

IN THE PUBLIC PROCUREMENT APPEALS AUTHORITY

APPEAL CASE NO. 12 OF 2023-24

BETWEEN

M/S BAMB SOLUTION (T) LTD.....APPELLANT

AND

HANANG DISTRICT COUNCIL.....RESPONDENT

RULING

CORAM

- | | |
|-------------------------------------|---------------|
| 1. Hon. Justice (rtd) Souda Mjasiri | - Chairperson |
| 2. Adv. Rosan Mbwambo | - Member |
| 3. Dr. William Kazungu | - Member |
| 4. Mr. James Sando | - Secretary |

SECRETARIAT

- | | |
|------------------------|------------------------------|
| 1. Ms. Florida Mapunda | - Deputy Executive Secretary |
| 2. Ms. Agnes Sayi | - Senior Legal Officer |
| 3. Ms. Violet Limilabo | - Senior Legal Officer |

FOR THE APPELLANT

- | | |
|----------------------|--------------------------|
| 1. Mr. Brian Kikoti | - Director of Finance |
| 2. Mr. Kuzeny Msungu | - Director of Operations |



FOR THE RESPONDENT

1. Mr. Omary Ngatanda - State Attorney, OSG
2. Ms. Masecha Mwemberi - State Attorney, Hanang District Council

This Appeal is in respect of Tender No. LGA/059/2023/2024/NC/01 for Provision of Revenue Collection Services for Food Crops, Business and Forest products (Uwakala wa Ukusanyaji wa Ushuru wa Mazao ya Chakula, Biashara na Misitu) (hereinafter referred to as "**the Tender**"). The Appeal has been lodged by **M/S BAMB Solution (T) Ltd** (hereinafter referred to as "**the Appellant**") against **Hanang District Council** (hereinafter referred to as "**the Respondent**").

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 National 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 to as "**the Regulations**").

On 3rd May 2023, the Respondent through the Tanzania National electronic Procurement System (TANePS) invited tenderers to participate in the Tender. The deadline for submission of tenders was set on 18th May 2023. On the deadline, the Respondent received five (5) tenders including that of the Appellant.

Handwritten signature and initials, possibly 'JN' with a superscript '2', and a small mark to the right.

The received tenders were subjected to evaluation. After completion of the evaluation process, the Evaluation Committee recommended award of the Tender to M/S Joblex (T) Ltd. The recommended contract price was Tanzania Shillings Three Hundred Fifty Eight Million Two Hundred Seventy Eight Thousand Nine Hundred Sixty only (TZS 358,278,960.00) per month. The recommended contract price was equivalent to Tanzania Shillings Two Billion Three Hundred Ninety Seven Million Seven Hundred Thirteen and Forty only (2,397,713,040.00) per annum.

The Evaluation Committee's recommendations were tabled before the Tender Board at its meeting held on 2nd June 2023. The Tender Board had reservations on the award proposed to M/S Joblex (T) Ltd. The reservation was about its failure to comply with the requirements provided in the Tender Document as was the case for other tenderers. Following such reservation, the Tender Board recommended that a new team be appointed to re-evaluate all the tenders. The Respondent's Accounting Officer appointed a new team to re-evaluate all the tenders. After completion of the re-evaluation process, the team found all tenders non-responsive. Therefore, it recommended the Tender to be re-advertised. The recommendations were tabled before the Tender Board and were approved accordingly at its meeting held on 27th June 2023.

The Respondent through a letter dated 30th June 2023 notified all tenderers that the Tender has been rejected. The rejection was due to the fact that all tenders were non-responsive. The rejection was pursuant to Regulation 16(2) of the Regulations. Dissatisfied with the Tender rejection, on 1th July 2023, the Appellant filed its application for administrative review to the Respondent.

 3

The record of Appeal indicates that the Respondent issued its decision through a letter dated 4th August 2023. The decision was communicated to the Appellant through email on 16th August 2023. The decision rejected the Appellant's application for administrative review for the reason that it owed money to Iringa Municipal Council which led to the institution of Civil Case No. 03 of 2022. Aggrieved with the Respondent's decision, on 23rd August 2023, the Appellant filed this Appeal to the Appeals Authority.

GROUND OF APPEAL

The Appellant's grounds of Appeal as stated in the Statement of Appeal may be summarized as follows: -

1. That, the Respondent conducted the evaluation process in contravention of the requirements provided in the Tender Document as well as Regulations 202 and 204 of the Regulations.
2. That, the Iringa Municipal Council had no case against the Appellant as contended by the Respondent on its decision with respect to its application for administrative review. Thus, the Appellant urged the Appeals Authority to issue a proper interpretation of Clause 3.8 of the Instructions to Tenderers (ITT).
3. That, Clause 3.8 of the ITT requires tenderers to have no debt with the Respondent's office. However, the Respondent used the said provision to disqualify the Appellant's Tender on the basis of having a debt with Iringa Municipal Council. The Appellant stated that its operations in Iringa Municipal Council were not relevant to the

Tender under Appeal. Therefore, it complied with the criteria for award of the Tender.

4. Finally, the Appellant prayed for the following orders: -
 - i. The Respondent be ordered to re-evaluate the tenders by nominating a new evaluation team in accordance with the Regulations; and
 - ii. The Respondent be ordered to pay costs of this Appeal.

REPLY BY THE RESPONDENT

The Respondent's reply to the Appellant's grounds of Appeal may be summarised as follows: -

1. That, the evaluation process was conducted as per the requirements provided in the Tender Document and in adherence to the procedures provided in the Regulations.
2. That, when evaluating the tenders and upon investigating on the trustworthiness of the tenderers, it found that in the year 2022 the Appellant was sued in the Primary Court of Iringa Municipality in Civil Suit No. 03/2022. The referred case was instituted following the Appellant's failure to remit the amount of Tanzania Shillings 5,690,200.00 to the Iringa Municipal Council being revenue that was collected by it as an agent of the Council. The Appellant's failure on this regard was considered to be a breach of the terms and conditions of the contract.
3. Finally, the Respondent prayed for the following orders: -
 - i. The Respondent to be allowed to proceed with the re-advertisement of the tender; and
 - ii. The Appellant to pay costs of this Appeal.

5


Before hearing the Appeal on merit, the Appeals Authority *suo motu* brought to the attention of the parties that there is a point of law that needs to be determined before considering the merits of the Appeal. This is ***whether the Appeal is properly before the Appeals Authority***. The point of law was raised by the Appeals Authority after reviewing the record of Appeal. It observed that the Appellant lodged its Appeal after a lapse of one month from the time it submitted an application for administrative review to the Respondent. Therefore, the Appeals Authority invited the parties to address it on the point of law so raised.

SUBMISSIONS BY THE APPELLANT ON THE POINT OF LAW

In this Appeal, the Appellant's submissions were made by Mr. Brian Kikoti, Director of Finance and Mr. Kuzeny Msungu, Director of Operations from the Appellant's office. Mr. Msungu commenced his submissions by stating that the Respondent through a letter dated 30th June 2023 notified all tenderers that the Tender had been rejected. The rejection was for the reason that all the submitted tenders were non-responsive to the requirements provided in the Tender Document. Furthermore, the letter indicated that the rejection was made pursuant to Regulation 16 (2) of the Regulations. Dissatisfied with the said rejection, on 1th July 2023, the Appellant filed its application for administrative review to the Respondent.

The Appellant contended that the Respondent did not issue its decision as required by the law. The Appellant claimed to have made several reminders through mobile phone, however the same were fruitless. The Respondent through a letter dated 4th August 2023 issued its decision which was communicated to the Appellant through email on 16th August

6


2023. Dissatisfied with the said decision on 23rd August 2023, the Appellant filed this Appeal. Initially, the Appellant stated that this Appeal was submitted within time. However, after the Members of the Appeals Authority brought to the attention of the Appellant the requirements under Sections 96(6) and (7) and 97(2)(a) of the Act, the Appellant readily conceded that the Appeal was filed out of time.

REPLY BY THE RESPONDENT ON THE POINT OF LAW

The learned State Attorney from the Office of the Solicitor General, Mr. Omary Ngatanda stated that based on the requirements of the law, it is clear that the Appeal was submitted out of time. Thus, he prayed that the same should be dismissed.

ANALYSIS BY THE APPEALS AUTHORITY

In resolving this issue, the Appeals Authority took cognizance of the Appellant's admission on the point of law raised by it *suo motu*. For the sake of enlightening the parties on the requirements of the law regarding filing of an appeal before this Appeals Authority, the Appeals Authority reviewed Sections 96(6) and (7) and 97(2)(a) of the Act which read as follows: -

"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; or

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

96(7) where the accounting officer does not issue a decision within the time specified in subsection

7


(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.

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 the 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".

(Emphasis added)

The above quoted provisions entail clearly that a tenderer may file an appeal before the Appeals Authority upon being dissatisfied with the procuring entity's decision on its application for administrative review or if the procuring entity fails to issue its decision within seven working

days. A tenderer is required to file its Appeal within seven working days of becoming aware of the circumstances giving rise to the dispute.

The record of this Appeal indicates that upon being dissatisfied with the Respondent's decision issued on 30th June 2023 that rejected all tenders, the Appellant applied for administrative review on 1th July 2023. According to the requirements of the law, the Respondent ought to have issued its decision within seven working days, that is by 12th July 2023. On the contrary, the Respondent issued its decision through a letter dated 4th August 2023, which was communicated to the Appellant through email on 16th August 2023. The record of Appeal reveals that upon being dissatisfied with the Respondent's decision issued on 16th August 2023, the Appellant filed this Appeal on 23rd August 2023.

In view of the above quoted provisions, the Appeals Authority observed that after the Appellant filed its application for administrative review on 1st July 2023, the Respondent was required to issue its decision within seven working days. Counting from 1st July 2023, the Respondent's decision ought to have been issued by 12th July 2023. Thus, the Respondent's act of issuing its decision that was communicated to the Appellant on 16th August 2023 contravened the law.

Having not received the Respondent's decision by 12th July 2023, the Appellant was required to file its Appeal to the Appeals Authority within seven working days. Counting from 12th July 2023, the Appeal should have been filed by 21st July 2023. On the contrary, the Appellant filed this Appeal on 23rd August 2023. Thus, the Appeal was filed after a lapse of one month from the time it ought to have been filed. Therefore, it was filed out of time.

Under the circumstances, the Appeals Authority would not delve into the merits of the Appeal. The Appeal is hereby dismissed for being filed out of time. 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 27th day of September 2023.

HON. JUSTICE (rtd) SAUDA MJASIRI



.....
CHAIRPERSON

MEMBERS: -

1. ADV. ROSAN MBWAMBO



2. DR. WILLIAM KAZUNGU

