

IN THE PUBLIC PROCUREMENT APPEALS AUTHORITY

AT DAR ES SALAAM

APPEAL CASE NO. 09 OF 2019-2020

BETWEEN

M/S MANYANYA ENGINEERING

COMPANY LIMITED.....APPELLANT

AND

TANZANIA NATIONAL ROADS AGENCY.....RESPONDENT

DECISION

CORAM

- | | |
|-------------------------|------------------|
| 1. Adv. Rosan Mbwambo | - Ag.Chairperson |
| 2. Eng. Stephen Makigo | - Member |
| 3. Dr. Leonada Mwangike | - Member |
| 4. Ms. Florida Mapunda | - Ag.Secretary |

SECRETARIAT

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

FOR THE APPELLANT

- | | |
|----------------------------|--------------------------------|
| 1. Mr. Hilal Hamza | - Advocate, A. K. K. Attorneys |
| 2. Mr. Zuberi H. Njakilaye | - Managing Director |
| 3. Mr. Jacob M. Mchenya | - Quantity Surveyor |

THE RESPONDENT

1. Mr. Kenan Komba - Principal Legal Counsel
2. Mr. Gurisha Y. Gurisha - Legal Counsel
3. Eng. Ngeleja Kawonga - Senior Maintenance
4. Eng. Mgeni Mwanga - Head – Engineering Unit
5. Eng. Obed T. Panga - Head of Procurement Management Unit

This Appeal was lodged by M/s Manyanya Engineering Company Limited (hereinafter referred to as "**the Appellant**") against the Tanzania National Roads Agency commonly known by its acronym TANROADS (hereinafter referred to as "**the Respondent**"). The Appeal is in respect of Tender No. AE/001/2019-20/AR/TEN/W/61 for Bridge Major Repair and Bridge Preventive Works along Matala-Njiapanda Road (hereinafter referred to as "**the Tender**").

The Tender was conducted through National Competitive Bidding method 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**").

After going through the record of Appeal submitted to the Public Procurement Appeals Authority (hereinafter referred to as "**the Appeals Authority**"), the background of the Appeal may be summarized as follows:

The Respondent through Mwananchi and the Daily News newspapers dated 18th July 2019 invited sealed tenders from eligible national Civil Engineers, Specialist Road Marking & Signage and Specialist Labour based Works Contractors registered with Contractors Registration Board in the specified class to participate in the Tender. This tender was advertised by the Respondent through its Regional Manager's Office of Arusha. The deadline for submission of tenders was set for 9th August 2019 whereby ten (10) tenders including that of the Appellant were received by the deadline.

The received tenders were then subjected to evaluation which was conducted into three stages namely; preliminary, detailed and post qualification evaluation. Preliminary Evaluation was conducted into two stages namely commercial responsiveness and technical responsiveness. During Preliminary Evaluation (commercial responsiveness) five tenders, including that of the Appellant were found to be non-responsive to the terms and conditions of the Tender, hence were disqualified. The remaining five tenders were then subjected to technical evaluation. At this stage two more tenders were disqualified.

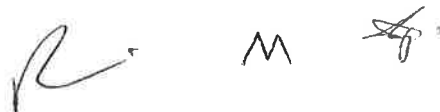
The remaining three tenders were then subjected to detailed evaluation whereby they were checked for arithmetic errors and ranking. None of them was found with arithmetic errors. M/s Emirates Construction Company Limited emerged to be the first ranked tenderer and was subjected to Post-Qualification. After completion of the Post-Qualification process, M/s Emirates Construction Company Limited was found to have complied with all tender requirements. It was therefore, recommended for award at a contract sum of Tanzania Shillings Seven Hundred Fifty-Seven

Handwritten signatures and initials at the bottom of the page, including a large signature on the left, the letter 'M' in the center, and another signature on the right.

Million two hundred ninety-five thousand six hundred Eighty (TZS 757,295,680) only, VAT inclusive. The Tender Board at its meeting held on 12th, 13th and 14th September 2019 approved award to M/s Emirates Construction Company Limited as was recommended by the evaluation committee.

The Respondent through a letter dated 18th September 2019 issued the Notice of Intention to award to all tenderers who participated in the Tender. The said notice specifically informed the Appellant that its tender was unsuccessful due to the reason that its Form of Tender has an ambiguity with regard to the adjudication status as it accepted and at the same time rejected Dr. Richard Masika as the adjudicator.

Dissatisfied with the given reason on 23rd September 2019, the Appellant wrote an application for administrative review to the Respondent's Accounting Officer. The said application was sent by email on 24th September 2019 and a hard copy was received by the Respondent on 27th September 2019. The Respondent constituted an independent review panel to work on the Complaint. On 4th October 2019, the Respondent issued its decision rejecting the application. Apparently, the Respondent added another reason for disqualification in this decision, namely that the Appellant's tender was also non-responsive as it was not initialled in the first page of the Form of Tender. Aggrieved further, on 11th October 2019, the Appellant lodged this Appeal.



Upon receipt of notification of the Appeal, the Respondent raised a preliminary objection on the point of law that, the Appeals Authority lacks jurisdiction because the Appellant's application for administrative review which ultimately gave rise to this Appeal was filed beyond the stipulated seven working days as required under Section 96(4) of the Act as amended.

When the appeal came up for hearing the Appeals Authority directed the parties to address it on both the preliminary objection and the merits of the Appeal. Should the preliminary objection not sustained then the Appeals Authority would proceed to determine the appeal on its merits.

RESPONDENT'S SUBMISSIONS ON THE PRELIMINARY OBJECTION

The Respondent submitted that its Preliminary Objection (PO) is in line with Section 96(4) of the Act. According to the said provision an application for administrative review to the accounting officer has to be lodged within seven working days from the date when the tenderer became aware of the circumstances giving rise to the complaint or disputes. He submitted that the Appellant became aware of the circumstances giving rise to a complaint after receipt of the Notice of Intention to award on 18th September 2019. The Appellant lodged its application for administrative review on 27th September 2019 that is on the eighth day from the date it became aware of the circumstances giving rise to a complaint. That is to say, the application for administrative review was delayed for one day.

 M 

The Respondent added that the seven working days requirement have also been amplified under Regulation 105(1) of GN. No. 446 of 2013 as amended. Thus, the Appellant ought to have lodged its application for administrative review within the stipulated period.

The Respondent therefore concluded its argument by indicating that it is a requirement of the law that application for administrative review be lodged within seven working days. Hence, failure to comply with such a requirement renders both the application for administrative review and the subsequent Appeal incompetent in the eyes of the law. Thus, the Respondent prayed for dismissal of the Appeal with costs .

REPLY BY THE APPELLANT ON THE PRELIMINARY OBJECTION

The Appellant submitted that its application for administrative review was lodged within the prescribed time. The Appellant does not dispute the fact that it became aware of the circumstances that gave rise to a complaint on 18th September 2019. The Appellant's proposition is based on an email that was sent to the Respondent dated 24th September, 2019 a copy of which was supplied. According to the Appellant service of the application for administrative review electronically is allowed under the provisions of Regulation 105(1) of GN. No. 446 of 2013. It was submitted that this Regulation allows application for administrative review to be submitted in writing or electronically. The Appellant submitted its application for review electronically, that is via email. Hence, the same was filed within seven working days as required by the law. The Appellant concluded its argument by indicating that the Preliminary objection lacks merit and the same be struck out.



  

In its brief rejoinder the Respondent denied to have received the Appellant's email dated 24th September 2019. Further, the learned counsel indicated that according to Section 60(1)(a) of the Interpretation of laws Act, Cap 1, counting of the days starts from the date the Appellant received the Notice of intention to award as that is a specific day when it became aware of the circumstances giving rise to a complaint. Thus, the Appellant's application for administrative review was filed beyond the seven working days.

ANALYSIS BY THE APPEALS AUTHORITY ON THE PRELIMINARY OBJECTION

In order to determine the contentious arguments by the parties on the Preliminary Objection, the Appeals Authority framed the issue as to whether the Appeal is properly before it.

In resolving this issue, the Appeals Authority revisited the documents submitted before it and observed that the Respondent issued the Notice of Intention to award on 18th September 2019. Upon being dissatisfied with the reasons given for its disqualification, the Appellant on 23rd September 2019 wrote an application for administrative review to the Respondent. However, it is not disputed that a hard copy of same was served to the Respondent on 27th September 2019. The Appellant alleged to have sent the said application via email on 24th September 2019. Apparently, no proof indicating that the email was actually received by the Respondent. The Appeals Authority finds that in the absence of evidence showing acknowledgment of receipt of the Appellant's email dated 24th September,

 M 

2019 it cannot accept the proposition that the administrative review was submitted on 24th September, 2019.

Determination of limitation period is a question of arithmetic. On this the starting point is the date of reckoning. The date of reckoning is usually set out in the relevant laws. In the instant case the relevant laws are the Act and the Regulations.

According to section 96(4) of the Act, any tenderer who is aggrieved by the act, omission or decision of a procuring entity is required to lodge its complaint/application for administrative review within seven working days from the date of becoming aware of the circumstances giving rise to a complaint. For purposes of clarity the said provision is reproduced herein below: -

*"The accounting officer shall not entertain a complaint or dispute unless it is submitted **within seven working days from the date the tenderer submitting it became aware of the circumstances giving rise to the complaint or dispute** or when that tenderer should have become aware of those circumstances, whichever is earlier". (Emphasis supplied)*

From the above quoted provision it is clear that a complaint/application for administrative review is to be lodged within seven working days from the date the tenderer submitting it became aware of the circumstances giving rise to the complaint or dispute.

Handwritten signatures and initials at the bottom of the page, including a large stylized signature, the letter 'M', and another signature.

Both parties are at one that the Appellant became aware on 18th September, 2019. It is the Respondent's proposition that the date of reckoning is 18th September, 2019 in view of the provision of section 60(1)(a) of the Interpretation of Laws Act. The Appeals Authority finds it prudent to establish as to when the counting of the date should start.

According to section 60 of the Interpretation of Laws Act counting of the dates depends on the wording of a written law. Section 60(1)(a), (b) and (c) of the Interpretation of Laws Act provides as follows: -

(a) where a period of time is expressed to be at, on or with a specified day, that day shall be included in the period;

(b) "*where a period of time is expressed to be reckoned **from**, or **after** a specified day, that day shall not be included in the period;*

(c) "*where anything is to be done **within** a time before a specified day, the time should not include that day*".

The wording of section 96(4) of the Act contains the words "within" and "from". Reading this section 96(4) of the Act together with section 60(1)(a), (b) and (c) of the Interpretation of Laws Act, the Appeals Authority finds Section 60(1)(b) and (c) more relevant than section 60(1)(a) relied by the Respondent. It is the Appeals Authority considered view that seven days within which to lodge an application for administrative review should exclude 18th September, 2019.

In this Appeal the Appellant received the Notice of Intention to award on 18th September 2019. The seven working days within which the Appellant ought to have filed its complaint started to run from 19th September 2019. Counting from 19th September 2019 the seven working days within which the Appellant ought to have lodged its complaint ends on 27th September 2019. The Appellant's application for review was therefore, lodged within seven working days as required.

Therefore, the Appeals Authority concludes that the Appeal is properly before it as the application for administrative review which ultimately resulted to this Appeal was lodged within the stipulated time. Thus, the preliminary objection is hereby dismissed. We now proceed to determine the merits of the Appeal.

SUBMISSIONS BY THE APPELLANT

The Appellant's grounds of Appeal may be summarised as follows:-

1. That, the Respondent's decision to disqualify the Appellant's tender is grossly wrong in that, the Form of Bid submitted has no any ambiguity and did not violate any provision of Tender Data Sheet (TDS) and Instruction to Tenderers (ITT).
2. That, the Form of Bid was standard as it was contained in the Respondent's Tender Document. Further the name of the adjudicator, one Eng. Richard Masika was proposed by the Respondent in the TDS. The Appellant just accepted Eng. Richard Masika to be the adjudicator. The Appellant expounded further that, on the first page of the Form of Tender the Appellant had accepted Eng. Richard Masika to be the

R M SF

adjudicator. In the second page the Appellant was not rejecting Eng. Richard Masika as an adjudicator instead the Appellant was complying with the format of the Form of Tender. The Appellant argued the Appeals Authority not to read the second page in isolation and insisted that the Appellant had not rejected the adjudicator as contended by the Respondent.

3. That, the Respondent's decision with respect to the application for administrative review dated 4th October 2019 is unlawful in that, it travelled beyond the ground stated in the Notice of Intention to award regarding the status of adjudicator. The Respondent after receipt of the application for administrative review ought to have dealt with issues presented before it; that is, the Appellant's act of rejecting and accepting Eng. Richard Masika as an adjudicator. To the contrary, it raised an extraneous matter which related to the Appellant's failure to initial the first page of the Bid Form.
4. That, the Respondent's act of raising new issues when considering an application for administrative review contravenes the principle of natural justice as the Appellant was denied the right to be heard in that regard. Thus, the Respondent's act is unlawful.
5. That, Section 96(2) of the Act requires the accounting officer when considering the applications for review to deal with matters which are the subject of review. In the Appellant's application for review the issue was rejection and acceptance of Eng. Richard Masika as an adjudicator. It was expected that the Respondent's Independent review panel would consider issues which are only subject of review. To the contrary, the independent review panel considered other extraneous matters which

were not part of the complaint. The Appellant submitted further that, the independent review panel turned itself into an evaluation committee as it went beyond the scope by considering other matters which were not the subject of review.

Furthermore, the Appellant expounded that Regulation 106(7) of GN No. 446 of 2013 requires the accounting officer to address only the complaint presented before it. It was also submitted that Regulation 106(3) of GN No. 446 of 2013 relied upon by the Respondent that it gave the independent review panel mandate to review all the documents submitted in relation to the Tender was a misconception as the review of the said documents was to be done in relation to the complaint only.

6. Finally, the Appellant prayed for the following orders:-

- i. The Respondent be prohibited from proceeding/acting and/or awarding the Tender unlawfully;
- ii. A declaration that the Appellant's submitted Form of Tender has no ambiguity regarding acceptance of Dr. Richard Masika as an adjudicator;
- iii. A declaration that the Respondent's decision with regard to the Appellant's application for administrative review is unlawful as it contravened the Act and its Regulation;
- iv. A declaration that the Respondent's act of introducing new ground for disqualification of the Appellant when handling application for review is unlawful and offends the fundamental principle of Natural Justice as the Appellant was not given right to be heard;

- v. The Respondent's decision to award the tender be revised and a declaration be made that the Appellant's Tender of TZS 645,926,100/- is the lowest responsive tender;
- vi. The Respondent be ordered to compensate the Appellant the costs of this Appeal as per the following breakdown:-
 - a) Filing fees for this Appeal - TZS 300,000/-
 - b) Advocate Fees - TZS 8,000,000/-
- vii. The Appeals Authority issue any other order it deems necessary

REPLY BY THE RESPONDENT

The Respondent's reply to the grounds of appeal may be summarized as follows:-

1. That, the Appellant was found to be non-responsive during preliminary evaluation as well as during review of its application for administrative review.
2. That, the Appellant's tender was found to be non responsive as its Form of Tender was inconsistent to the terms and conditions of the Tender Document. The Appellant's act of accepting and rejecting the proposed adjudicator amounts to material deviation as per Clause 28.2 (b) of the ITT.

The Respondent added that, the Appellant was required to furnish all the information as required by the Tendering Document, this include Form of Tender pursuant to Clauses 7.5 and 14.1 of the ITT. To the contrary, the Appellant failed to comply with such requirement. Thus,

its Tender was disqualified for being non-responsive. The Appellant's disqualification was done pursuant to Regulations 202(5), 203(1) and 206(2) of GN. No. 446 of 2013.

3. That, following the application for administrative review lodged by the Appellant, the Respondent formulated an independent review panel which reviewed the Appellant's complaint. The independent review panel is a creature of the law, thus, it has a right to review all the documents pursuant to Regulation 106(3) of GN No. 446 of 2013. The Respondent added further that the nature and scope of the administrative review was not limited to the Appellant's application only but also to all documents submitted by the Appellant at the time of bidding.

The Respondent contended further that, since the independent review panel is not confined to a complaint only, it went through the documents submitted and observed that, the Appellant's Form of Tender was not initialled at the first page as required by Clause 20.2 of the ITT. The Appellant's anomaly in this regard led his tender to be non-responsive. Thus, the Appellant's tender was fairly disqualified.

4. Finally, the Respondent prayed that:-

- i) The Appellant's prayers listed under item 3 (i-vi) are unfounded and the same be dismissed in its entirety with costs.
- ii) With regard to the Appellant's compensation, the Respondent submitted that the Appellant is not entitled to any

compensation as the Appeal has no merits and is unfounded on misconception of facts and law.

ANALYSIS BY THE APPEALS AUTHORITY

The Appeals Authority having gone through the various documents submitted by both parties and oral submissions during the hearing is of the view that, the parties are in agreement that the Appeal is centred on two main issues namely:-

- 1 Whether the Appellant's disqualification was justified; and**
- 2 What relief(s), if any, are the parties entitled to**

Having identified the issues in disputes, the Appeals Authority proceeded to determine them as hereunder:-

1.0 Whether the Appellant's disqualification was justified

In resolving this issue the Appeals Authority revisited the documents submitted and observed that, the Appellant was disqualified for two reasons, namely:-

- i) Accepting and at the same time rejecting Eng. Richard Masika as an adjudicator, and
- ii) Failure to initial the first page of its Form of Tender as per Clause 20.2 of the ITT.

As regards the first reason that of accepting and at the same time rejecting Eng. Richard Masika as an adjudicator the Appeals Authority revisited the original Tender Document. The Appeals Authority observed that tenderers were required either to accept the proposed adjudicator or to reject the

proposed adjudicator. Should they reject the proposed adjudicator they should insert the name of the person they propose as an adjudicator.

Apparently, in the instant case, the Appellant accepted the adjudicator in the first option. In the second option the Appellant while appears to reject the adjudicator in the first line inserted the word N/A in the second line.

N/A means Not Applicable. The Appeals Authority finds that by inserting N/A in this second option it means this option of rejecting the proposed adjudicator is not applicable. Therefore, the Appellant accepted the proposed adjudicator in the first option. There is in the circumstances, no ambiguity as submitted by the Respondent.

Based on the above, the Appeals Authority is of settled view that, the Appellant's disqualification on the ground that it had accepted and at the same time rejected Eng. Richard Masika as an adjudicator was improper.

Another reason of disqualification is that the 1st page of the Appellant's Form of Tender was not initialled as required by Clause 20.2 of the ITT. The Appeals Authority revisited the Evaluation Report and observed that, the Appellant was disqualified at the preliminary evaluation stage for accepting and at the same time rejecting Eng. Richard Masika as an adjudicator. That same reason was reported to the Tender Board and it was endorsed. Also the same reason was contained in the Notice of Intention to award.

Having considered the submissions by the parties and the documents submitted, the Appeals Authority observed that the issue of the Appellant's failure to initial its first page of the Form of Tender was brought up by the independent review panel when reviewing the Appellant's complaint.

In order to ascertain the validity of the findings by the Independent review panel, the Appeals Authority revisited Section 96(2) of the Act which provides as follows:-

"On receiving a complaint under this section, the accounting officer may depending on the nature of the complaint constitute an independent review panel from within or outside his organization which shall review the complaint and advise him on the appropriate actions to be taken".

From the wording of the above quoted provision, it is crystal clear that the mandate of the independent review panel is on the submitted complaint. In this Tender, the independent review panel went further to consider other matters which were not part of the complaint submitted by the Appellant.

The Appeals Authority also considered Regulation 106(3) of GN. No 446 of 2013 relied upon by the Respondent. According to the Respondent this regulation gives the independent review panel unlimited powers to review everything in relation to the Tender and not the complaint only. Section 96(2) of the Act which guides on the formation of the independent review panel states in clear terms that the mandate of such review panel is in relation to the complaint. Thus, it is not possible that Regulation 106(3) and (4) of GN. No. 446 of 2013 which elaborate how would the

independent review panel work to grant more powers to it than those specified in the main Act.

The Appeals Authority is of the considered view that, Regulation 106(3) allows the independent review panel to consider, amongst other, the information in the records kept by the procuring entities, information provided by other tenderers and any other relevant information so as to advise the accounting officer on the decision to be made in relation to the complaint lodged.

In this Tender the independent review panel apart from reviewing the complaint lodged it considered other matters which were not part of the complaint as a result it came out with the findings that the first page of the Appellant's Form of Tender was not initialled. The Appeals Authority is in agreement with the Appellant's argument that the independent review panel turned itself to an Evaluation Committee, as it exceeded its scope of work.

The Appeals Authority therefore is of the firm view that, the independent review panel had acted ultra vires its powers by considering other matters which were not subject of review.

The above notwithstanding, the Appeals Authority revisited Clause 20.2 of the ITT and observed that it requires, amongst other, all pages of the tender except for an amended literature to be initialled by a person signing the tenders. The Appeals Authority revisited the Appellant's tender and observed that the first page of its Form of Tender was not initialled as required. Further, the Appeals Authority reviewed the tender submitted by

the proposed successful tenderer M/s Emirates Construction Company Limited and observed that, Section IX-1.3 - Schedule of Equipment, Section IX-1.4 - Key Personnel, Item 1.8-Financial Capability, Tender Securing Declaration, Declaration on Litigation and Special Power of Attorney were all amended but were not initialled.

The Appeals Authority failed to comprehend the Respondent's motive in this regard, as it re-evaluated the bids which were found to be unsuccessful when handling their application for review and failed to re-evaluate the bids which were found to be successful in order to satisfy itself if the award have been proposed to eligible tenderers. The Respondent's conduct in this regard contravened Section 4A of the Act which requires all procurement process to observe equality of opportunity, fairness of treatment and the need to obtain value for money.

Therefore, the Appeals Authority conclusion with regard to the first issue is that the Appellant's disqualification was not justified.

2.0 What reliefs, if any, are the parties entitled to

Taking cognizance of the findings above, that the Appellant was unfairly disqualified, the Appeals Authority hereby allows the Appeal and ordered the Respondent to re-evaluate all the tenders in observance of the law. Each party to bear its own costs.

It is so ordered.

This Decision is binding on the Parties and may be executed in terms of Section 97 (8) of the Act.

The Right of Judicial Review as per Section 101 of the Act is explained to the Parties.

The Decision is delivered in the presence of the Appellant and in the absence of the Respondent this 7th day of November 2019.



ADV. ROSAN MBWAMBO
AG.CHAIRPERSON

MEMBERS:

1. ENG. STEPHEN MAKIGO



2. DR. LEONADA MWAGIKE

