

**IN THE  
PUBLIC PROCUREMENT APPEALS AUTHORITY  
AT DAR ES SALAAM.**

**APPEAL CASE NO. 8 OF 2014/15**

**BETWEEN**

**M/S KSK AUTO GARAGE AND**

**SUPPLIES LIMITED.....APPELLANT**

**AND**

**TANZANIA ELECTRICAL, MECHANICAL**

**AND ELECTRONIC SERVICES**

**AGENCY ..... RESPONDENT**

**CORAM:**

- |                              |                |
|------------------------------|----------------|
| 1. Ms. Esther J. Manyesha    | -Chairperson   |
| 2. Mr. Kesogukewe M. Msita   | -Member        |
| 3. Mrs. Rosemary A. Lulabuka | - Member       |
| 4. Eng. Francis T. Marmo     | -Member        |
| 5. Mr. Ole-Mbille Kissioki   | -Ag. Secretary |

## **SECRETARIAT**

1. Mrs. Toni S. Mbilinyi -Principal Legal Officer
2. Ms. Violet S. Limilabo -Legal Officer
3. Mr. Hamisi O. Tika -Legal Officer

## **FOR THE APPELLANT**

1. Mr. Abdallah R. M. Matumula -Advocate -Bashaka & Co  
Advocate
2. Mr. Steven B. Lyimo - Managing Director

## **FOR THE RESPONDENT**

1. Ms. Swimmy Haonga - Ag. Procurement and  
Supplies Manager
2. Ms. Flora Bocko - Supplies Officer
3. Mr. Gratian B. Mali - Senior Legal Officer
4. Mr. Boniphace Sariro - Legal Officer

This decision was scheduled for delivery today 25<sup>th</sup> September, 2014, and we proceed to deliver it.

The Appeal at hand was lodged by **M/S KSK AUTO GARAGE AND SUPPLIES LTD** (hereinafter referred to as "**the Appellant**") against the **TANZANIA ELECTRICAL, MECHANICAL AND ELECTRONIC SERVICES AGENCY** commonly known by its acronym **TEMESA** (hereinafter referred to as "**the Respondent**").

The said Appeal is in respect of Lot No. 1 of Tender No. AE/006/2014-2015/HQ/FA/NCS/01 for Provision of Services for Maintenance and Repair of Government Owned Motor Vehicles, Motor Cycles, Plants and Equipment.

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 vide the Daily Newspaper dated 28<sup>th</sup> April, 2014 invited tenderers using framework agreement to submit tenders for the tender under Appeal.

The said tender was conducted through National Competitive procedures specified in the Public Procurement Regulations, 2013 (hereinafter referred to as "**GN. No. 446/2013**").

The deadline for the submission of tenders was initially set for 19<sup>th</sup> May, 2014; however, it was later extended to 2<sup>nd</sup> June, 2014 whereby sixty three firms submitted their tenders.

Being dissatisfied with the extension of time, on 2<sup>nd</sup> July, 2014, the Appellant sought for administrative review with the Respondent's Accounting Officer.

On 22<sup>nd</sup> July, 2014, the Respondent's Accounting Officer delivered his decision by dismissing the complaints for lack of merits. The said letter was received by the Appellant on 4<sup>th</sup> August, 2014.

On 13<sup>th</sup> August, 2014, the Appellant lodged their Appeal to the Appeals Authority.

## **SUBMISSIONS BY THE APPELLANT**

The Appellant's documentary, oral submissions as well as responses from questions raised by Members of the Appeals Authority during the hearing may be summarized as follows:

That, on 6<sup>th</sup> May, 2014, they bought the Tender Document and they were number thirty four on the buyers list.

That, on 19<sup>th</sup> May, 2014, which was the initial deadline for submission of tenders, they went to submit their tender. However, they were told that the tender submission deadline had been extended to 2<sup>nd</sup> June, 2014.

That, they were not informed of the reasons for extension of time hence sought for legal advice. That is when they knew the reason for extension of time and decided to lodge their complaint.

That, until 16<sup>th</sup> May, 2014 when the Respondent extended the time, the Appellant had presumed that many tenderers had purchased the Tender Document.

That, the Respondent extended the bid submission date from 19<sup>th</sup> May, 2014 to 2<sup>nd</sup> June, 2014 without any amendment in the Tender Document contrary to Section 68 (4) and (5) of the Public

Procurement Act, No. 7/ 2011 (hereinafter referred to as "**PPA No. 7/2011**").

That, they were dissatisfied with extension of time, hence lodged complaints to the Respondent's Accounting Officer.

That, their complaints were dismissed on the ground that, the extension of time was due to minimal responses in respect of tenders. They were dissatisfied with such decision since the tender under appeal had high responses compared to others.

That, their Appeal is based on the following grounds:-

- i. That there was a breach of the PPA/2011.
- ii. That there was no compliance with the Tender Document.
- iii. That the ground which led to extension of time was contrary to Section 59 (2) (a) (b) of the PPA/2011.

That, the extension of time made them to suffer psychologically since they prepared their tender in a hurry to meet the set deadline which was stated in the Tender Document.

Finally the Appellant prayed for the following orders:

- i. Nullification of the tender process
- ii. Retendering
- iii. To be paid damages

## **REPLY BY THE RESPONDENT**

The Appellant's documentary, oral submissions as well as responses from questions raised by Members of the Authority during the hearing may be summarized as follows:

That, the date for submission of the tender was extended from 19<sup>th</sup> May, 2014 to 2<sup>nd</sup> June, 2014, and the same was published in the Daily Newspaper dated 16<sup>th</sup> May, 2014. The mode used to extend the submission date was the same as that used during invitation of the tender. Therefore the Appellant ought to have used the same knowledge to become aware of extension of time.

That, the deadline for submission of tenders was extended after they had realized that the response was minimal compared to experience from previous year which would lead to getting competent service providers.

That, they sought for approval of the Tender Board to extend time and the said approval was granted.

That, Section 68 (5) and Clauses 9.1, 9.2 and 9.3 of the Instruction To Bidder could not be invoked since they neither altered the Tender Document nor the venue for the tender submission.

That, they wanted to exercise value for money by having many competitors as experienced in the previous year whereby seventy nine service providers purchased and returned Tender Document, but after evaluation only forty service providers found to be qualified. In this tender seven days before the deadline, forty service providers had purchased the Tender Document; the number which was considered relatively low.

That, the Appellant failed to prove how they were affected by the extension of time.

Finally the Respondent prayed for the dismissal of the Appeal with costs for lack of merits.

## **ANALYSIS BY THE AUTHORITY**

That upon analysis of the solicitation document and the Minutes of Tender Opening concerning this Appeal and oral hearing of the parties, the Appeals Authority noted that, the tender under Appeal was a pre-qualification for the purpose of short listing competent service providers. Therefore, it should be clear that the determination of this Appeal shall base on the pre-qualification process.

Having gone through the documents submitted and having heard the oral submissions by the parties, the Appeals Authority is of the view that the Appeal is centered on the following two issues:

**1.0 Whether the extension of time for the submission of the applications for pre-qualification was proper.**

**2.0 To what reliefs, if any, are the parties entitled to.**

Having identified the issues in dispute the Authority proceeded to resolve them as hereunder;

## **1.0 Whether the extension of time for the submission of the applications for pre-qualification was proper.**

In resolving this issue the Appeals Authority considered the Appellant's main contention that; the ground for extension of time basing on low response was contrary to the requirement of Section 68 (4) and (5) of the PPA/2011, and the Respondent's submission that, they extended the submission date after realising that there was low response of forty service providers for the Lot under appeal compared to the previous year whereby seventy nine service providers applied.

To ascertain the partys' arguments the Appeals Authority revisited the Tender Document, the Minutes of tender opening vis-à-vis the Applicable law. In the course of doing so, the Appeals Authority observed that, the tender was at the pre-qualification stage and the applicable procedure was the one relating to pre-qualification process and not invitation to tender. Hence, the provisions relied upon by parties were of no relevance since they relate to a tender that has reached a stage of invitation to tender while the appeal at hand is relating to prequalification.

Upon being asked by Members of the Appeals Authority as to why they thought that responses of forty service providers did not

encourage fair competition and value for money; the Respondent explained that they had experience of previous financial year whereby seventy nine service providers submitted applications, but only forty service providers qualified to be shortlisted. Therefore, they were worried after receiving only forty applications seven days before the closing date and thought that such a small number neither provided a sufficient number of service providers to be shortlisted nor encouraged fair and wider competition for Procuring Entity to use in arranging procurement of common use items and services through framework agreement.

In ascertaining the party's arguments the Appeals Authority revisited the procedure involved in the pre-qualification process as provided under Part III more specifically Regulation 121 (1) (d) and (e) of GN. No. 446/2013. For purpose of clarity the said provision is reproduced as follows:

Reg. 121 " The pre-qualification documents shall  
contain-

**(d) the manner and place for the submission of applications to pre-qualify and the deadline for**

**the submission, expressed as specific date and time and allowing sufficient time for the suppliers, service providers or contractors to prepare and submit their applications, taking into account the reasonable needs of the procuring entity; and**

**(e) any other requirement that may be established by the procuring entity in conformity with these Regulations relating to preparation and submission of the applications to pre-qualify and to the pre-qualification proceedings”.**

From the above quoted provisions the Appeals Authority is of the view that, the manner, place and deadline for submission of the application depend on the needs of the Respondent.

Furthermore, the Appeals Authority observed that, the law is silent on the issue of extension of time for submission of the applications for prequalification. However, after hearing the grounds that lead to extension of time by the Respondent, the Appeals Authority is of the considered view that the said ground was justified as it meant to prepare a long list of service providers

for the purpose of enhancing competition and value for money gains.

The Appeals Authority further considered the Appellants contention that, extension of time deprived them of their right to prepare the application well since they were in hurry to meet the initial submission deadline.

The Appeals Authority does not agree with the Appellant, because the extension of time did not jeopardize their right to withdraw their application and improve or modify it while waiting to re-submit it on or before the extended deadline.

Accordingly, the Appeals Authority's conclusion on the first issue is that the extension of time for submission of the applications for prequalification was proper.

## **2.0 To what reliefs, if any, are the parties entitled to.**

Having analyzed the contentious issue in dispute, the Appeals Authority finds it prudent to consider prayers by the parties.

To start with, the Authority considered the Appellant's prayers to nullify the tender process, and order for retendering. The Appeals Authority rejects these prayers based on the conclusion of the first issue.

With regard to damages the Appeals Authority equally rejects that prayer for want of jurisdiction.

With regard to the prayer by the Respondent that the Appeal be dismissed with costs for lack of merit, the Appeals Authority concurs with the Respondent as established in its analysis and hereby dismisses the Appeal in its entirety. However, the Appeals Authority can not grant the prayer for costs for want of jurisdiction.

In view of the above findings, the Appeals Authority hereby dismisses the Appeal for lack of merit and orders each party to bear their own costs.

The decision is binding on the parties and may be executed in any court of competent jurisdiction in terms of Section 97 (8) of the PPA/2011.

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

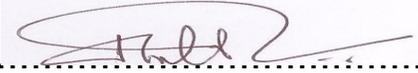
Decision delivered in the presence of the Appellant and the Respondent this 25<sup>th</sup> September, 2014.

  
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**MS. ESTHER J. MANYESHA**

**CHAIRPERSON**

**MEMBERS:**

1. MR. K. M. MSITA.....

2. MRS. R. A. LULABUKA.....

3. ENG. F. T. MARMO.....