

IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY
AT DAR ES SALAAM
APPEAL CASE NO 11 OF 2015-16

BETWEEN

M/S NYANZA LAUNDRY AND GENERAL

SERVICES LTD..... APPELLANT

AND

BUGANDO MEDICAL CENTRE.....1ST RESPONDENT

M/S AKO GROUP LTD..... 2ND RESPONDENT

RULING

CORAM

- | | | |
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| 1. Hon. Vincent K.D Lyimo, J. (rtd) | - | Chairman |
| 2. Mrs. Rosemary A. Lulabuka | - | Member |
| 3. Eng. Francis T. Marmo | - | Member |
| 4. Mr. Ole-Mbille Kissioki | - | Secretary |

SECRETARIAT

- | | | |
|---------------------------|---|-------------------------|
| 1. Mrs. Toni S. Mbillinyi | - | Principal Legal Officer |
| 2. Ms. Violet S. Limilabo | - | Legal Officer |

3. Mr. Hamisi O. Tika - Legal Officer

FOR THE APPELLANT

1. Mr. Erasto Theonest - Director Human Resource &
Corporate Affairs
2. Mr. Mavula M. Selebe - Branch Manager, Dar es Salaam

FOR THE 1ST RESPONDENT

1. Mr. Anaclet K. Laurean - Advocate
2. Mr. Edwin Elias - Supplies Officer

FOR THE 2ND RESPONDENT

1. Ms. Happiness Kategile - Director of Legal and Corporate Affairs
-AKO Group Ltd.
2. Ms. Sabrina Mtega -Legal Officer
3. Mr. Solomon Mgunda - Business Development Manager

This Ruling was scheduled for delivery today 26th November 2015, and we proceed to do so.

This Appeal was lodged by M/S NYANZA LAUNDRY AND GENERAL SERVICES LTD (hereinafter referred to as "the Appellant") against BUGANDO MEDICAL CENTRE (hereinafter referred to as "the 1st Respondent") and M/S AKO GROUP LIMITED (hereinafter called "2nd Respondent") in respect of Tender No. BMC/HQ/2015-16/05 for Provision of Laundry Services (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 facts of this Appeal may be summarized as follows:-

On 7th August 2015, the 1st Respondent invited tenderers to submit their respective bids for the above tender. The deadline for the submission of the tenders was on 20th August 2015 whereby four (4) tenders were received.

The tenders were subjected to evaluation which was conducted in three stages namely; preliminary, detailed evaluation and lastly, post qualification. At the preliminary evaluation, two (2) tenderers were disqualified for failure to meet some of the commercial eligibility criteria. The remaining two (2), the Appellant inclusive, were subjected to technical evaluation whereby the Appellant was disqualified for two main reasons; first that its price for most of the items listed was very high and second, for lack of sufficient laundry machines. The Appellant had only two (2) laundry machines. The 2nd Respondent as the remaining tenderer was thus subjected to detailed evaluation and later post qualification. The Evaluation

Committee therefore recommended M/s AKO Group Ltd. for award of the tender at a contract price stipulated in its price schedule.

The Respondent's Tender Board, at its meeting held on 11th September 2015, approved the recommendation of the Evaluation Committee and awarded the tender to M/s AKO Group Ltd. at the same prices quoted in its price schedule.

On 16th August 2015 the Respondent by its letter under Ref. No. AB.309/386/02 informed the Appellant of its intention to award the tender to M/s AKO Group Ltd. The said Notice neither stated the tender amount to be awarded, nor the reasons for the Appellant's disqualification. As a result, the Appellant by its letter dated 22nd September 2015, complained to the Respondent's Accounting Officer stating that the notice of intention has not complied with Section 60 (3) of the Public Procurement Act of 2011 (the Act) together with Reg. 231 (2) and (4) of GN 446/2013. The Appellant requested for re-issue of notice and to avoid award of tender to the 2nd Respondent.

In response, the 1st Respondent by its letter Ref. No AB.309/386/03 dated 25th September 2015, gave to the Appellant the reasons for its disqualification. In addition the 1st Respondent asserted to have fully complied with the provisions of the Act and its Regulations. Further, on 30th September 2015, through its letter Ref. AB.309/386/04, the 1st Respondent made additional clarification to the Appellant indicating it had

been disqualified because its Company was found to have few equipment and the price it had quoted was very high.

On 7th October 2015, the Appellant wrote to the Respondent, objecting to the award of the contract to the 2nd Respondent. The 1st Respondent did not reply prompting the Appellant to file this Appeal on 23rd October, 2015.

Upon the Appellant lodging his Appeal, this Appeals Authority notified the Respondents as a result of which the 1st Respondent raised a Preliminary Objection (P.O.) on a point of law:

That this Appeal is against the wrong party for the 1st Respondent (Bugando Medical Centre) is not a legal entity with legal personality capable of being sued.

The Appeals Authority, before proceeding with the merits of the Appeal, found it prudent to first determine the PO so raised.

SUBMISSIONS OF THE 1ST RESPONDENT ON THE P.O.

On the date of hearing of the appeal, this Appeals Authority had to determine the issues to be decided in relation to the P.O. raised. There was only one issue calling for determination and that is whether Bugando Medical Centre is a corporate entity with the capacity to sue or being sued. The parties were then required to address that issue before embarking on the merits of the appeal.

In addressing the Appeals Authority on the P.O, the learned advocate for the 1st Respondent submitted that Bugando Medical Centre is a registered trust owned by Tanzania Episcopal Conference of the Catholic Bishops of Tanzania. That means, it has no legal capacity to sue or being sued in its own name; instead, it is the Registered Trustees of Bugando Medical Centre who are the proper parties to be sued. The learned counsel further submitted that Bugando Medical Centre is neither a public body as defined under Section 3 of the Act nor a procuring entity for purposes of this tender. The learned counsel prayed for the dismissal of the appeal.

APPELLANT'S SUBMISSIONS ON THE P.O.

In contesting the P.O., Mr. Erasto Theonest who is the Appellant's Director of Human Resource and Corporate Affairs, did not dispute the fact that Bugando Medical Centre is a Trust, but rather glossed and based his arguments on the Tender Document. He lamented that the Tender Document which provided guidance on the tendering process never made reference to the Registered Trustees of Bugando Medical Centre and was thus misleading to the bidders. Mr. Erasto went as far as making reference to part of the Respondent's Tender Advertisement in which it was stipulated that the tendering procedures will be in accordance with the Public Procurement Regulations and that it was not the first time Bugando Medical Centre was being sued. In the Appellant's view therefore, it is the 1st Respondent himself who misled the tenderers thus it has to take responsibility for that.

ANALYSIS BY THE APPEALS AUTHORITY

Having heard the arguments by the parties on the P.O. and as already pointed out above, there is only one main issue for determination and that is:-

Whether the 1st Respondent is an entity capable of suing or being sued in its own name.

In analysing this issue, the Appeals Authority took cognisance of the fact that the Appellant has not disputed the fact that the 1st Respondent is a registered trust. Further, this Appeal Authority observed that Mr. Erasto not being a lawyer could not by any stretch of imagination appreciate the importance of the legal issue at hand. The principle in respect to the manner of how to deal with issues wherein a P.O. has been raised was succinctly framed in the case of *Mukisa Biscuit Manufacturing Co. Ltd. vs West End Distributors Ltd – (1969) E.A. 696*. In that case, the then Court of Appeal of East Africa said:-

... A preliminary objection is one which contains a point of law which if argued as a P.O. may dispose of the suit.

The corollary is that a P.O. may not be raised if any fact has to be proved. In the instant Appeal, the learned counsel for the 1st Respondent did not provide proof that the his client is a registered trust. This Appeals Authority has established beyond doubt that indeed Bugando Medical Centre is a Trust a matter of law which does not require any further proof.

The Appeals Authority is of the settled view that, the 1st Respondent being a trust, the proper parties to be sued are the Registered Trustees of Bugando Medical Centre. Section 8 (1) of the Trusteeship Incorporation Act, Cap 318 RE 2002 provides as follows:-

“ Upon the grant of a certificate under subsection (1) of section 5, the trustee or trustees shall become a body corporate by the name described in the certificate, and shall have–

(a) perpetual succession and a common seal;

(b) power to sue and be sued in such corporate name;

(c) subject to the conditions and directions contained in the said certificate to hold and acquire, and, by instrument under such common seal, to transfer, convey, assign and demise, any land or any interest therein in such and the like manner, and subject to the like restrictions and provisions, as such trustee or trustees might, without such incorporation, hold or acquire, transfer, convey therein, assign or demise any land or any interest”.

As already indicated above, the Appellant’s arguments glossed over the Respondent’s Tender Document which provided the Procuring Entity’s name as Bugando Medical Centre. The Appeals Authority finds that indeed, the 1st Respondent in floating this Tender, acted in ignorance of the provisions of Section 6 (2) of the Trusteeship Act, op-cit. which requires the words “Registered Trustees” to be included in the name of the trust.

For ease of reference, the section provides:-

"The name of every body corporate created under this Act shall include the words "Registered Trustees".

In the case at hand, the Tender Document, Paragraph 1 of Tender Advertisement, it is shown that Bugando Medical Centre intends to apply part of its own source of funds to procure Laundry Services for the FY 2015/16. Further, under Paragraph 3 of the same, it is shown that the tender process will be in accordance with the National Competitive Tendering procedures specified under the Public Procurement Act and its Regulations.

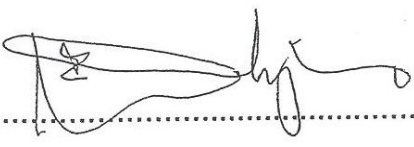
The Appeals Authority has observed and wishes to point out that in some instances, formats of bid documents issued by the Public Procurement Regulatory Authority as guidance to public procuring entities and other beneficiaries of public funds, have been used by private entities for bidding purposes without making modifications to suit individual cases. The appeal at hand is one of those cases.

In sum, it is the firm views of the Appeals Authority that Bugando Medical Centre could not have been sued in its own name in the manner the Appellant did. It is therefore the Appeals Authority's finding that the 1st Respondent is not an entity capable of being sued in its own name.

For the foregoing, this Appeals Authority upholds the P.O. and the Appeal is hereby dismissed. Each party to bear its own costs.

Right of Judicial Review as per Section 101 of the Public Procurement Act 2011 explained to parties.

This Ruling is delivered in the absence of the parties this 26th November 2015.




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JUDGE (Rtd) V.K.D. LYIMO

CHAIRMAN

MEMBERS

- 1. MRS. ROSEMARY A. LULABUKA.....
- 2. ENG. FRANCIS T. MARMO.....