

IN THE  
PUBLIC PROCUREMENT APPEALS AUTHORITY

AT DAR ES SALAAM

APPEAL No. 40 OF 2017-18

BETWEEN

M/S PUBLIC JOINT STOCK COMPANY,  
RESEARCH AND PRODUCTION CORPORATION  
UNITED WAGON COMPANY ..... APPELLANT

AND

THE TANZANIA RAILWAYS CORPORATION.....RESPONDENT

RULING

CORAM

- |                            |   |                 |
|----------------------------|---|-----------------|
| 1. Ms. Monica P. Otaru     | - | Ag. Chairperson |
| 2. Eng. Francis T. Marmo   | - | Member          |
| 3. Mr. Louis P. Accaro     | - | Member          |
| 4. Mr. Ole-Mbille Kissioki | - | Secretary       |

SECRETARIAT

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

FOR THE APPELLANT

- |                      |   |  |
|----------------------|---|--|
| 1. Mr. John M. Cheyo | - | Appellant's representative                   |
| 2. Mrs. Rita Chihoma | - | Advocate; Maira & Adhis Company<br>Advocates |

FOR THE RESPONDENT

- |                        |   |                                     |
|------------------------|---|-------------------------------------|
| 1. Mr. Petro Mnyeshi   | - | Ag. Company Secretary/Legal Officer |
| 2. Mr. Reginald Malele | - | Ag. Principal Procurement Manager   |

This Appeal was lodged by M/s Public Joint Stock Company, Research and Production Corporation, United Wagon Company (hereinafter referred to as "the Appellant") against Tanzania Railways Corporation (hereinafter referred to as "the Respondent").

The Appeal is in respect of Pre-qualification process for Tender No.PA/003/HQ/2017-18/G/02 for Supply, Testing, Commissioning and Training of Rolling Stock for Standard Gauge Railway (SGR) System to Operate in Tanzania Central Railway Corridor (hereinafter referred to as "the Tender").

After going through the submissions by the parties, the Public Procurement Appeals Authority (hereinafter referred to as "the Appeals Authority"), wishes to summarize the facts of the Appeal as follows:-

The Respondent through the Daily News and Habari Leo newspapers dated 27<sup>th</sup> December 2017, published the request for Pre-qualification pursuant to the Public Procurement Act of 2011, (hereinafter referred to as "the Act") and the Public Procurement Regulations, Government Notice No. 446 of 2013 (hereinafter referred to as "G.N. No. 446 of 2013") both as amended in 2016. The deadline for the submission of Pre-qualification requests was initially set for 30<sup>th</sup> January 2018 then was extended to 28<sup>th</sup> February 2018. Thirty five (35) firms submitted their requests.

The requests were subjected to evaluation whereby twenty three (23) firms qualified for short listing. Twelve (12) firms, the Appellant inclusive, were found to be non-responsive. They were informed of the results through letters dated 6<sup>th</sup> April 2018. The Appellant received theirs on 12<sup>th</sup> April 2018. The letter specifically stated that the Appellant's bid was disqualified for the following reasons;

- i) No Power of Attorney and the Anti-bribery policy submitted was not signed.

- ii) 9 Projects for past experience submitted but there is no any informal (sic) agreement between supplier and manufacturer as per the client requirement.
- iii) No any submission of after sale for short and long term.

Aggrieved, the Appellant submitted an application for administrative review to the Respondent on 4<sup>th</sup> May 2018 disputing all the reasons given for his disqualification. On 10<sup>th</sup> May 2018, the Respondent issued his decision and rejected all the grounds so raised. Dissatisfied, on 21<sup>st</sup> May 2018 the Appellant lodged this Appeal.

In response to the Appellant's grounds of Appeal, the Respondent raised a Preliminary Objection (PO) to wit; that the Appeal is time barred.

Before proceeding to the merits of the Appeal, the Appeals Authority deemed it proper to determine the PO so raised in order to substantiate its validity.

#### THE RESPONDENT'S SUBMISSIONS ON THE PO

Supporting the PO the Respondent submitted that, the Appeal has been lodged out of time contrary to the requirement of Section 97(2)(b) of the Act. According to the Section, a tenderer who is dissatisfied with the decision of the accounting officer is required to lodge an Appeal to the Appeals Authority within seven days. The Appellant was dissatisfied with the decision issued by the Respondent's accounting officer on 10<sup>th</sup> May 2018. Thus, counting from 10<sup>th</sup> May 2018, the seven days within which the Appellant ought to have lodged the Appeal expired on 17<sup>th</sup> May 2018. However, the Appellant lodged the Appeal on 21<sup>st</sup> May 2018, that is three days after expiry of the stipulated period and without leave to do so.

When asked by the Members of the Appeals Authority to narrate the sequence of events from the date they issued the Pre-qualification results; the Respondent submitted that, the Pre-qualification results were issued vide a letter dated 6<sup>th</sup> April 2018, received by the Appellant on 12<sup>th</sup> April 2018. The Respondent submitted further that, upon dissatisfaction with

disqualification, the Appellant filed for administrative review on 4<sup>th</sup> May 2018 through a letter dated 27<sup>th</sup> April 2018.

The Respondent argued that, the Appellant's application for review was filed out of time and the Respondent entertained it just as a matter of courtesy, issuing his decision on 10<sup>th</sup> May 2018. He argued further that, the Appellant were to lodge the Appeal by 17<sup>th</sup> May 2018 and not 21<sup>st</sup> May 2018, as did the Appellant.

The Respondent concluded his arguments by praying for the Appeal to be struck out as it is incompetent.

#### THE APPELLANT'S REPLY

The Appellant counter argued the Respondent's submissions by relying on Section 97(2)(b) of the Act. According to the Appellant the said Section requires the Appeal to be filed within seven *working* days and not seven days, as argued by the Respondent. The Appellant expounded that, they received the Respondent's decision on 11<sup>th</sup> May 2018 and filed this Appeal on 21<sup>st</sup> May 2018. Counting from 11<sup>th</sup> May 2018, the seven working days within which the Appeal ought to have been filed ended on 22<sup>nd</sup> May 2018. As the Appeal was filed on 21<sup>st</sup> May 2018, it is within time.

On their side, explaining the sequence of events from the date they received the Pre-qualification results, the Appellant stated that they received the same on 12<sup>th</sup> April 2018 and filed the application for review on 4<sup>th</sup> May 2018; admitting that it was filed out of time.

#### ANALYSIS BY THE APPEALS AUTHORITY

In resolving the contentious arguments by the parties on the PO the Appeals Authority relied on the provisions of the Act, in particular subsections 96(1) and 96(4) which provide guidance to tenderers on submission of complaint to the accounting officer if dissatisfied with a procurement process. The said provisions read;

S.96(1) "Any complaint or dispute between procuring entities and tenderers which arises in respect of procurement proceedings, disposal of public assets by tender and award of contracts shall be reviewed and decided upon a written decision of the accounting officer of a procuring entity and give reasons for his decision".

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 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.

The above quoted provisions entail that the Appellant should have submitted their complaint to the accounting officer within seven working days.

As admitted by both parties, the Appellant became aware of the circumstances giving rise to the complaint on 12<sup>th</sup> April 2018 when they received the Pre-qualification results. The records indicate that the Appellant filed their complaint to the Respondent on 4<sup>th</sup> May 2018 while the seven working days within which they were required to do so lapsed on 23<sup>rd</sup> April 2018.

Furthermore, it is undisputed fact that, much as the application for administrative review was lodged beyond the stipulated time, the Respondent proceeded to entertain the same. Based on these facts the Appeals Authority finds the Appellant's and the Respondent's conducts in this regard to have contravened Section 96(4) of the Act.

From the above analysis it goes without saying that the administrative review was preferred beyond the stipulated time, hence the subsequent act of entertaining it and Appealing to this Appeals Authority is improper. The Appeals Authority is of the settled view that, the Appellant's Appeal by all standards is out of time, thus lack legs to stand on.

From the reasons stated above, the PO is upheld and the Appeal is hereby struck out.

No order as to costs.

The Right of Judicial Review is available to the parties as per Section 101 of the Act.

This Ruling is delivered in the presence of the parties this 4<sup>th</sup> day of July 2018.

*M. Otaru*  
.....  
**Ms. MONICA P. OTARU**  
**Ag. CHAIRPERSON**

**MEMBERS:**

- 1. ENG. FRANCIS MARMO** ..... *F Marmo*
- 2. MR. LOUIS ACCARO** ..... *L Accaro*