

IN THE PUBLIC PROCUREMENT APPEALS AUTHORITY

APPEAL CASE NO. 05 OF 2023-24

BETWEEN

M/S SIMBA LOGISTIC EQUIPMENT SUPPLY LTD.....APPELLANT

AND

TANZANIA -ZAMBIA RAILWAY AUTHORITY.....RESPONDENT

RULING

CORAM

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| 1. Hon. Justice (rtd) Sauda Mjasiri | - Chairperson |
| 2. Eng. Stephen Makigo | - Member |
| 3. Mr. Rhoben Nkori | - Member |
| 4. Mr. James Sando | - Secretary |

SECRETARIAT

- | | |
|------------------------|------------------------------|
| 1. Ms. Florida Mapunda | - Deputy Executive Secretary |
| 2. Ms. Violet Limilabo | - Senior Legal Officer |

FOR THE APPELLANT

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| 1. Mr. Ronald Kato | - Head- Business Development |
| 2. Mr. Joshua Nyagoli | - Head Commercials |

FOR THE RESPONDENT

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| 1. Ms. Mercy Chimtawi | - Senior Legal Counsel |
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2. Mr. Christopher Shiganza -Deputy Managing Director
3. Mr. Fuad Abdallah - Regional General Manager
4. Mr. James Mwashu - Regional Civil Engineer
5. Ms. Tusajigwe Ndile - Supplies Officer
6. Mr. Marwa Magori - Supplies Manager

This Appeal was lodged by **M/S Simba Logistic Equipment Supply Ltd** (hereinafter referred to as "**the Appellant**") against the **Tanzania - Zambia Railway Authority** commonly known by its acronym as "**TAZARA**" (hereinafter referred to as "**the Respondent**"). The Appeal is in respect of Tender No. AE/130/HQ/2022-2023/G/01 for Supply of Railway Wooden Sleepers (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 this Appeal may be summarized as follows: -

The Tender was conducted through International Competitive Tendering Method as specified in the Public Procurement Act, No. 7 of 2011 as amended (hereinafter referred to as "**the Act**") and the Public Procurement Regulations, GN. No. 446 of 2013 as amended (hereinafter referred as "**the Regulations**").

On 24th February 2023, the Respondent invited tenderers through the Tanzania National electronic Procurement System (TANePS). The deadline for submission of tenders was set on 20th March 2023. On the deadline, five tenders were received including that of the Appellant.

The received tenders were subjected to evaluation which was conducted in three stages, namely; preliminary, technical and financial evaluation. At the preliminary evaluation stage, four tenders were disqualified including that of the Appellant. The remaining tender of M/S Rick Plan Company Ltd was technically evaluated and found to have complied with the requirements of the Tender Document. The tender was then subjected to financial evaluation and the Evaluation Committee recommended award of the Tender to M/S Rick Plan Company Ltd subject to negotiations. The recommended contract price was Tanzania Shillings One Billion Six Hundred Fourteen Million Two Hundred Forty Thousand Only (1,614,240,000.00) VAT inclusive for a period of twelve months.

On 28th April 2023, the Tender Board approved the Evaluation Committee's recommendations. On 11th May 2023, the Respondent wrote a letter to M/S Rick Plan Company Ltd (the proposed successful tenderer) informing it that the quantity of Wooden Sleepers would be increased by 19% for each lot. M/S Rick Plan Company Ltd was further informed that the increased quantity would change the Tender contract price from Tanzanian Shillings One Billion Six Hundred Fourteen Million Two Hundred Forty Thousand Only (1,614,240,000.00) VAT inclusive to Tanzanian Shillings One Billion Nine Hundred Twenty Million Nine Hundred Forty Five Thousand Six Hundred only (1,920,945,600.00) VAT inclusive. The letter also required M/S Rick Plan Company Ltd to accept the changes. On 12th May 2023, M/S Rick Plan Company Ltd accepted the increased quantity as requested by the Respondent.

On 16th May 2023, the Respondent issued the Notice of Intention to award the Tender to all tenderers which participated in the Tender. The Notice informed the tenderers that the Respondent intended to award the Tender to M/S Rick Plan Company Ltd at the contract price of Tanzanian Shillings One Billion Nine Hundred Twenty Million Nine Hundred Forty Five Thousand Six Hundred only (1,920,945,600.00) VAT inclusive. The Notice also informed the Appellant that its tender was disqualified for submitting a defective Power of Attorney. The said Notice stated that the power of attorney was given to one Ronald Kato while the acknowledgement was made by Joshua Nyagoli on that defective Power of Attorney.

Dissatisfied with the reason for its disqualification, on 23rd May 2023, the Appellant applied for administrative review to the Respondent. On 29th May 2023, the Respondent informed the Appellant that it had not identified the provisions that were breached by the Respondent. Thus, the Respondent required the Appellant to submit a detailed application for administrative review. The Respondent's letter was received by the Appellant on 31st May 2023. Based on the Respondent's advice, the Appellant on 5th June 2023 submitted another application for administrative review to the Respondent which included the provisions that were breached. When the Appellant did not receive any response from the Respondent, on 25th June 2023, the Appellant wrote a reminder to the Respondent.

On 3rd July 2023, the Respondent issued its decision which dismissed the Appellant's application for administrative review. Aggrieved further, on 11th July 2023, the Appellant filed this Appeal to the Appeals Authority.

When the matter was called on for hearing and at the time of framing up the issues, the Appeals Authority informed the parties that it observed from the record of appeal that there is a point of law to be determined as to '*whether the Appeal is properly before the Appeals Authority*'. Given the above observations, the following issues were framed, namely: -

- 1.0 Whether the Appeal is properly before the Appeals Authority;**
- 2.0 Whether the disqualification of the Appellant was justified; and**
- 3.0 What reliefs, if any, are the parties entitled to?**

Having framed the issues, the Appeals Authority required the parties to address the first issue which relates to the point of law raised *suo motu* by the Appeals Authority before embarking on the substantive Appeal.

SUBMISSIONS BY THE APPELLANT ON THE PO

In this Appeal, the Appellant's submissions were made by Mr. Ronald Kato, Head of Business Development from the Respondent's office. He commenced his submissions by stating that the Appeal is properly before the Appeals Authority as it has been lodged as per the requirements of the law. According to him, on 22nd May 2023, the Appellant received the Notice of Intention to award from the Respondent dated 16th May 2023.

Upon being dissatisfied with the reason given for its disqualification, on 23rd May 2023, the Appellant applied for administrative review to the Respondent.

The Respondent through a letter dated 29th May 2023 informed the Appellant that its application for administrative review did not indicate the provisions of the law that were breached. Therefore, the Respondent could not entertain it. The Appellant alleged to have received the said letter on 31st May 2023 via TANEPS. On 5th June 2023, the Appellant submitted a detailed application for administrative review. When the Appellant did not receive any decision from the Respondent, on 25th June 2023, the Appellant sent a reminder to the Respondent. On 3rd July 2023, the Respondent issued its decision which dismissed the Appellant's application for administrative review.

Mr. Ronald Kato stated that based on the requirements of Section 96 (4) and 97 (1) and (2) (b) of the Act, the Appellant became aware of the circumstances leading to this Appeal on 3rd July 2023. Then, it filed this Appeal on 11th July 2023. Counting from 3rd July 2023 when it became aware of the circumstances leading to this appeal, it filed its appeal within the seven working days as required by the law. Therefore, the Appeal is properly before the Appeals Authority.

REPLY BY THE RESPONDENT ON THE PO

The Respondent's submissions were made by Ms. Mercy Chimtawi, Senior Legal Counsel. She commenced her submissions by stating that, the Respondent is in agreement with the Appeals Authority's observation

regarding the time limit for filing an application for administrative review and subsequently this Appeal. She stated that, the Appellant submitted its application for administrative review to the Respondent on 23rd May 2023 within seven working days. The Respondent was required to issue its decision within seven working days in compliance with the Act. The Respondent issued its decision through a letter dated 29th May 2023 sent to the Appellant via TANEPS on 31st May 2023. After receipt of the Respondent's decision, the Appellant ought to have filed its Appeal to the Appeals Authority within seven working days. To the contrary, the Appellant did not do so until 11th July 2023 when it filed this Appeal beyond the time limit specified under the Act. She stated further that the Appeal has been filed out of time without seeking the leave of the Appeals Authority to file it out of time as prescribed by the law. Therefore, she prayed that the Appeal be dismissed with costs.

ANALYSIS BY THE APPEALS AUTHORITY ON THE PO

1.0 Whether the Appeal is properly before the Appeals Authority

In resolving this issue, the Appeals Authority revisited Sections 95(1), 96(1) & (4) and 97 (1) & (2) of the Act which provide a guidance on submission of the application for administrative review to the Accounting Officer and Appeal to this Appeals Authority. The provisions read as follows:-

"95(1) Any tenderer who claims to have suffered or that may suffer any loss or injury as a result of a breach of a duty imposed on a procuring entity by this Act may seek a review in accordance with sections 96 and 97.

96(1) Any complaints or dispute between procuring entities and tenderers which arise in respect of procurement proceedings, disposal of public assets by tender and awards 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.

(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 the complaint or dispute or when that tenderer should have become aware of those circumstances, whichever is earlier.

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 a complaint to the Appeals Authority within seven working days from the date of communication of the decision by the accounting officer or upon the expiry of the period within which the accounting officer ought to have made a decision.

The above quoted provisions indicate clearly that if a tenderer is not satisfied with the procuring entity's decision, it is required to file an application for administrative review to the respective procuring entity within seven working days of becoming aware of the circumstances giving rise to a complaint. The procuring entity is required to issue its decision within seven working days, and where it fails to do so, a tenderer is required to file an Appeal to the Appeals Authority within seven working days.

Relating the above quoted provisions to the facts of this Appeal, the Appeals Authority observed that the Appellant received the Notice of Intention to award through a letter dated 16th May 2023 on 22nd May 2023 via TANEPS. Dissatisfied with the reason given for its disqualification as contained in the said Notice, the Appellant filed its application for administrative review to the Respondent on 23rd May 2023 within seven working days.

The Respondent through a letter dated 29th May 2023, informed the Appellant that it failed to identify the provisions that were breached by the Respondent in compliance with Clause 47.3 (a) to (f) of the ITT and Regulation 105(3) (a) to (f) of the Regulations. Hence, the Respondent required the Appellant to submit a detailed application for administrative review. The Appellant alleged to have received the Respondent's letter on 31st May 2023. On 5th June 2023, the Appellant submitted a detailed application for administrative review to the Respondent. There was no response to its application for administrative review until on 3rd July 2023, when the Respondent issued the decision to dismiss the Appellant's



application for administrative review. Then on 11th July 2023, the Appellant filed this Appeal to the Appeals Authority.

As per the record of this Appeal, it is evident that the Appellant's letter dated 23rd May 2023 addressed to the Respondent was an application for administrative review. The same was filed within seven working days as prescribed by the law. The Appeals Authority is of the view that the Respondent's letter dated 29th May 2023, served to the Appellant via TANePS on 31st May 2023 was a decision on the Appellant's application for administrative review. The decision indicated that the Respondent rejected to entertain the Appellant's application for not disclosing the provisions of the law that had been breached.

Dissatisfied with the Respondent's decision in this regard, the Appellant was required to file its Appeal to this Appeals Authority within seven working days. Counting from 31st May 2023, the seven working days within which the Appellant ought to have filed its Appeal to the Appeals Authority expired on 12th June 2023. The Appellant filed this Appeal on 11th July 2023 almost one month from the date it ought to have filed its Appeal. Thus, the Appeals Authority finds the Appellant to have contravened Section 97 (1) and (2) (b) of the Act.

The Appeals Authority further considered the Appellant's argument that an Appeal ought to have been filed after becoming aware of the circumstances giving rise to the Appeal. Furthermore, that it became aware of the said circumstances after receipt of the Respondent's decision which dismissed its application for administrative review on 3rd July 2023. The Appeals

Authority disagrees with the Appellant's contention as Section 97 (1) and (2) of the Act provides two alternatives to the Appellant. It allows an appeal to be filed to this Appeals Authority if a tenderer is dissatisfied with the procuring entity's decision or if a procuring entity fails to issue its decision within the specified time limit. As per the record of Appeal, the Appeals Authority is of the firm view that, the Respondent's letter dated 29th May 2023 received by the Appellant on 31st May 2023 was a decision capable of being challenged by way of Appeal to the Appeals Authority.

Therefore, the Appellant's proposition that it became aware of the circumstances leading to this Appeal on 3rd July 2023 is rejected. The Appellant was required to act on the Respondent's letter received on 31st May 2023 by filing an Appeal to the Appeals Authority pursuant to Section 97 (1) and (2) (b) of the Act as cited above.

In view of the above observations, the Appeals Authority finds the Appeal to have been filed out of time. Under the circumstances, the Appeals Authority concludes the first issue in the negative that the Appeal is not properly before the Appeals Authority.

Given our findings in the first issue, the Appeals Authority would not delve into the merits of the Appeal. Therefore, the Appeal is hereby dismissed. We make no order as to costs.


It is so ordered.

This Ruling is binding and can be enforced in accordance with Section 97(8) of the Act.

The Right of Judicial Review is as provided under Section 101 of the Act.

This Ruling is delivered in the presence of the Respondent and in the absence of the Appellant though duly notified this 17th day of August 2023.

HON. JUSTICE (rtd) SAUDA MJASIRI



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CHAIRPERSON

MEMBERS: -

1. ENG. STEPHEN MAKIGO.....

2. MR. RHOBEN NKORI.....