

IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY
AT DAR ES SALAAM
APPEAL CASE NO 25 OF 2018-19
BETWEEN
M/S UNISOFT TECHNOLOGIES (T) LIMITED.....APPELLANT
AND
UNIVERSITY OF DAR ES SALAAM.....RESPONDENT

RULING

CORAM

- | | | |
|------------------------------------|---|-------------|
| 1. Hon. Justice (Rtd) Suda Mjasiri | - | Chairperson |
| 2. CPA. Fredrick Rumanyika | - | Member |
| 3. Mr. Rhoben P. Nkori | - | Member |
| 4. Mr. Ole-Mbille Kissioki | - | Secretary |

SECRETARIAT

- | | | |
|------------------------|---|---------------|
| 1. Ms. Florida Mapunda | - | DST |
| 2. Mr. Hamisi O. Tika | - | Legal Officer |
| 3. Violet S. Limilabo | - | Legal Officer |

FOR THE APPELLANT

1. Mr. Erick K.Rweyemamu - Advocate, Kings Law Chambers
2. Mr. Alfred Tukiko Okech - Advocate, Kings Law Chambers
3. Mr. V. Sosidhar Mendy - Managing Director
4. Mr. Vyomesh Shelat - Executive Director

FOR THE RESPONDENT

1. Mr. Petro E.Mselewa - Advocate
2. Mr. Jeremiah Masunga - Procurement Officer
3. Mr. Emmanuel Haule - Smart Card Manager

This Appeal was lodged by M/s Unisoft Technologies (T) Limited (hereinafter referred to as "the Appellant") against the University of Dar es salaam (hereinafter referred to as "the Respondent").

The Appeal is in respect of Tender No. PA/011/2017-18/45 /Lot 1 for the Supply of Printing Materials and Equipment to the University of Dar es salaam (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 Respondent through the Mwananchi Newspaper dated 3rd September 2018, invited eligible tenderers to participate in the Tender, which was due for submission on 17th September 2018.

Six (6) firms submitted their tenders timely. The tenders were then subjected to evaluation which was conducted in three stages, namely; Preliminary, Detailed technical and commercial responsiveness.

Five tenders including the Appellant's were disqualified at the preliminary and detailed evaluation stages respectively, for being non-responsive to the requirements. The remaining tender by M/s Compulynx (T) Limited was therefore subjected to the final evaluation stages and was ultimately recommended for award of the tender, at the contract price of TZS. 135,848,148.24 VAT inclusive.

The Tender Board through circular resolution dated 12th October 2018, approved the award recommendations by the Evaluation Committee.

On 24th October 2018, the Respondent issued a "Notice of Intention to Award the Contract" to all tenderers who participated in the process. The Notice informed the disqualified bidders the reasons for their disqualification. The basis of the Appellant's disqualification was that its proposed retransfer printer did not comply with the specification of the retransfer commercial lamination module, dual laminator and tactile impressor module contained in the Tender Document.

The Appellant received the said notice on 30th October 2018. Being dissatisfied with the respondent's decision, it applied for administrative review of the decision of the Accounting Officer on the same day.

On 23rd November 2018, the Appellant received the Respondent's letter dated 14th November 2018 advising it that its complaint has been received and was being reviewed.

On 29th November 2018, the Appellant received the Respondent's decision in a letter dated 21st November 2018, dismissing its complaint for lack of merits. Aggrieved further by the respondent's decision, the Appellant lodged this Appeal on 4th December, 2018.

GROUPS OF APPEAL

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

- i. That, the assertion by the Respondent that the Appellant failed to comply with the required tender specifications by submitting specifications which were too general was not true. The Appellant complied with the specifications contained in the Tender Document. It quoted "CR805 Duplex" retransfer which was exactly what the Respondent needed. This was confirmed by the Entrusted Data Card Corporation, the manufacturer of the printer.
- ii. That its tender was the lowest compared to other bidders. Its quoted price is TZS. 129,953,518.00 VAT Inclusive while the price of the proposed bidder is TZS. 135,848,148.24 VAT Inclusive.

Finally, the Appellant prayed for the following;

- i. Award of the tender be made to the right bidder.

- ii. Nullification of the intention to award issued by the Respondent.

REPLY BY THE RESPONDENT

The Respondent's reply to the grounds of Appeal may be summarized as hereunder;

That, the Appellant's technical specifications of CR805 Duplex Retransfer printer was too general; hence it was found to be non-responsive to the requirements.

That, the tender requirement was CR805 Duplex retransfer printer, 125 Card input hopper with custom tactile impressor and retransfer commercial laminator module, dual laminator module.

The Appellant attached Entrusted Data Card CR805 Card printer without an option of inline lamination module. It is difficult to laminate without such a module. Therefore, the Respondent failed to establish if the Appellant had quoted single laminator module or dual laminator modules.

The Tender Document required bidders to describe the type and style of the tactile modules to be supplied. It was required also to state whether the module is custom or generic. The Appellant's tender did not state so.

That it is true that the Appellant was the lowest bidder but was not the lowest evaluated bidder. The successful bidder is not necessarily the one with the lowest price, but the lowest evaluated price as per

Instruction to Tenderers (ITT) Clause 34 (1) and Regulation 212 of the Public Procurement Regulations, GN.NO.446 of 2013 as amended.

Finally, the Respondent prayed for the following reliefs;

- i. A declaration that the Respondent's decision to disqualify the Appellant was proper and was made within the dictates of the law.
- ii. That, the Appeals Authority be pleased to uphold the decision to award the contract to the proposed bidder.
- iii. That, the Appeals Authority be pleased to uphold the decision of disqualifying the Appellant for being non responsive to the requirements of the Tender Document.
- iv. Any other remedy the Appeals Authority deems fit and appropriate to grant.

At the hearing of the Appeal, and during the framing up of the issues, the Appeals Authority observed that there was a point of law for determination before going into the merits of the appeal that is *whether or not the Appeal is properly before it.*

This was in relation to its jurisdiction to entertain the Appeal which was filed out of the prescribed time. The decision by the Accounting Officer was delivered beyond the time limit provided by the law. The complaint was lodged on 30th October 2018 and the decision was made on 29th November 2018, which is 22 working days beyond the required seven working days. Furthermore, the Appellant preferred its appeal before the Appeals Authority on 4th December 2018, which

was late by eleven (11) working days from the date when the Accounting Officer ought to have delivered its decision. The Appeals Authority called upon learned counsel to address it on the point of law.

SUBMISSIONS BY THE APPELLANT

The Appellant submitted that the Notice of Intention to award the contract by the Respondent was issued on 24th October 2018 and received by it on 30th October 2018. On the same day it requested for administrative review of the Accounting Officer as required under the law. On 23rd November 2018, it received the Respondent's letter dated 14th November 2018, acknowledging receipt of the complaint and advising it that it is working on the complaint. Therefore, they had to wait for the Respondent's decision which was received on 29th November 2018. The Appeal was lodged on 4th December 2018 within seven working days from the date of receipt of the decision. Thus, in terms of Section 97 (1) and (2) (b) read together with Section 35 of the Public Procurement (Amendment) Act, 2016, the Appeal is properly before the Appeals Authority. Therefore, the provision of Section 96 was no longer applicable.

He argued further that, Article 107A of the Constitution of the United Republic of Tanzania requires courts to administer justice without due regard to technicalities. Therefore, in the interest of justice, the Appeals Authority should abide by the Constitution. He stated that the Respondent contributed to the delay if any, in view of its letter

dated 14th November 2018, which informed them that the complaint is being worked upon.

It rested its submissions by praying for the appeal to be determined on merit as the point of law has no basis.

SUBMISSIONS BY THE RESPONDENT

On his part the counsel for the Respondent argued that in terms of Sections 96(6) and 97(1) and (2) (a) of the Public Procurement Act, 2011, the Appellant had the option of appealing directly to the Appeals Authority without having to wait for the decision of the Accounting officer after the lapse of seven working days as provided under the law. Since the Respondent failed to deliver its decision within the prescribed time under the law, the Appellant should have filed its complaint directly to the Appeals Authority. This Appeal therefore has been filed out of time, and should be dismissed.

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 determination, 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:

It is not disputed that the Appellant lodged its complaint to the Respondent's Accounting Officer on 30th October 2018, in compliance with Section 96(4) of the Act, after it had received the Notice of

Intention to award the tender dated 24th October 2018. The Respondent was required under the law to issue a written decision within 7 working days from the date it received the complaint in compliance with Section 96(6) of the Act. The Respondent was therefore required to issue its written decision to the Appellant on or before 8th November 2018. However, this was not done.

The Appeals Authority is of the considered view that, since the Respondent failed to issue its decision within the specified period, the Appellant should have pursued its rights under Sections 96(7) and 97(1) and (2) (a) of the Act, as amended, which provide as follows:-

“S. 96(6) The accounting officer shall, within seven working days after the submission of the complaint or dispute deliver a written decision which shall:-

(a) State the reason for the decision; and

(b) If the complaint or dispute is upheld in whole or in part indicate the corrective measures to be taken.

S.96 (7) where the accounting officer does not issue a decision within the time specified in subsection (6), the tenderer submitting the complaint or dispute to the procuring entity shall be entitled immediately thereafter to institute proceedings under section 97 and upon institution of such proceedings, the competence of the accounting officer to entertain the complaint or dispute shall cease”.

"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 the tenderer may make the complaint to the Appeals Authority within seven working daysupon expiry of the period within which the accounting officer ought to have made a decision.

(Emphasis Added).

In view of the above mentioned provisions, the Appellant ought to have filed his appeal to this Appeals Authority by 19th November 2018. However, it did not do so.

In relation to the Appellant's argument that it did not appeal because the Respondent had indicated that it was working on the complaint, the Appeals Authority is of the view that this argument has no legal basis. At the time the Respondent issued the letter to the Appellant, the 7 (seven) working days had already lapsed. In terms of Section 96(7) of the Act, the Accounting Officer no longer had the mandate to entertain the complaint.

Having so analyzed, the Appeals Authority does not agree with the Appellant's arguments that the provision of Section 96 of the Act was not applicable under the circumstances since it provide the right of

complaint as well as the right of appeal under all circumstances. The Appellant failed to provide any legal basis for its exclusion.

The above notwithstanding, the Appeals Authority considered the Appellant's reliance to Article 107A of the Constitution of the United Republic of Tanzania and observed that the issue at hand relates to a clear provision of the law which has not been complied with. Since the law states in no uncertain terms that upon the Respondent's failure to issue a written decision within the prescribed time, the aggrieved complainant is required to lodge its Appeal to this Appeals Authority within seven working days from the date when the Accounting Officer ought to have delivered its decision, we agree with the Respondent that Appeal has been filed out of time and is not properly before the Appeals Authority.

Consequently, given the requirements under the law, we are of the considered view that the Appeal is out of time and is hereby dismissed. As the point of law was raised *suo motu* by the Appeals Authority, each party is to bear its own 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 11th January 2019.

HON. JUSTICE (RTD) SAUDA MJASIRI

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CHAIRPERSON

MEMBERS:

1. CPA.FREDRICK RUMANYIKA

Handwritten signature of CPA Fredrick Rumanyika in blue ink, written over a dotted line.

2. MR. RHOBEN P.NKORI

Handwritten signature of Mr. Rhoben P. Nkori in blue ink, written over a dotted line.