referred to as "**the Respondent**").

The Appeal is in respect of Tender No. PA /011/G/08/2019/2020/02 for Supply of Communication Equipments for Research under SIDA Project (CoICT) iGRID (hereinafter referred to as "**the Tender**").

According to the documents 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 Tender was conducted through Tanzania National e-Procurement System (TANePS) 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 and GN. No. 333 of 2016 (hereinafter referred to as "**the Regulations**").

The Respondent through TANEPS issued a Mini Competition Form on 6th November 2019 inviting tenderers shortlisted by the Government Procurement Services Agency (GPSA) to submit their quotations. On the deadline for submission three tenderers submitted their quotations.

Quotations were then subjected to evaluation which was conducted into two stages namely, technical and financial comparison. After completion of the evaluation process, the Evaluation Committee recommended award of the Tender to the Appellant at a contract price of Tanzanian Shillings Fifty Seven Million Thirty Nine Thousand Two Hundred Twenty Four and Sixty Eight Cents only (57,039,224.68).

The Tender Board through Circular Resolution No. PMU/NOV/19 dated 27th November 2019 approved the award as recommended by the Evaluation Committee. On 16th December 2019, the Respondent issued the award letter to the Appellant. On 3rd January 2020 the Respondent issued the Local Purchase Order (LPO) to the Appellant for the supply of communication equipment. On 13th February 2020, the Appellant delivered the equipment to the Respondent.

The Respondent by a letter dated 13th March 2020 rejected the High Performance Servers delivered by the Appellant for two reasons that:-

- i. The requested processor speed was 3.6 GHz, but the Appellant delivered 2.10 GHz; and



- ii. The requested maximum memory was 1.2TB DDR4, but the Appellant delivered 128 GB DDR4.

The Respondent also required the Appellant to deliver within two weeks the High Performance Servers which complies with the technical specifications provided in the Quotation Document. The said letter was received by the Appellant on 25th March 2020.

On 26th March 2020 the Appellant wrote a letter to the Respondent indicating its dissatisfaction to the rejection of the High Performance Servers. The Appellant also clarified in the said letter as to how the High Performance Servers complied with the technical specifications provided in the Quotation Document.

The Respondent formed an inspection committee to inspect the High Performance Servers supplied by the Appellant. After completion of the assignment, the inspection committee reached a conclusion that the Appellant's High Performance Servers did not comply with the required processor speed and maximum memory as specified in the Quotation Document.

Following the findings of the inspection committee, on 23rd June 2020 the Respondent notified the Appellant that its High Performance Servers have been rejected for failure to comply with technical specifications. Therefore the Respondent asked the Appellant to collect the rejected equipment from its premises within seven days.



On 13th July 2020, the Appellant wrote another letter to the Respondent which clarified further the technical requirements of the servers and requested for a meeting in order to discuss the matter. On 27th July 2020, the Respondent rejected the Appellant's request and reminded it to collect the servers from its premises. The letter was received by the Appellant on 13th August 2020.

Dissatisfied further, on 20th August 2020, the Appellant filed this appeal to the Appeals Authority.

GROUNDS OF APPEAL

The Appellant's grounds of appeal as stated in the Statement of Appeal may be summarised as follows: -

1. That, the Respondent had erred in law and fact by rejecting the High Performance Servers supplied as it complied with the technical specifications provided in the Quotation Document.
2. That, the Respondent had seriously erred and misconceived its own technical specifications provided in the Quotation Document, thus the rejection is unfounded in law. The Appellant added that the specifications provided in the Quotation Document were "Maximum Memory of 1.2 TB DDR4". To comply with the said requirements the Appellant supplied servers with 128 GB DDR4. Thus, if the Respondent wanted servers with 1.2 TB DDR4, it ought to have stated clearly that the required memory is "1.2 TB DDR4". The Respondent's act of specifying maximum memory implies that, the memory should not



exceed the maximum limit. Thus, the supplied servers were in compliance with the technical requirement.

3. That, the Respondent had seriously erred in law and fact by failure to make payment due to the Appellant after delivery of the High Performance Servers.
4. That, the Respondent erred in law and fact by its refusal to have a discussion which could clarify the misunderstanding of the technical requirements.
5. Finally, the Appellant prayed for the following orders: -
 - i. Prompt payment of the principal sum of TZS 57,039,224.68 being specific damages for the supply of the High Performance Servers in dispute;
 - ii. Prompt payment of the interests at a commercial rate of 37% of the principal sum from the date of delivery of the servers till the date of decision of this Honourable Appeals Authority;
 - iii. Payment of general damages estimated to TZS 200,000,000/= being an equivalent to the true account of loss of business and fame;
 - iv. An order for the Respondent to accept the High Performance Servers in dispute; and
 - v. Any other relief (s) that this honourable Appeals Authority may deem equitable to grant.



REPLY BY THE RESPONDENT

The Respondent's reply to the Appellant's grounds of appeal included a Preliminary Objection (PO) on a point of law to the effect that: -

The Appeal is time barred as it was referred to this Honourable Appeals Authority out of the prescribed time under the law.

Without prejudice to the above, the Respondent's reply to the Appellant's grounds of Appeal was as follows: -

1. That, the Respondent was right to reject the High Performance Servers supplied by the Appellant as it did not comply with the technical specifications provided in the Quotation Document.
2. That, the Respondent was right not to make payment to the Appellant after delivery of the server as did not comply with the specifications provided in the Quotation Document.
3. That, the Respondent had not misconceived the specifications provided in the Quotation Document as the same were very clear. Thus, the refusal of the Appellant's servers is justified.
4. That, the Appellant contravened technical specifications, hence there was no need of having a meeting to discuss the already breached specifications. Thus, the whole tender was rendered non-executed. The Appellant ought to blame itself for failure to comply with technical specifications.
5. Finally, the Respondent prayed for the following orders: -



- i. The Appeal be dismissed in its entirety with costs;
- ii. Rejection of the Appellant's reliefs number (i), (ii), (iii) and (iv)
- iii. Any other relief(s) that this honourable Appeals Authority may deem equitable to grant.

As the Respondent raised a Preliminary Objection (PO) on a point of law that the Appeal is time barred, the Appeals Authority deemed it proper to determine the PO raised first before proceeding with the substantive merits of the Appeal. In so doing, the Appeals Authority allowed parties to make submissions on the PO.

SUBMISSIONS BY THE RESPONDENT ON THE PO

The learned counsel for the Respondent commenced his submissions by indicating that the Appellant contravened the requirement of Section 97 of the Act as its Appeal has been lodged beyond the stipulated time limit. The Appellant was informed through a letter dated 13th March 2020 which was received on 25th March 2020 that the servers supplied by the Appellant had been rejected for failure to comply with technical specifications. The Respondent formed an inspection committee which inspected the Appellant's supplied servers. After completion of the inspection, the committee issued a report which indicated that the servers did not comply with technical specifications.

On 23rd June 2020, the Respondent informed the Appellant on the findings of the inspection committee that the supplied servers did not comply with



technical specifications, thus the same were rejected. The Appellant was asked to collect them from the Respondent's premises within seven days. The Respondent's position which was stated in a letter dated 23rd June 2020 reflected its final decision. Thus, the Appellant ought to have submitted a complaint if it was dissatisfied with the Respondent's decision. To the contrary, on 13th July 2020 the Appellant wrote a letter to the Respondent seeking for a meeting. The Respondent declined the proposed meeting through its letter dated 27th July 2020 which was received by the Appellant on 13th August 2020.

The Appellant lodged its Appeal to this Appeals Authority on 20th August 2020 almost two months after receipt of the Respondent's decision which rejected the supplied servers. According to Section 97(2)(b) of the Act, the Appellant ought to have filed its Appeal within seven working days after receipt of the Respondent's decision issued on 23rd June 2020 and received by the Appellant on 25th June 2020.

In support of his argument the learned counsel for the Respondent relied on Appeal Case No. 25 of 2018-19 between Unisoft Technologies (T) Ltd versus the University of Dar es salaam whereby the Appeals Authority dismissed the appeal for being filed out time.

The counsel for the Respondent further argued that, the letter dated 27th July 2020 addressed to the Appellant did not contain the Respondent's decision to reject the servers; instead, it simply informed the Appellant that



the request to have an amicable settlement on the matter has been rejected.

The learned counsel concluded his submissions by insisting that, the Respondent's decision to reject the servers was made on 23rd June 2020 which was received by the Appellant on 25th June 2020. This Appeal was filed on 20th August 2020 and is therefore out of time.

The Respondent prayed for dismissal of the Appeal with costs.

APPELLANT'S SUBMISSIONS ON THE PO

The learned counsel for the Appellant commenced his submissions by indicating that the PO has no merit as it has been made so as to avoid determination of the substantive Appeal on merit.

According to Rule 9 (1) of the Public Procurement Appeals Rules GN. No. 411 of 2014 as amended (hereinafter referred to as "**the Appeals Rules**"); an appeal to this Appeals Authority should be lodged within seven working days of becoming aware of the circumstances giving rise to the Appeal. The Appellant lodged this Appeal after being dissatisfied with the Respondent's decision which was received on 13th August 2020, thus the Appeal was lodged within time.

The learned counsel submitted further that the sequence of events indicates that the Respondent issued its first decision to reject the Appellant supplied servers through a letter dated 13th March 2020 which was received by the Appellant on 25th March 2020. Thereafter, the Respondent formed an inspection committee which inspected the



Appellant's servers and its findings were communicated through a letter dated 23rd June 2020 which was received by the Appellant on 25th June 2020. Thus, if the Respondent's decision issued on 25th March 2020 was final, it ought not to have formed an inspection committee thereafter. The counsel stated that the Appellant after receipt of the Respondent's letter on 25th June 2020, it wrote another letter to the Respondent on 13th July 2020 seeking an amicable discussion on the matter. This implies that there was an ongoing communication between the parties before the Respondent made its final decision. The Respondent's final decision was issued on 27th July 2020 and received by the Appellant on 13th August 2020. Thus, the Appellant became aware of the circumstances giving rise to the appeal on 13th August 2020 and the Appeal was lodged on 20th August 2020 within seven working days prescribed under the law.

In expounding his argument, the counsel for the Appellant made reference to Article 107A (2) (e) of the Constitution of the United Republic of Tanzania, 1977 as amended and Section 3A of the Civil Procedure Code Cap 33, (R.E 2019). These provisions require the courts or tribunals not to be bound by technicalities when dispensing justice. Thus, if the Appeals Authority would establish that the Appeal has been filed out of time contrary to Section 97(1) and (2) of the Act, the Appellant should be accorded the opportunity to proceed with the appeal on merit.

The Appellant's counsel concluded his submissions by praying that the PO be dismissed and the appeal be heard on merits.



Having heard the submissions of the parties on the PO, having reviewed the documents submitted and the relevant provisions of the law, the Appeals Authority found it pertinent for the parties to address it on ***whether the Appeals Authority has jurisdiction to entertain the Appeal*** as the dispute arose after the award has been made, the contract signed and delivery made in execution of the contract. Parties were therefore invited to address the Appeals Authority on jurisdiction.

THE APPELLANT'S SUBMISSIONS ON JURISDICTION

The counsel for the Appellant started his submissions by indicating that, according to Section 3 of the Act read together with Rule 3 of the Appeals Rules, the word tenderer has been defined to include supplier. The Appellant was a supplier who was issued with LPO and supplied goods to the Respondent. The cause of action arose after the supplied goods were rejected by the Respondent. Counsel added that there was no dispute in relation to the tender process.

Counsel for the Appellant submitted that Section 97(3) of the Act empowers the Appeals Authority to entertain a dispute arising after entry into force of a procurement contract. In support of his argument counsel relied on the decision of the Appeals Authority in Appeal Case No. 59 of 2009 between Mputa Security Services Guards Company Ltd and another versus the Institute of Rural Development Planning-Dodoma. According to the counsel for the Appellant, complaints arising after entry into force of a procurement contract are to be submitted directly to the Appeals Authority.



Thus, since the Appellant's complaint arose after entry into force of a procurement contract the Appeals Authority has jurisdiction to entertain the Appeal.

THE RESPONDENT'S SUBMISSIONS ON JURISDICTION

The Respondent's counsel commenced his submissions by indicating that Rule 4 of the Appeals Rules state in clear terms as to who may Appeal. According to the said Rules tenderers are allowed to Appeal if dissatisfied with acts or decisions of a procuring entity. The Appellant ceased to be a tenderer on 3rd January 2020 when it was issued with the LPO which is the contract. After the issuance of the LPO the Appellant became a supplier as the procurement process ended after the award has been made and contract signed.

Counsel for the Respondent added that, after the signing of the contract any dispute arising thereafter is to be referred to arbitration pursuant to the terms and conditions of the Framework Agreement and not to the Appeals Authority. Thus, after rejection of the delivered servers, the Appellant ought to have relied on clauses of the Framework Agreement.

In response to the definition of the word tenderer under Section 3 of the Act relied upon by the Appellant, the Respondent's counsel submitted that the counsel for the Appellant has misconstrued the meaning of the word tenderer. According to him the word tenderer under Section 3 of the Act,



includes suppliers, contractors, service providers or asset buyers who qualify to be a tenderer.

With regard to Appeal Case No. 59 of 2009 between Mputa Security Services Guards Company Ltd and another versus the Institute of Rural Development Planning-Dodoma, the Respondent's counsel submitted that the case is not relevant to the Appeal at hand. The referred case was decided in 2009 when the Appeals Rules were not yet in force, thus it cannot be applicable under the circumstances. Rule 4 of the current Appeals Rules provides as to who may appeal to this Appeals Authority. The Appellant is not a tenderer as it has been awarded the tender and became a supplier after signing the contract. Thus, it cannot file an Appeal or complaint to the Appeals Authority.

REJOINDER BY THE APPELLANT

In his rejoinder counsel for the Appellant insisted that the Appellant is a supplier and according to Section 97(3) of the Act is entitled to lodge this Appeal. Section 97(3) allows tenderers/ suppliers to file an appeal to this Appeals Authority after entry into force of a procurement contract.

ANALYSIS BY THE APPEALS AUTHORITY

Having considered the parties' submissions on both the PO raised by the Respondent and point of law raised *suo motu* by the Appeals Authority, we find it proper to first determine **whether the Appeals Authority has jurisdiction to entertain the Appeal.**



In the course of so doing the Appeals Authority revisited the appeal record and observed that the Appellant was the successful tenderer and was awarded the Tender. It signed the contract (LPO) and delivered the High Performance Servers to the Respondent. The delivered servers were rejected by the Respondent for being non compliant with the technical specifications. Aggrieved with the rejection, the Appellant made efforts to resolve the matter amicably through various correspondences. However, the efforts ended in vain; hence, the Appellant lodged this appeal.

Section 95(1) of the Act provides guidance in relation to a right of review.

The provision reads:-

"Any tenderer who claims to have suffered or that may suffer any loss or injury as a result of breach of duty imposed on a procuring entity by this Act may seek a review in accordance with Section 96 and 97."

From the wording of the above provision, the Appeals Authority deemed it proper to consider the meaning of the word tenderer. According to Section 3 of the Act, a "tenderer" has been defined to mean: -

*"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".*

(Emphases provided)



The Appeals Authority observed that "procurement proceedings" and "procurement" is defined as follows under Section 3 of the Act: -

"Procurement proceedings" means the proceedings to be followed by a procuring entity or any approving authority when engaging in procurement.

"Procurement" means buying, purchasing, renting leasing or otherwise acquiring any goods, works or services by a procuring entity and includes all functions that pertain to the obtaining of any goods, works or services, including description of requirements, selection and invitation of tenderers, preparation and award of contracts."

In view of what has been stated hereinabove, the Appeals Authority agrees with the submissions by counsel for the Respondent that the Appellant is not a tenderer at this stage, as it ceased to be a tenderer upon entering into a contract (LPO). It is clear that a right of review referred to in Sections 96 and 97 of the Act relate to a dispute arising during procurement proceedings. The Appeal at hand relate to a dispute which arose during execution of the contract.

Based on the circumstances of this Appeal, the Appeals Authority is of the firm view that in any tender proceedings, if the award has been made, the contract signed and execution thereof has been started or is underway, the review process under Sections 96 and 97 of the Act is not applicable to the parties who have already entered into the contract. The execution of the



contract is a new stage guided by the terms of the signed contract or order for performance. Thus, any dispute arising out of such contract is beyond the award and cannot be a subject of review under Sections 96 and 97 of the Act.

The Appeals Authority is of the firm view that Section 97(3) of the Act applies where the tenderer is dissatisfied with the award of the tender and the contract has entered into force.

The Appeals Authority distinguishes Appeal Case No. 59 of 2009 between Mputa Security Services Guards Company Ltd and another versus the Institute of Rural Development Planning-Dodoma relied upon by the Appellant from the facts of this Appeal. The circumstances of this appeal are different. In the above case, the Appellants were unsuccessful bidders challenging the award made to the proposed bidder while in the Appeal at hand the Appellant was a successful bidder and was awarded the tender, signed the contract and executed it.

Given the circumstances, the Appeals Authority hereby finds that it has no jurisdiction to entertain the appeal. Having arrived at this conclusion, it will not delve into the Preliminary Objection raised by the Respondent. Therefore the Appeal is hereby dismissed.

Each party is to bear its own costs.

It is so ordered.

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 21st day of September 2020.

HON. JUSTICE (RTD) SAUDA MJASIRI



CHAIRPERSON

MEMBERS:

1. ADV. ROSAN MBWAMBO.....



2. MS. NDEONIKA MWAIKAMBO.....

