

IN THE PUBLIC PROCUREMENT APPEALS AUTHORITY

APPEAL CASE NO. 02 OF 2023-24

BETWEEN

M/S PITAMBRA BOOKS PVT LTD.....APPELLANT

AND

TANZANIA INSTITUTE

OF EDUCATION.....RESPONDENT

RULING

CORAM

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| 1. Hon. Justice (rtd) Souda Mjasiri | - Chairperson |
| 2. Ms. Ndeonika Mwaikambo | - Member |
| 3. Dr. William Kazungu | - 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. Ms. Neeta Ranawet | - Regional Manager |
| 2. Ms. Maryclara Thadei | - Business Consultant |

FOR THE RESPONDENT

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| 1. Mr. Leopold Kaswezi | - Senior State Attorney |
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2. Mr. William Masanja

- Head of Procurement
Management Unit

The Appeal was lodged by **M/S Pitambra Books Pvt Ltd** (hereinafter referred to as "**the Appellant**") against the **Tanzania Institute of Education** commonly known by its acronym as "**TIE**" (hereinafter referred to as "**the Respondent**"). The Appeal is in respect of Tender No. PA/070/2022/2023/G/19B Lot 4-6 for Printing and Supply of Primary Standard 2-5 Text Books for EP4R Project Phase III (hereinafter referred to as "**the Tender**"). The Tender has three Lots and this Appeal relates to Lots 5 and 6.

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 19th February 2023, the Respondent invited the Tender through the Tanzania National electronic Procurement System (TANePS). The deadline for submission of Tenders was set on 9th March 2023. On the deadline, the Respondent received nine tenders including that of the Appellant.

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The received tenders were accordingly evaluated and after completion of the evaluation process, the Evaluation Committee recommended award of the Tender for Lot 5 to M/S Nyambari Nyangwine Group of Companies Ltd and Lot 6 to M/S Mbesa Books Distributors Ltd. However, the said recommendations of award were subject to negotiations.

The Tender Board through Circular Resolution No. 2022/2023/57 of 11th May 2023, approved the Evaluation Committee's recommendations. On 18th May 2023, negotiations successfully took place between the proposed successful tenderers and the Respondent. On 25th May 2023, the Tender Board through Circular Resolution No. 2022/2023/71 approved the negotiation report.

On 26th May 2023, the Respondent issued the Notice of Intention to award the Tender to all tenderers who participated in this Tender process. The Notice informed the tenderers that the Respondent intends to award Lot 5 to M/S Nyambari Nyangwine Group of Companies Ltd at the contract price of Tanzania Shillings Two Billion Nine Hundred Ninety-One Million Eight Hundred Sixteen Thousand One Hundred Forty Four only (TZS 2,991,816,144.00) VAT exclusive. On the other hand, it intends to award Lot 6 to M/S Mbesa Books Distributors Limited at the contract price of Tanzania Shillings Three Billion Three Hundred Fifty Million only (TZS 3,350,000,000.00) VAT exclusive. The Notice also informed the Appellant that its tender was disqualified for having quoted a higher price than prices quoted by the proposed successful tenderers. The Appellant claimed to have received the said Notice through TANEPS on 5th June 2023.



On 5th June 2023, the Appellant wrote a letter to the Public Procurement Regulatory Authority (PPRA) requesting for re-evaluation of the reason given for its disqualification and award proposed to the successful tenderers. Having not received any reply thereto, on 3rd July 2023, the Appellant filed this Appeal to the Appeals Authority.

The Appeals Authority notified the Respondent about the Appeal and required it to file its statement of reply. In submitting its reply, the Respondent raised two Preliminary Objections (POs) on a point of law to wit: -

- i. The Appeal is not tenable in law for violating the requirements of Section 96(1) of the Act; and
- ii. The Appeal is time barred for contravening Section 97(2) and (3) of the Act read together with Rule 9(1) of the Public Procurement Appeals Rules, GN. No.411 of 2014 as amended in 2017 (hereinafter referred to as "**the Appeals Rules**").

When the matter was called on for hearing, the Appeals Authority informed the parties that due to time limit it has in the determination of appeals, it would hear both the POs and the merits of the Appeal. Therefore the following issues were framed: -

- 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 directed the parties to address it on the POs raised which are centred on the first issue, before embarking on the substantive merits of the Appeal.

SUBMISSIONS BY THE RESPONDENT ON THE POs

The Respondent's submissions were made by Mr. Leopold Kaswezi, Senior State Attorney from the Respondent's office. He commenced his submissions by addressing the first PO and stated that, according to Section 96(1) of the Act, a tenderer who is dissatisfied with a particular tender process is required to seek for an administrative review to the accounting officer of the respective procuring entity.

In this Appeal, the Respondent issued the Notice of Intention to award the Tender through TANEPS on 5th June 2023. The Notice was received by the Appellant on the same date. Upon receipt of the said Notice, the Appellant was dissatisfied with the reason given for its disqualification and the proposed award to the successful tenderers. On 5th May 2023, the Appellant filed an application for administrative review to the PPRA.

The learned State Attorney submitted that according to Section 96(1) of the Act, the Appellant was required to file its application for administrative review to the Respondent's Accounting Officer and not to PPRA. In addition, the Appellant's application for administrative review was to be submitted through TANEPS as it was explicitly stated in the Tender Document.

The learned State Attorney contended further that, according to the requirements of Section 96(4) of the Act, an application for administrative



review to the Respondent's Accounting Officer was to be filed within seven working days from the date the Appellant became aware of the circumstances giving rise to the complaint. In this Appeal the cause of action arose after the Appellant received the Notice of Intention to award the Tender and became dissatisfied. Thus, the Appellant ought to have filed its application for administrative review to the Respondent's Accounting Officer within seven working days. The Respondent's Accounting Officer would be required to issue its decision within seven working days from the date it received the application for administrative review. If the Appellant was dissatisfied with the decision issued or if the Accounting Officer would have failed to issue its decision within the specified time limit, the Appellant would be required to file an Appeal to this Appeals Authority.

However, the Appellant failed to comply with the requirements of Section 96 of the Act, as there was no application for administrative review that was filed to the Respondent. Therefore, no Appeal would stand in the absence of the application for administrative review. Thus, the Appellant's act of filing this Appeal should be regarded as an abuse of the appeal process.

On the second PO the learned State Attorney submitted that Section 97(2)(a) & (b) and (3) of the Act provides guidance on filing of Appeal before the Appeals Authority. That is, an appeal to this Appeals Authority has to be filed within seven working days when a tenderer becomes aware of the circumstances giving rise to an appeal.

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According to the record of Appeal, the Appellant received the Notice of Intention to award on 5th June 2023. Had it been dissatisfied, it ought to have filed its application for administrative review by 15th June 2023. After a lapse of the seven working days with no decision from the Respondent, the Appellant ought to have filed its Appeal to the Appeals Authority by 23rd June 2023. On the contrary, the Appellant's Appeal was filed on 3rd July 2023 and was therefore out of time.

Rule 9(1) of the Appeals Rules also states clearly that an Appeal to this Appeals Authority has to be filed within seven working days. Thus, since the facts of this Appeal depict that the Appeal was filed beyond the stipulated seven working days, this Appeal is out of time and the same should not be entertained by the Appeals Authority.

In view of the above, the learned State Attorney prayed for dismissal of the Appeal with costs.

APPELLANT'S REPLY ON THE POS

In this Appeal the Appellant was represented by Ms. Neeta Ranawet, the Appellant's Regional Manager. She made her submissions on the two POs concurrently. She commenced by stating that, the Appellant received the Notice of Intention to award the Tender via TANePS on 5th June 2023. After receipt of the said Notice and being dissatisfied with the decision, she filed an application for administrative review to PPRA on 5th June 2023.

She contended that, according to the Tender Document, an application for administrative review was to be filed to PPRA and the Appellant complied with such a requirement. She added that, much as the application for

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administrative review was addressed to PPRA, the same was copied to the Respondent and to this Appeals Authority. However, there was no response from the addressee of the letter and therefore the Appellant decided to file this Appeal on 3rd July 2023.

Having being enlightened by the Members of the Appeals Authority on the requirements of Clauses 45 to 48 of the Instruction To Tenderers (ITT) and Sections 96 and 97 of the Act, the Appellant stated that it was not aware of the requirements of the law in relation to filing of an application for administrative review and the subsequent appeal thereafter.

Taking cognizance of the requirements of the law, the Appellant conceded to have not filed an application for administrative review as per the requirements of the law. Therefore, this Appeal is not properly before the Appeals Authority.

ANALYSIS BY THE APPEALS AUTHORITY ON THE POs

1.0 Whether the Appeal is properly before the Appeals Authority

Taking cognizance of the fact that the Appellant conceded to have not properly filed this Appeal, the Appeals Authority proceeds to determine the above issue which covers both POs for the purpose of enlightening the parties. In so doing, the Appeals Authority revisited Sections 95(1), 96(1) & (4) and 97(1), (2) and (3) of the Act which provide a guidance on submission of the application for administrative review to the Accounting Officer and Appeal to the Appeals Authority. The provisions read as follows:-



"Sec. 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.

Sec. 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,

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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.

- (3) *A tenderer may submit a complaint or dispute directly to the Appeals Authority if the complaint or dispute cannot be entertained under section 96 because of entry into force of the procurement or disposal contract, and provided that the complaint or dispute is submitted within seven working days from the date when the tenderer submitting it became aware of the circumstances giving rise to the complaint or dispute or the time when that tenderer should have become aware of those circumstances."*

The above quoted provisions indicate clearly that if a tenderer is not satisfied with the procuring entity's acts or omissions, 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, if it fails to do so; a tenderer is required to file an Appeal to the Appeals Authority within seven working days. In addition, a tenderer may file an Appeal to the Appeals Authority where the procurement contract has entered into force.



Having related the above quoted provisions to the facts of this Appeal, the Appeals Authority observed that the Appellant received the Notice of Intention to award dated 26th May 2023 on 5th June 2023 via TANEPS. Since the Appellant was dissatisfied with the said Notice, it ought to have submitted its application for administrative review to the Respondent's Accounting Officer within seven working days.

Counting from 5th June 2023, the seven working days within which the Appellant ought to have filed its application for administrative review to the Respondent expired on 14th June 2023. The Appellant did not do so and instead on 5th June 2023, it wrote a letter to PPRA requesting for re-evaluation of the reason given for its disqualification as it quoted the lowest price compared to the proposed successful tenderers.

During the hearing the Appellant was asked by the Members of the Appeals Authority to clarify the reason that led it to file its application for administrative review to PPRA instead of filing the same to the Respondent's Accounting Officer. In response thereof, the Appellant submitted that the Tender Document directed it to do so. However, having gone through the provisions of the Tender Document and the Act, during the hearing of the appeal, the Appellant conceded to have mistakenly lodged its application for administrative review to PPRA instead of filing the same to the Respondent.

Clauses 45.1, 46.1, 47.1, 48.1 and 49.1 of the ITT in the Tender Document provide guidance on the procurement dispute resolution procedures for this Tender. The said clauses read as follows: -

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"45.1 A Tenderer who claims to have suffered or that may suffer any loss or injury as a result of breach of a duty imposed on a PE or an approving authority in the course of these procurement proceeding(s) may seek a review in accordance with the procedure set out under this Section.

46.1 The Tenderer shall submit an application for review within Seven (7) working days of him becoming or should have become aware of the circumstances giving rise to the complaint or dispute.

47.1 Any application for administrative review shall be submitted through TANEPS to the Accounting Officer of a PE and a copy shall be served to the Public Procurement Regulatory Authority (PPRA).

48.1 The Accounting Officer (AO) of a PE shall, within Seven (7) working days after receipt of the complaint or dispute, deliver a written decision...

49.1 Complaints or disputes which:

- (a) are not settled within the specified period under ITT 48.1 [Decision by the Accounting Officer of a PE];
- (b) the Tenderer is not satisfied with the decision of the accounting officer; or
- (c) arise after the procurement contract has entered into force pursuant to ITT 40 [Notification of award],



shall be referred to the Public Procurement Appeals Authority (PPAA) at the address specified in the TDS within seven (7) working days from the date when the Tenderer received the decision of the accounting officer or, in case no decision is issued after the expiry of the time stipulated under ITT 48.1 [Decision by the Accounting Officer of a PE] or when the Tenderer become aware or ought to have become aware of the circumstances giving rise to the complaint or dispute pursuant to ITT 46.1 [Time Limit on Review]”.

(Emphasis supplied)

From the record of this Appeal and the Appellant's own admission that it did not exhaust the dispute review procedures as provided in the Tender Document and the Act, the Appeals Authority finds this Appeal to be improperly before it as it contravenes the requirements of Sections 96 and 97 of the Act read together with Clauses 45.1, 46.1, 47.1, 48.1 and 49.1 of the ITT.

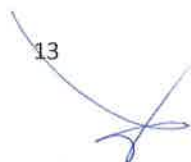
Given our findings hereinabove, the Appeals Authority concludes the first issue in the negative that, the Appeal is not properly before it. The Appeals Authority would therefore not delve into the merits of this Appeal, as it lacks jurisdiction to do so.

The Appeal Authority hereby dismiss the Appeal in its entirety. We make no order as to costs.

It is so ordered.



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

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 26th day of July 2023.

HON. JUSTICE (rtd) SAUDA MJASIRI



.....
CHAIRPERSON

MEMBERS: -

1. MS. NDEONIKA MWAIKAMBO.....



2. DR. WILLIAM KAZUNGU.....

