

IN THE
PUBLIC PROCUREMENT APPEALS
APPEAL CASE NO. 15 OF 2015-16

BETWEEN

M/S JAPATAN LIMITED..... APPELLANT

AND

NGORONGORO CONSERVATION

AREA AUTHORITY RESPONDENT

DECISION.

CORAM

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

SECRETARIAT

- | | | |
|---------------------------|---|---------------|
| 1. Ms. Violet S. Limilabo | - | Legal Officer |
| 2. Mr. Hamisi O. Tika | - | Legal Officer |

FOR THE APPELLANT

- | | | |
|-----------------------|---|------------------------------|
| 1. Mr. Gerald Msovela | - | Advocate, Novelty Advocates. |
| 2. Mr. Joseph Asenga | - | Administrative Officer |

FOR THE RESPONDENT

1. Mr. Egidis Mweyunge -Acting Legal Services Manager
2. Mr. R.M.Mackiros - Manager, Human Resources and Administration
3. Mr. Johnson Saitev Laizer -Ag. Manager, Procurement Management Unit

This Decision was scheduled for delivery today 8th January 2016 and we proceed to do so.

The Appeal was lodged by M/s JAPATAN LIMITED (hereinafter referred to as "the Appellant") against the NGORONGORO CONSERVATION AREA AUTHORITY (hereinafter referred to as "the Respondent").

The Appeal is in respect of Tender NO. AE/055/2014-15/HQ/G/42 for Supply of field Gear and Rangers Uniforms (hereinafter referred to as "the tender").

According to the documents submitted to the Public Procurement Appeals Authority (hereinafter referred to as "the Appeals Authority"), as well as oral submissions by the parties during the hearing, the facts of the Appeal may be summarized as follows:

The Respondent issued through the Daily News newspaper dated 23rd March 2015, an invitation to tenderers to submit bids under the National Competitive Tendering Procedures specified in the Public Procurement Act No. 7 of 2011 (hereinafter referred to as "the Act") and the Public

Procurement Regulations No. 446 of 2013 (hereinafter referred to as G.N. No. 446/2013).

The deadline for the submission of the tenders which had been set for 28th April 2015 was extended to 14th May 2015, whereby seven (7) tenders were received from the following firms:-

S/N	NAME OF THE BIDDER	QUOTED PRICE IN TZS/USD. (VAT INCLUSIVE)
1.	M/s SB Combined Company Limited	224,280,000.00
2.	M/s HHOK Printing Company Ltd	178,261,538.00
3.	M/s Kikapu Investment Company Limited	USD.165,762.45
4.	M/s Japatan Limited	199,589,035.00
5.	M/s Cozy Traders (T) Limited	231,834,600.00
6.	M/s Sheria Ngowi Limited	242,271,700.00
7.	M/s Ital Shoe Limited	332,608,800.00

The tenders were subjected to evaluation process, conducted in two stages namely; preliminary/ commercial and technical evaluation.

During the preliminary /commercial evaluation, two (2) tenders by M/s. HHOKI Printing Company and M/s Kikapu Investment Company Limited respectively were disqualified while the remaining five tenders (5) were subjected to technical evaluation, and were found to be technically responsive.

The said tenders were checked for arithmetic errors before price comparison. In that process, the tender by the Appellant was found with errors, whereby his original price changed from TZS. 199,589,035.00 to TZS. 250,345,555.00 (VAT Inclusive). The tenders were ranked as follows-

S/N	NAME OF THE BIDDER	QUOTED PRICE IN TZS/USD. (VAT INCLUSIVE)	RANKING
1.	M/s SB Combined Company Limited	224,280,000.00	1
2.	M/s Japatan Limited	250,345,555.00.	3
3.	M/s Cozy Traders (T) Limited	231,834,600.00	2
4.	M/s Sheria Ngowi Limited	263,334,700.00	4
5.	M/s Ital Shoe Limited	332,608,800.00	5

The Tender Board at its meeting held on 16th September 2015, approved the recommendations of the Evaluation Committee to award the Tender to M/s SB Combined Company Limited at a contract price of TZS. 224,280,000.00 (VAT Inclusive), pending confirmation from the Appellant on the arithmetic correction of errors.

On 17th September 2015, the Appellant by their letter with Ref. No. JPT/NCAA/01/15 confirmed the corrections made thereby prompting the Respondent who on 18th September 2015, issued a Notice of Intention to award the tender to M/s SB Combined Company Limited to all bidders.

Aggrieved, the Appellant on 24th September 2015 applied for administrative review to the Respondent's Accounting Officer on two major grounds namely;

- i. That the Respondent had failed to note the arithmetic errors contained on item 2 of their quoted price which would have reduced the bid price.
- ii. That, the confirmation of the arithmetic corrections which they had made was vitiated not only as a result of an alleged wrong error identified by the Respondent but was also due to undue pressure they had been subjected to from one of the Respondent's staff.

In response to the Appellant's application, the Respondent's Accounting Officer on 29th September 2015, formed a review panel which, after revisiting the arithmetic errors confirmed the Appellant's price to be the lowest evaluated. The panel therefore recommended the award of the tender to the Appellant.

On 12th October 2015, the Respondent's Accounting Officer through their letter with Ref. No. NCAA/D/276/VOL.XXV/83 communicated his decision to all bidders, awarding the Tender to the Appellant at a contract price of TZS. 201,065,215.00 (VAT Inclusive) thereby rescinding his earlier notice of intention to award the Tender to M/s SB Combined Limited.

Responding to the letter of award of contract, the Appellant on 13th October 2015, by their letter with Ref. No. JPT/NCAA/T/03/2015, wrote to the Accounting Officer acknowledging the award so made. Upon the acceptance of the offer of contract by the Appellant, the Respondent on

22nd October 2015 through its letter under Ref. No. NCAA /D/276/VOL.XXV/88 informed all the respective bidders that he had received a complaint from M/s SB Combined Company Limited disputing the award he had made to the Appellant and that he had decided to suspend the procurement process in question pending resolution of the complaints so made.

On 23rd October 2015 the Appellant through their letter with Ref. No. JPT/NCAA/T/04/15 wrote to the Respondent disputing Respondent's powers to entertain any complaint after the procurement contract had come into force in terms of Regulation 105(4) of G.N. No.446/2013.

In response to the Appellant, on 26th October 2015 the Respondent's Accounting Officer denied to have awarded the contract to the Appellant and asserted that the letter referred to by the Appellant was a mere communication letter informing him of the decision of the complaint made. The Accounting Officer insisted that he cannot award the tender while there was a pending complaint before him. The Respondent therefore, informed the Appellant and other bidders that he was working on the matter and all bidders will be informed accordingly.

That, while communication between the Appellant, other bidders and the Respondent were in progress, the Tender Board at its meeting held on 23rd October 2015 decided to reject all tenders and re-advertise it and directed the Accounting Officer to seek guidance from the Public Procurement Regulatory Authority (PPRA). PPRA directed the procuring entity to resolve all disputes before seeking to annul the tender process.

That, on 26th October and 6th November 2015 respectively, the Appellant wrote to the Respondent indicating his dissatisfaction on the matter and the delay by the Respondent which would frustrate the contract. Having received no response from the Respondent, on 30th November 2015, the Appellant lodged his Appeal to this Appeals Authority.

That, on 7th December, 2015, the Appeals Authority notified the Respondent of the pending Appeal and required them to file their responses.

On receiving notification of the Appeal by the Appellant, the Respondent raised a Preliminary Objection which centred on the jurisdiction of this Appeals Authority to entertain the Appeal. Briefly stated, the Respondent argued that the Appeal is out of time, it should therefore not be entertained by the Appeals Authority.

In view of the objection raised, and as a matter of procedure, the Appeals Authority was obliged to resolve the Preliminary Objection before addressing the merits of the Appeal.

RESPONDENT'S SUBMISSIONS ON THE PRELIMINARY OBJECTION

In support of the Preliminary Objection, the learned counsel for the Respondent submitted that the Appellant received Respondent's letter of intention to award the tender on 12th October 2015. The Appellant filed his Appeal on 30th November 2015; he was therefore required to lodge his Appeal to the Appeals Authority within fourteen days from the date of that

letter. To the contrary the Appellant did not do so. Therefore, his Appeal is out of time and that the Appeals Authority should not entertain it. He contended that no contract had been offered to the Appellant, arguing as he did, that the letter which was addressed to the Appellant indicating that they were being offered the contract was a mere communication, which carried no weight under the circumstances. Members of the Appeals Authority intervened by drawing the Respondent's attention to the contents of the last paragraph of his letter which read thus:

'Due to these circumstances, NCAA resolves these complaints by awarding M/s Japatan Limited this tender at a contract price of TZS. 201,065,215.00 VAT inclusive instead of M/s SB Combined Limited for TZS. 224,280,000.00 VAT Inclusive'.

In response, the Respondent's counsel conceded that those words connote that the award of the tender had been made. And by necessary implication, the Appellant who had been awarded the contract was under no obligation to take any action other than to participate in the execution of the prospective contract. Under the circumstances the Preliminary Objection so raised crumbled as a house of boxes and was ordered to be struck out. That done, the Appeals Authority set out to determine the appeal on its merits.

SUBMISSIONS BY THE APPELLANT

The Appellant's grounds of Appeal may be summarized as follows:

1. That, the Respondent denies awarding them the tender while they were the lowest evaluated tenderer.

2. The Respondent erred in law and fact by usurping powers of the Appeals Authority by carrying out administrative review of the tender twice, hence contravening Sections 96(8) and 97(1) of the Act, as the accounting officer had become *functus officio*.
3. That, as a result of misdirection and defiance of law by the Respondent, the Appellant had suffered an enormous pecuniary loss as the Respondent had already communicated the award of the tender.

Finally, the Appellant prays for the following reliefs;

- i. Payments of damages for Psychological torture and mental anguish at TZS. 20,000,000.00
- ii. Legal fees to the tune of TZS. 10,000,000.00
- iii. The Respondent to be ordered to award him a tender as per acceptance letter issued by them.
- iv. A declaration that the Respondent's Accounting Officer's silence defeats justice and infringes Regulation 4 (1) and (2) (d) of G.N.446/2013.
- v. If found in breach, stern measures should be taken to the Respondent as are not seriously taking this matter.

REPLIES BY THE RESPONDENT.

The Respondent's replies to the grounds of Appeal may be summarized as follows;

1. That, no bidder had been awarded this tender. What transpired was a mere communication to the bidders.
2. That, they have never usurped the powers of the Appeals Authority because they merely conducted the administrative reviews in respect of the complaints received.
3. They did not contravene any provision of the law cited by the Appellant and that the Respondent had been communicating to all bidders in every stage they had passed for transparency purposes.
4. That, with regard to the prayers for costs, the Respondent avers that, the Appellant is the one who is to pay the Respondent as he frustrated the process by confirming the corrections of errors communicated.
5. That, with regard to the prayer for award of the tender in the Appellant's favour, the same should be determined by the Appeals Authority.

ANALYSIS BY THE APPEALS AUTHORITY

In dealing with this Appeal, the Appeals Authority having gone through the tender proceedings including various documents submitted by both parties and oral submissions during the hearing, it is of the view that the Appeal

has been centred on three main issues calling for determination; and these are:-

1. Whether there was an award of tender made to the Appellant
2. Whether the Respondent had powers to entertain the application by M/s SB Combined Limited for administrative review after the award to the Appellant.
3. To what relief(s) if any, are the parties entitled to

Having framed the above issues, the Appeals Authority proceeded to resolve them as follows;

1. Whether there was an award of Tender made to the Appellant.

In resolving this issue, the Appeals Authority observed that immediately after the Appellant had requested the Accounting Officer for the Administrative review, the Accounting Officer constituted a review panel which affirmatively established that the Appellant's tender price was not TZS. 250,345,555.00 as previously indicated, but were TZS. 201,065,215.00 VAT inclusive. The panel advised the Accounting Officer to award the tender to the Appellant bearing in mind that all the tenderers in the process were found to be commercially and technically responsive to the requirements of the Tender Document. The Appeals Authority observed further that, the Accounting Officer agreed with the panel's recommendations and consequently by his letter with Ref. NCAA/D/276/VOL.XXV/83 dated 12th October 2015 awarded the tender to the Appellant at a contract price of TZS. 201,065,215.00 VAT Inclusive.

The Respondent also communicated his decision to all bidders and rescinded the proposal to award the tender to M/s SB Combined Limited. The letter reads in part as follows;

"...NCAA reviewed the bid of M/s JAPATAN Limited and found to be a total price of TZS. 201,065,215.00 VAT inclusive and not TZS. 201,967,915.00 VAT inclusive as per his complaints...

Due to these circumstances, NCAA resolves these complaints by awarding M/s Japatan Limited this tender at a contract price of TZS. 201,065,215.00 VAT inclusive instead of M/s SB Combined Limited for TZS. 224,280,000.00 VAT Inclusive since both firms met other criteria and finally price comparison taken onboard. This is in line with Public Procurement Regulations 2013, G.N.NO.446, Section 212 (a)" (sic)... (Emphasis Added).

In view of the above findings, the Appeals Authority is of the firm view that what was communicated to the Appellant was indeed an award of the tender and not a mere communication as alleged, since the said letter is in conformity with the requirement of Section 60(6) of the Act. The Respondent is therefore estopped from denying the fact. Accordingly, it is the Appeals Authority's settled view that the Respondent awarded this Tender to the Appellant and the first issue is thus answered in the affirmative.

2. Whether the Respondent had powers to entertain the application by M/s SB Combined Limited for administrative complaint after award to the Appellant.

In resolving this issue, the Appeals Authority observed that having positively resolved the first issue that there was an award of the tender made by the Respondent, any subsequent application for administrative review would have no legal basis under the law. The Appellant insisted that the Respondent having accepted the award of the contract, he no longer had powers to entertain complaints or application for administrative reviews under the circumstances.

The Appeals Authority concurs with the Appellant that the Respondent was *functus officio* in terms of Section 95(5) of the Act, read together with Regulation 105(4) of G.N.NO.446/2013. The Respondent would have had that power if at all his letter was a Notice of Intention to Award the tender and not an award. Accordingly, the Appeals Authority's conclusion in this regard is that Respondent had no powers to entertain the application by M/s SB Combined Limited for administrative review after contract had entered into force.

3. To what relief(s) if any, are the parties entitled to

In resolving this issue, the Appeals Authority first considered the Appellant's prayers for payments of damages for psychological torture and mental anguish to the tune of TZS. 20,000,000.00 and legal fees to the tune of TZS. 10,000,000.00. The Appeals Authority is of the view that the Appellant is apparently knowledgeable to the procurement procedures and that's why he successfully managed to

defend the award made to him. However, he has failed to justify the validity for payments he claimed. The same shall not issue.

With regard to the prayer that the Respondent be ordered to award him a tender as per acceptance letter issued by them, the Appeals Authority is of the firm view that there was no dispute of the award and it is on record that the moment the Respondent communicated to the Appellant on 12th October 2015 and the Appellant accepted the offer, the contract came into force. An order to the Respondent to award cannot issue as it will be superfluous.

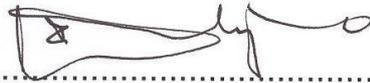
On the basis of the aforesaid conclusions, the Appeals Authority upholds the Appeal and orders as follows;

1. Compensation to the Appellant of filing fees of TZS. 200,000/-
2. Parties to coordinate to facilitate the execution of the contract in respect to the tender in observance of the law.

It is so ordered.

Right of Judicial Review as per Section 101 of the PPA/2011 explained to parties.

This Decision is delivered in the presence of the Appellant and his counsel and the Respondent this 8th January, 2016.



.....
JUDGE (rtd) V.K.D. LYIMO

CHAIRMAN

MEMBERS:

1. MRS. R. A. LULABUKA



2. ENG. A. J. MWAMANGA

