

IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY
AT DAR ES SALAAM
APPEAL NO. 10 OF 2017-18

BETWEEN

M/S FUTURE CENTURY LIMITEDAPPELLANT

AND

RURAL ENERGY AGENCY.....RESPONDENT

RULING

CORAM

- | | | | |
|----|-------------------------|---|-----------------|
| 1. | Mrs. Rosemary Lulabuka | - | Ag. Chairperson |
| 2. | Eng. Aloys Mwamanga | - | Member |
| 3. | Mr. Louis Accaro | - | Member |
| 4. | Mr. Ole-Mbille Kissioki | - | Secretary |

SECRETARIAT

- | | | | |
|----|---------------------|---|----------------------|
| 1. | Ms. Florida Mapunda | - | Senior Legal Officer |
| 2. | Ms. Violet Limilabo | - | Legal Officer |
| 3. | Mr. Hamis Tika | - | Legal Officer |

FOR THE APPELLANT

- | | | | |
|----|--------------------------|---|---------------------------|
| 1. | Mr. Martin Matunda | - | Advocate, Crest Attorneys |
| 2. | Mr. Albert A. Muhanika | - | Managing Director |
| 3. | Ms. Helene Masanja | - | Director |
| 4. | Mr. Matare Kiturira | - | Logistics/Procurement |
| 5. | Mr. Atumpelege Mwakyembe | - | Procurement Specialist |

FOR THE RESPONDENT

1. Mr. Gissima Nyamo-Hanga - Director General
2. Mr. George M.J Nchwali - Director of Finance and Administration
3. Ms. Willa Haonga - Legal Affairs Officer
4. Ms. Amina Lwasye - Human Resource Dev & Admin
Manager
5. Mr. Thomas Wambura - Head of Procurement Management
Unit

This Ruling was scheduled for delivery today, 19th September, 2017 and we proceed to do so.

The Appeal was lodged by M/s Future Century Limited (hereinafter referred to as "the Appellant") against the Rural Energy Agency commonly known by its acronym REA (hereinafter referred to as "the Respondent"). The Appeal is in respect of Tender No. AE/008/2016-17/HQ/G/9,10 & 11 for Supply and Installation of Medium and Low Voltage Lines, Distribution of Transformers and Connection of Customers in Un-electrified Rural areas in Mainland Tanzania on Turnkey basis (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 facts of the Appeal can be summarized as follows:-

The Respondent by his letter dated 17th January 2017 invited pre-qualified tenderers to participate in the above named Tender. The deadline for

submission of bids was 22nd February 2017, whereby forty three (43) firms, the Appellant inclusive submitted their bids.

Tenders were subjected to evaluation and thereafter award was made to the lowest evaluated bidders. The Appellant was dissatisfied with the Respondent's decision of not awarding the tender to them; hence they applied for administrative review. The Respondent rejected the Appellant's complaint as a result they filed Appeal Cases No. 30, 31 and 32 of 2016/17 to this Appeals Authority. The Appeals Authority issued its Decision in respect to the said Appeals on 12th May 2017 whereby the Appellant was unsuccessful in all the Appeals.

The records indicate that after the decision of the Appeals Authority, the Respondent went on with his internal processes regarding this Tender and on 15th May 2017 vide a letter with Ref. AG.143/171/17/9 invited the Appellant to participate in the negotiations as the Tender Board had approved award of the Tender No. 10 Lot 9 to them. Negotiations took place on 17th May 2017 and both parties agreed on the tabled agenda for discussion.

On 16th June 2017, the Respondent vide a letter with Ref. AG 143/171/05/43 required the Appellant to provide detailed explanations on how they came into possession of the draft Minutes of Negotiation between REA and M/s Nakuroi Investment Co. Ltd which were among the annexures submitted by them to this Appeals Authority in Appeals No. 30, 31 and 32

of 2016/17. The Appellant vide a letter with Ref. FC/REA/2017/501 dated 21st June 2017, responded by explaining that the said draft minutes were obtained from the Respondent's Legal Manager who was soliciting illegal monetary payment to enable him facilitate the award of the contract to them. The Appellant explained further that, the Respondent's Legal Manager's act was reported to the Minister for Energy and Minerals as well as to the Prevention and Combating of Corruption Bureau (PCCB).

On 29th June 2017 the Respondent requested the Appellant to supply copies of letters presented to the Minister for Energy and Minerals and PCCB as evidence of reporting the said matter as claimed.

On 4th July 2017, the Respondent vide a letter with Ref. AG 135/143/02/58 informed the Appellant that his bids were rejected for being in possession of unauthorized information while the tender process was still in progress. The Tender Board approved rejection of the Appellant's tenders through its meeting held on 28th June 2017.

Dissatisfied with rejection of their tenders, on 9th July 2017 the Appellant vide a letter with Ref. FC/REA/2017/503 with sub-heading "Response for explanation, rejection and asking for administrative review" applied for administrative review to the Respondent challenging amongst others; reason given for rejection of their tenders and failure to be accorded right to be heard. On 12th July 2017, the Respondent vide his letter with Ref. No. AG/143/171/05/Vol.IV/65 issued his decision and rejected all the

Appellant's grounds for administrative review. The said letter was received by the Appellant on 18th July 2017.

Dissatisfied with the Respondent's decision, on 27th July 2017, the Appellant submitted another application for administrative review challenging rejection of his bids. On 31st July 2017, the Respondent informed the Appellant that their application for administrative review had been dismissed and the position of the Respondent remained the same as in their letter dated 12th July 2017.

On 7th August 2017, the Appellant again wrote another letter with the same heading "Response for explanation, rejection and asking for administrative review" raising same issues relating to rejection of his bids. On 14th August 2017 the Respondent replied to the Appellant's complaint. Being dissatisfied with the Respondent's decision, the Appellant on 23rd August 2017 lodged this Appeal.

The Respondent after being served with the statement of Appeal raised Preliminary Objections (PO) on the point of the law to wit;

- a) The Appeal is bad in law for being time barred; and
- b) The Appeal contains grounds/reasons which were not raised in the Appellant's complaint submitted for administrative review to the Accounting Officer, which are: Paragraph 1, 3, 5, and 6 of the grounds of Appeal.

Before embarking on the grounds of Appeal, the Appeals Authority deemed it proper to determine the first PO raised in order to establish if the Appeal is properly before it. In so doing, the Appeals Authority revisited parties' submissions on the PO as summarized hereunder.

SUBMISSIONS BY THE RESPONDENT ON THE PO

Submitting on the first point of PO the Respondent argued that, after they had rejected the Appellant's bid vide a letter dated 4th July 2017, the Appellant applied for administrative review on 9th July 2017. The Respondent issued his decision in relation to the Appellant's complaint on 12th July 2017. The said decision was acknowledged to have been received by the Appellant on 18th July 2017. The Respondent argued further that, being dissatisfied with the Respondent's decision the Appellant ought to have filed his Appeal to this Authority within seven working days from the date they received the Respondent's decision pursuant to Section 97(2) of the Public Procurement Act of 2011 as amended (hereinafter referred to as the Act).

The Respondent argued further that, instead of lodging his Appeal to this Appeals Authority, the Appellant went on submitting several letters to them seeking for administrative review while the matter had already been decided through the letter dated 12th July 2017. The Appellant lodged this Appeal on 23rd August 2017 after the statutory stipulated time had already expired. Thus, the Appellant's Appeal was lodged out of time and without leave to do so. The Appeal so lodged is in contravention of Sections 97(2)

and 98 of the Act. Section 98 of the Act allows extension of time to be sought if the statutory stipulated time for filing an appeal had already lapsed. However, the Appellant did not apply for leave and his Appeal was filed out of time.

Therefore, the Respondent prayed that the Appeal be struck out for being filed out of time.

APPELLANT'S REPLIES ON THE PO.

Responding to the PO the Appellant submitted that, his Appeal is not time barred as the same had been filed within seven working days as required by the law. In expounding his argument the Appellant submitted that, the decision of the Respondent that led them to file this Appeal was issued on 14th August 2017 and the Appeal was filed on 23rd August 2017; thus it was filled within time.

They submitted further that, they applied for administrative review through their letter dated 9th July 2017 after being informed by the Respondent that their tenders have been rejected. The Respondent responded to the Appellant's complaint vide their dated 12th July 2017. In expounding his argument the Appellant contended that, the Respondent's replies raised new issues that were not initially included in the Appellant's application for administrative review, thus after receipt of the same the Appellant sought for other reviews in relation to the new issues raised. The Appellant did not want some of his ground of Appeal be struck out because they were not

raised to the Accounting Officer as it was in the Consolidated Appeals Cases No.30, 31 and 32 of 2016/17.

They argued that, the Respondent's act of continuing to respond to the issues raised by the Appellant in their applications for review indicates that they were yet to issue their final decision until 14th August 2017. Thus, in determining the time limit for filing of this Appeal, the Respondent's conduct should also be considered as they continued to entertain the Appellant's applications for review submitted to them.

Finally, the Appellant prayed that the PO raised be overruled and the Appeal be heard on merits.

ANALYSIS BY THE APPEALS AUTHORITY

Having gone through the filed documents together with the oral submissions by the parties, the Appeals Authority is of the firm view that there is one basic issue calling for consideration, and that is whether the Appeal is properly before it. After formulation of the main issue, the Appeals Authority proceeded to resolve it as hereunder;

In resolving this issue the Appeals Authority revisited Section 97(1) and (2) of the Act which provides as follows;

S.97(1)“A tenderer who is aggrieved by the decision of the Accounting Officer may refer the matter to the Appeals Authority for review and administrative decision.

(2) Where

(a) the accounting Officer does not make a decision within the period specified under this Act or;

(b) the tenderer is not satisfied with the decision of the accounting officer,

the tenderer may make the complaint to the Appeals Authority within seven working days from the date of the communication of the decision by the accounting officer”.

(Emphasis supplied).

The above quoted provision entails that tenderers are accorded right of Appeal to the Appeals Authority if the accounting officer fails to issue his decision within the stipulated time or if a tenderer is dissatisfied with the decision of the accounting officer. The requirement of the above provision is in *parimateria* with Regulation 106(10) of GN. No. 446 of 2013 as amended.

In substantiating the validity of the parties’ arguments on the P.O the Appeals Authority revisited the documents submitted and observed that, the Appellant was dissatisfied with the Respondent’s decision to reject their

tenders issued on 4th July 2017. Furthermore, it is not disputed by both parties that upon being dissatisfied by such Respondent's decision, the Appellant applied for administrative review on 9th July 2017. The Respondent then issued his decision on 12th July 2017 and the same was received by the Appellant on 18th July 2017. It was further observed that, being dissatisfied with the Respondent's decision the Appellant lodged another application for administrative review on 27th July 2017. On 31st July 2017 the Respondent replied to the Appellant's application for review by informing them that the Respondent's decision is contained in the letter dated 12th July 2017 and their application for review was rejected in its entirety. The Appeals Authority observed that the Appellant went on seeking for further administrative review to the Respondent vide letter dated 7th August 2017 and the Respondent by its letter dated 14th August 2017 replied to the same by affirming its decision made in its letter dated 12th July 2017. The Appellant submitted his Appeal to this Appeals Authority on 23rd August 2017.

From the above facts the Appeals Authority is of the view that the Appellant's act of lodging an application for administrative review on 9th July 2017 after being dissatisfied with the Respondent's decision to reject their tenders was in compliance with Section 96(4) of the Act which reads;

S.96(4)"The accounting officer shall not entertain a complaint or dispute unless it is submitted within seven working days from the date the tenderer submitting it became aware of the circumstances giving rise to the complaint or dispute or when

that tenderer should have become aware of those circumstances, whichever is earlier". (Emphasis added)

The above provision allows tenderers to challenge decisions of accounting officers within seven working days of becoming aware of the circumstances giving rise to a complaint. The Appellant became aware of the Respondent's decision to reject their tenders on 4th July 2017; hence lodging an application for administrative review on 9th July 2017 was proper in the eyes of the law.

The Appeals Authority is of the further view that, since the Appellant received the Respondent's decision on their application for administrative review on 18th July 2017 and being dissatisfied, he ought to have lodged his Appeal to this Appeals Authority within seven working days pursuant to Section 97(2) of the Act quoted earlier herein. Counting from 18th July 2017, the seven working days within which the Appellant ought to have lodged his Appeal expired on 27th July 2017. The Appellant lodged this Appeal on 23rd August 2017 that is seventeen days beyond the stipulated time.

The Appeals Authority considered the Appellant's argument that they were unable to file the Appeal as the Respondent's decision dated 12th July 2017 raised new issues that were not included in their application for review dated 9th July 2017. The Appeals Authority reviewed the Appellant's application for administrative review and the Respondent's decision thereof and observed that indeed there were no new issues that were raised in the

Respondent's decision. In his decision the Respondent replied to the grounds of review raised by the Appellant. The Appeals Authority observed that, even if there could be new issues emanated from the Respondent's decision, the Appellant ought to have challenged the same by way of Appeal to this Appeals Authority. The Appellant was not required to seek for further review based on the fact that there were new issues raised in the Respondent's decision. The Appellant is precluded from raising new grounds of Appeal to this Appeals Authority if and only if the same was not included in his original application for administrative review to the Respondent. The replies or decision of the Respondent if raises new issue the same could be challenged by way of Appeal to this Appeals Authority. Having so observed the Appeals Authority is of the firm view that, if the Appellant after receipt of the Respondent's decision on 18th July 2017 was dissatisfied by the contents thereof he ought to have submitted his Appeal to this Appeals Authority within seven working days. Thus, the Appellant's act of submitting his Appeal after expiry of seven working days from the date they received the Respondent's decision on their complaint contravened the requirement of Section 97(2) of the Act.

The Appeals Authority also considered the Appellant's argument that, the Respondent's act of responding to his several applications for review indicates that they were yet to issue their final decision until 14th August 2017. The Appeals Authority revisited the documents submitted and observed that the Respondent's decision on the application for administrative review was issued on 12th July 2017 and all other

subsequent letters thereof were making reference to the position of the Respondent contained in the same letter. The Appeals Authority is of the further view that, even if the Respondent continued to respond to various issues raised by the Appellant, the law recognizes the first application for administrative review and the decision issued thereafter. Other subsequent correspondences after the decision on the application for administrative review had been issued are not recognized by the law.

Based on the above analysis the Appeals Authority is of the settled view that the Appeal has been lodged out of time since the same ought to have been lodged within seven working days after the receipt of the Respondent's decision on 18th July 2017.

In view of the above, the Appeals Authority agrees with the submissions by the Respondent that the Appeal was lodged out of time and without leave to do so. Consequently, the PO is hereby upheld and the Appeal is hereby struck out.

It is so ordered. Each party to bear its own costs.

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 Appellant and the Respondent this 19th September, 2017.



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MRS. R. LULABUKA
Ag:CHAIRPERSON

MEMBERS:

1. MR. LOUIS ACCARO 

2. ENG. ALOYS MWAMANGA 