

**IN THE PUBLIC PROCUREMENT APPEALS AUTHORITY
AT DAR ES SALAAM
APPEAL CASE NO. 14 OF 2019-20**

**BETWEEN
M/S GREENLINE TECHNOLOGIES LIMITED.....APPELLANT**

**AND
TANZANIA TELECOMMUNICATIONS
CORPORATION.....RESPONDENT**

RULING

CORAM

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|-------------------------|-----------------|
| 1. Adv. Rosan Mbwambo | - Ag. Chairman |
| 2. Mr. Rhoben Nkori | - Member |
| 3. Dr. Leonada Mwangike | - Member |
| 4. Ms. Florida Mapunda | - Ag. Secretary |

SECRETARIAT

- | | |
|------------------------|-----------------|
| 1. Ms. Violet Limilabo | - Legal Officer |
| 2. Mr. Hamisi O. Tika | - Legal Officer |

FOR THE APPELLANT

- | | |
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| 1. Ms. Vulfrida B. Teye | - Advocate- Velma Law |
| 2. Mr. Habyalimana Mayeye | - Advocate- Velma Law |
| 3. Mr. Benson K. Kisamawa | - Advocate – Velma Law |
| 4. Mr. Alex Postelnicu | - Chief Executive Officer |

FOR THE RESPONDENT

- | | |
|------------------------------|---|
| 1. Mr. Emanuel Nkonyi | - Principal Legal Officer |
| 2. Mr. Khamis Madata Mgeleka | - Manager, Procurement and Supplies
Management |
| 3. Mr. Baraka Mbangile | - Legal Officer |

This Appeal was lodged by M/s Greenline Technologies Limited (hereinafter referred to as "**the Appellant**") against Tanzania Telecommunications Corporation (hereinafter referred to as "**the Respondent**"). The Appeal is in respect of Tender No. PA/032/HQ/2018-2019/G/65 for the Supply of Broadband Wireless Access Radio (BBWAR) with Associated Accessories under One-year Framework Contract (hereinafter referred to as "**the Tender**").

The Tender was conducted through the National Competitive Bidding procedures specified under 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 and GN. No. 333 of 2016 (hereinafter referred to as "**the Regulations**"). On 24th January 2019, the Respondent invited nine eligible tenderers to bid. The deadline for the submission of tenders was set for 8th February 2019, whereby five tenders were received including that of the Appellant.

After completion of the evaluation process, the Appellant's bid emerged successful. The Appellant was issued with an acceptance letter on 15th June 2019. On 23rd June 2019, the Appellant accepted the award. It is in the record of the Appeal that while waiting for signing of a contract the Appellant received from the Respondent a notice of cancellation of award of the tender through a letter with Ref. No. DF 5011/2018-2019 G/65.3 dated 20th September 2019. This letter informed the Appellant that the award of the tender has been cancelled due to the reason that from the

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evidence submitted to the Respondent it has been discovered that the Appellant lacked "*legal capacity on tax payment compliance.*"

Through a letter dated 1st October 2019, the Appellant asked the Respondent to provide "*specific details on what the legal capacity on tax compliance is based on?*". On 18th October 2019, the Respondent responded to the Appellant's letter and availed the requested details. It was indicated in the response letter that the cancellation of the award of the tender to the Appellant was a result of the Appellant's "*lacking legal capacity on tax payment compliance during tendering, prior to signing of the contract*" as required by Regulations 4(1) and (2) of the Regulations and section 4A of the Act.

Dissatisfied by the reasons given, on 29th October 2019, the Appellant applied for administrative review. On 18th November 2019, the Respondent issued its decision dismissing the application for administrative review. Dissatisfied further, on 27th November 2019, the Appellant lodged this Appeal.

GROUND OF APPEAL

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

1. That, the Respondent acted incorrectly in cancelling the awarded Tender to the Appellant on the ground that it lacked legal capacity on tax payment compliance, a requirement which was not among the criteria provided for in the Tender Document issued by the Respondent.

2. That, the Respondent's act of cancelling the award of the tender was arbitrary, unfair, discriminatory and was not impartial. It also lacked transparency, integrity and accountability as required by law in the procurement process.
3. That, the Respondent also acted against public interest which is another requirement of the law in the procurement process because the Appellant was the lowest evaluated bidder.
4. In any event, it was stated that the Appellant was compliant as evidenced in the Tax Clearance Certificate issued by the Tanzania Revenue Authority (TRA).
5. That, it was further stated that the Respondent did not attach a copy of a framework agreement in the letter of award and despite the Appellant's follow up for the same the Respondent repeatedly failed and or refused to supply it.
6. Finally, the Appellant prayed for the following reliefs: -
 - i. A declaration that the cancellation of the Award of the tender made to the Appellant is unlawful;
 - ii. Uphold the acceptance letter issued to the Appellant and declare that a framework contract should be issued to it;
 - iii. In the alternative, the Respondent to compensate the Appellant, a sum of TZS. 530,149,882; and
 - iv. Any other order and/or relief that the Appeals Authority deems fit to grant.

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REPLY BY THE RESPONDENT

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

1. That, the Respondent disputed all grounds of Appeal and insisted that the Appellant lacked legal capacity on tax payment compliance during tendering for failure to furnish in its tender "*documents establishing its eligibility to tender and its qualifications to perform the contract if its tender is accepted*".
2. That, the Respondent conducted the procurement process in a manner that maximizes competition, integrity, accountability, fairness, transparency and achieves value for money.
3. That, the procurement process complied with the requirement of the Act and its Regulations, that is why the Appellant was awarded the Tender after being found to have submitted the lowest evaluated bid. However, the said award was cancelled due to the Appellant's failure to comply with tax requirements.
4. As to failure to sign the framework contract the Respondent stated that had the Appellant been tax payment compliant the contract would have been signed.
5. Finally, the Respondent prayed for the following orders:-
 - i. A declaration that the cancellation of the award made to the Appellant was lawful;
 - ii. A declaration that, the letter of award issued to the Appellant was unlawful;



- iii. That, the Appellant is not entitled to any compensation as there was no any contractual arrangement entered between the parties to entitle compensation; and
- iv. Any other relief/ order the Appeals Authority deems fit to grant.

In the course of reviewing documents submitted before the Appeals Authority two pertinent issues caught its attention. These related to the time in which the complaint was handled by the Accounting Officer and the date in which the Appeal by the Appellant to this Appeals Authority was lodged. It was also observed that the 120 days Bid Validity Period of the Tender which was opened on 8th February 2019 lapsed on 8th June 2019 and that there are no records indicating that it was extended. At the hearing of the Appeal the Appeals Authority asked the parties to address it on these points along with the merits of the appeal.


ISSUES

Four main issues were framed, namely: -

- (i) Whether or not cancellation of the award of the tender was justified;
- (ii) Whether or not the appeal is properly before the Appeals Authority;
- (iii) Whether or not there is a valid Tender for consideration; and
- (iv) What reliefs are the parties entitled to.

THE APPELLANT'S SUBMISSIONS

The Appellant submitted in respect of the first issue that documents required to be attached and or provided in the tender are stated in the Tender Document. These are specifically provided for in the Instructions to

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Tenderers (ITT) and in the Tender Data Sheet (TDS) and not otherwise. According to the Appellant Clauses 11 and 13 of the ITT set out documents constituting the tender and documents establishing eligibility and qualifications of tenderers, respectively. The Appellant contended that it submitted all the required documents. It was further submitted that in fact Clause 11 of the TDS provides for additional documents that must be included in the tender. None of them include tax payment compliance documents.

The Appellant argued further that, the issue of compliance ought to have been dealt with during evaluation process and prior to the award. Raising it two months after the award has already been communicated and accepted is an afterthought. The Appellant added that the Respondent acted arbitrary and was not impartial before reaching to a decision it made. The Respondent failed to accord it an opportunity to clarify the matter. It added that, even on assumption that the Respondent acted correctly, yet the Appellant has a tax clearance certificate issued by the TRA on 15th October 2019.

It was also submitted by the Appellant that the Respondent's assertion that the parties have not signed the contract contained in the request for administrative review is not valid. It is so because the delay in signing the contract was caused by the Respondent despite several reminders made by the Appellant.

The Appellant submitted that it has been supplying equipment from Cambium Networks which is a US radio company listed on the NASDAQ Stock Exchange (CMBM) and a worldwide market leader in fixed Radio

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(former Motorola). Therefore, the Appellant has got superior equipment than other bidders. In the circumstances, the proposition that the Respondent complied with the requirements of the Act and its Regulations in this procurement process is not true.

That, the Respondent's act of cancelling the award contravenes the requirements of Regulations 4(2) (b) and (d) of the Regulations. This Regulation requires all public officers including the accounting officers and members of the tender board when undertaking or approving the procurement to be guided by the principles of integrity, accountability, fairness and transparency.

That, pursuant to Regulation 233(1) of the Regulations, the Respondent and the Appellant was required to enter into contract within fourteen days after issuance of the acceptance letter and after fulfilling all the necessary conditions prior to signing of the contract. The Appellant fulfilled its obligations save for the Respondent. The Appellant asked the Appeals Authority to answer issue number one in the negative

On the second issue, the Appellant submitted that the Respondent's letter dated 20th September 2019 stated that the award made to the Appellant in respect of this Tender has been cancelled after being found that it lacked legal capacity on tax payment compliance. According to the Appellant the cancellation letter was vague as it did not provide the details on what it meant by lack of legal capacity on tax payment compliance. On 1st October 2019, the Appellant sought for clarifications from the Respondent. The

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Respondent through its letter dated 18th October 2019 provided the requested clarifications. Therefore, the letter of 18th October, 2019 is the one that gave rise to the complaints under section 96(4) of the Act.

After receipt of the Respondent's clarifications, the Appellant applied for administrative review to the Respondent on 29th October 2019 challenging the cancellation of award on the ground that Tax payment compliance documents were not among the documents which were to be submitted during submission of tenders. The Respondent issued its decision on 18th November 2019 dismissing the Appellant's application for administrative review. Dissatisfied, on 27th November 2019, the Appellant filed this Appeal within seven working days as required by law. The Appeal was filed within time and thus properly before the Appeals Authority.

With regard to the third issue, the Appellant argued that in principal all tenders and its accompanied tender securities are required to be valid throughout the tender process as stipulated under Section 71 of the Act. The Appellant argued that it is important for the tender and its security to be valid so as to ensure that the procurement process including evaluation of the tenders and signing of the contract are done within the bid validity period. Therefore, anything done beyond the bid validity period is not valid.

REPLY BY THE RESPONDENT

In response to the first issue, the Respondent submitted that the cancellation was justified because the Appellant lacked legal capacity. The Appellant failed to submit tax payment compliant documents contrary to

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Clause 11 of the TDS and Clause 13 of the ITT. The Respondent added that in terms of Regulation 9(5) of the Regulations, bidders were required to provide evidence of their eligibility, proof of compliance with necessary legal, technical and financial requirements. It was the duty of the tenderer to establish its eligibility and qualifications.

The Respondent informed the Appeals Authority that it inquired from TRA of the Appellant's tax payment compliance through a letter dated 30th August 2019. In a letter of the same date with Ref: No. TRA/HQ/CG/DRD, TRA informed the Respondent that the Appellant's tax returns trend from 2012 to 2019 show that it is not tax compliant. Based on the opinion by TRA, the Respondent deemed not proper to award the tender to a firm which is not Tax compliant. It therefore decided to cancel the award.

The Respondent also submitted that after the notice of cancellation the Appellant submitted a Tax Clearance Certificate dated 15th October, 2019 to be valid up to 31st December, 2019. This certificate according to the Respondent is an afterthought. It is also not a confirmation that TRA does not have any claims against the Appellant. Therefore the cancellation was justified.

As regards to the issue of limitation of time the Respondent submitted that the cancellation letter was issued on 20th September 2019. This letter provided a clear reason for the cancellation of the Appellant's award. According to the Respondent time started to run from the date of issuance of the cancellation letter on 20th September 2019. The Respondent added

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that its decision was final. If the Appellant was dissatisfied then it ought to have filed its Appeal to the Appeals Authority within seven working days from 20th September, 2019. To the contrary, the Appellant sought for clarifications and applied for administrative review to the Respondent. According to the Respondent the Appeal has been filed out of time contrary to the requirement of Sections 96 and 97 of the Act, thus, the same should be dismissed.

With regard to the bid validity period of the Tender, the Respondent concurred with the Appellant's submission that section 71 of the Act provides guidance in relation to validity of the tenders. That is to say, tenders are required to be valid until award is made. The Respondent submitted further that according to the Tender Document the tender validity period for this Tender was one hundred and twenty days (120). This period lapsed on 8th June 2019 and there was no any extension sought by the Respondent. The Respondent opted not to seek for extension of the validity period on the reason that it had already discovered that the Appellant had failed to comply with the tax payment requirement. Therefore, there was no need to request the Appellant to extend its bid validity period.

ANALYSIS BY THE APPEALS AUTHORITY

Having considered submissions by the parties on both merits of the Appeal and points of law, the Appeals Authority consider it proper to first determine the second issue which relate to the time limit of lodging an Appeal to the Appeals Authority. In the course of so doing the Appeals



Authority observed that the Respondent's letter dated 20th September 2019 informed the Appellant that the award has been cancelled due to lack of legal capacity on tax payment compliance. The Appeals Authority finds that the letter was not clear. It was not clear as to what tax payments the Appellant was not compliant. Thus, the Appellant was right to seek clarifications as it did on 1st October 2019 before making any other steps.

The Appellant received clarifications from the Respondent on 18th October 2019. The Appeals Authority shares the Appellant proposition that the date of reckoning is 18th October, 2019 when the Appellant knew the reason for cancellation. It is apparent that being dissatisfied the Appellant applied for administrative review on 29th October 2019. This application for administrative review was, in the Appeals Authority's view, lodged within the prescribed seven working days. According to section 96(6) of the Act the Respondent was required to issue a written decision within seven (7) working days from the date it received the Appellant's complaints. That is to say the Respondent ought to have issued its decision on or before 7th November 2019. Seemingly, the Respondent issued its decision on 18th November 2019.

Since the Respondent failed to issue its decision within seven (7) working days, the law requires the Appellant to proceed to lodging an Appeal to the Appeals Authority within seven (7) working days from the date the Respondent ought to have issued its decision. This is in accordance with provisions of sections 96.- (6) & (7) and 97.-(1) & (2)(a) of the Act.



From the parties' respective submissions on this point, the Appeals Authority finds it appropriate and for guidance purposes in future, to reproduce sections 96.-(6) & (7) and 97.-(1) &(2)(a) of the Act 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 days upon expiry of

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the period within which the accounting officer ought to have made a decision. (Emphasis Added).

Therefore, the Appeals Authority finds that the Appellant ought to have filed its Appeal by 18th November 2019. Apparently, this Appeal was filed on 27th November 2019. From the sequence of events it is crystal clear that the Appellant's Appeal to this Appeals Authority was lodged beyond the time prescribed by law. It is time barred.

The above finding suffices to dispose of this Appeal. However, now that the decision to cancel the award of the tender remains intact, the Appeals Authority finds it appropriate to look into the issue of the tender validity period. Both parties confirmed and the Appeals Authority too, agrees that the tender validity period lapsed on 8th June 2019.

Both parties in their respective submissions on this point made reference to section 71 of the Act. This section reads: -

*"71. The procuring entity shall require tenderers to make their tenders and tender securities including tender securing declaration valid for periods specified in the tender documents, **sufficient to enable the procuring entity to complete the comparison and evaluation of the tenders and for the appropriate tender board to review the recommendations and approve the contract or contracts to be awarded whilst the tenders are still valid**". (Emphasis ours)*

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As can be seen this section governs tender validity and tender security. It requires a procuring entity like the Respondent herein to require tenderers, like the Appellant herein to make their tenders and tender securities valid for period specified in the tender documents. The tender validity and tender security period must be sufficient to enable the procuring entity to complete comparison and evaluation of the tenders and give its recommendations to the appropriate tender board. The tender validity and tender security period should also be sufficient to enable the appropriate tender board to review recommendations given by the procuring entity and approve the contract or contracts to be awarded. It is the requirements of this section that all these formalities must be completed "***whilst the tenders are still valid.***"

From the Minutes of the Tender Board Meeting held on 12th April 2019 it is evident that the Tender Board approved the award on that date. It is apparent that all the formalities were completed whilst the tender was still valid. In other words, the requirements of the provisions of section 71 of the Act were complied.

However, now that the award approved by the Tender Board had been cancelled, it follows naturally that the Respondent would have to recommend to the tender board for award to another qualified bidder. In view of the provision of section 71 of the Act, the above formalities must be completed "***whilst the tenders are still valid.***" And since the tender validity period has long expired, it follows that the tender is no longer valid. In other words, there is no tender to be recommended for award.



In the circumstances while dismissing this Appeal the Appeals Authority directs the Respondent to retender if it is still interested with the project. As the points were raised 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 20th day of December 2019.



ADVOCATE ROSAN MBWAMBO

Ag: CHAIRMAN

MEMBERS:

1. MR. RHOBEN NKORI.....
2. DR. LEONADA MWAGIKE.....