

**IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY**

APPEAL NO. 15 OF 2020-21

BETWEEN

M/S CREDITINFO TANZANIA LIMITED..... APPELLANT

AND

TPB BANK PLC RESPONDENT

RULING

CORAM

- | | |
|-------------------------------------|-----------------|
| 1. Hon. Justice (rtd) Souda Mjasiri | - Chairperson |
| 2. Dr. Leonada Mwagike | - Member |
| 3. Adv. Rosan Mbwambo | - Member |
| 4. Ms. Florida Mapunda | - Ag. Secretary |

SECRETARIAT

- | | |
|------------------------|------------------------|
| 1. Ms. Agnes Sayi | - Senior Legal Officer |
| 2. Ms. Violet Limilabo | - Legal Officer |

FOR THE APPELLANT

- | | |
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| 1. Mr. Van Reynders | - Chief Executive Officer |
| 2. Ms. Subrina Gulamali | - Legal Counsel |
| 3. Mr. Walter Robogo | - Compliance Officer |

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FOR THE RESPONDENT

1. Mr. Erick Zakayo - Head of Procurement Management Unit
2. Ms. Paulina Kunjumu - Legal Counsel
3. Mr. Lawson Kawamala - Senior Procurement Manager

The Appeal was lodged by **M/S CREDITINFO TANZANIA LIMITED** (hereinafter referred to as "**the Appellant**") against the **TPB BANK PLC** (hereinafter referred to as "**the Respondent**").

The Appeal is in respect of Tender No. PA/092/2020/TPB/NC/39 for Credit Reference Bureau Services (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 using National Competitive Tendering method through the Tanzania National e-Procurement System (TANePS) as per 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**").

The Respondent through TANePS issued an Invitation to Tender on 3rd October 2020 whereby two tenderers were invited to submit their tenders. The deadline for submission was set for 19th October 2020 at

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14.00 hours. By the deadline for submission, two (2) tenders including that of the Appellant were received and opened publicly through TANEPS.

Tenders were then subjected to evaluation which was conducted into three stages namely; preliminary, technical and financial. During preliminary and technical evaluation stages all two (2) tenders were found to be responsive hence subjected to financial evaluation. According to the Evaluation Report dated 30th October 2020, the Appellant's tender was found to have quoted a higher price of Tanzanian Shillings Ninety Nine Million One Hundred and Twenty Thousand (99,120,000) only VAT Inclusive compared to the price quoted by M/s Dun & Bradstreet Credit Bureau Tanzania Limited of Tanzanian Shillings Ninety Six Million Seven Hundred and Sixty Thousand (96,760,000) only VAT Inclusive.

The Evaluation Committee recommended the award to M/s Dun & Bradstreet Credit Bureau Tanzania Limited. The Tender Board at its meeting held on 5th November 2020 approved the award subject to negotiations. Negotiations took place on 9th November 2020 whereby the price was reduced to Tanzanian Shillings Fifty Million (50,000,000) only VAT Inclusive.

On 26th November 2020, the Respondent issued the Notice of Intention to award the Tender to all tenderers who participated in the Tender process through TANEPS. The Notice informed the tenderers that the award has been proposed to M/s Dun & Bradstreet Credit Bureau Tanzania Limited at the contract price of TZS 50,000,000.00 VAT Inclusive. The Notice also informed the Appellant that its tender was

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found to have a higher price compared to the price quoted by the proposed successful tenderer (M/s Dun & Bradstreet Credit Bureau Tanzania Limited).

Dissatisfied with the Tender results, the Appellant directly lodged this Appeal on 7th December 2020.

THE APPELLANT'S STATEMENT OF APPEAL

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

1. That, the Respondent's act of negotiating with the proposed successful tenderer and lowering the initially quoted price for almost fifty percent (50%) contravenes Regulation 225 of the Regulations.
2. That, the Respondent did not act in good faith against the Appellant as it denied it the right to seek administrative review. The Respondent served the Appellant with the notice of intention to award after the deadline for submission of application for administrative review had lapsed.
3. Finally, the Appellant prayed for the following orders: -
 - i. Voiding this tender award and the Respondent to fairly assess the tender with total transparency;
 - ii. Alternatively void the decision and treat all Bidders equally with equal rights; and
 - iii. Any other legal relief that the Appeals Authority may deem fit in favour of the Appellant.



REPLY BY THE RESPONDENT

The Respondent's reply to the Appellant's grounds of appeal was preceded by a Preliminary Objection (PO) to wit: -

"The Appeal has been filed prematurely contrary to Sections 60 (3) and 96 of the Act as the Appellant ought to have applied for administrative review before lodging this Appeal".

According to the Respondent, the Appellant was required to lodge an application for administrative review prior to the submission of an Appeal to this Appeals Authority.

Without prejudice to the above, the Respondent's reply to the Appellant's grounds of Appeal is summarised as follows: -

1. That, according to Regulation 225 (g) of the Regulations as amended, negotiations are conducted only with the lowest evaluated bidder for the purpose of reducing prices in case of procurement of goods, works or non-consultancy services. Therefore, negotiations were conducted with M/s Dun & Bradstreet Credit Bureau Tanzania Limited (proposed successful tenderer) who emerged to be the lowest evaluated bidder with a bid price of TZS 96,760,000.00 VAT Inclusive. The Appellant was not invited for negotiation as its quoted price of TZS 99,120,000.00 VAT Inclusive was higher compared to that of the proposed successful tenderer.
2. That, the Respondent uploaded the Notice of intention to award the tender in TANEPS on 26th November 2020. It was indicated in the system that, the deadline for submission of complaint was 4th December 2020. It was presumed that the Appellant received the notification as it

was not the responsibility of the Respondent to notify the Appellant out of the system. The Respondent further added that, if the Appellant had not received the notice of intention before the deadline for submission of complaint, this should have been verified by the administrators of TANEPS.

3. With respect to the Appellant's prayers, the Respondent stated that Bidders were given ample time, seven (7) working days to submit their complaints, but the Appellant did not do so. Hence voiding this Tender would be unfair to the lowest evaluated bidder.
4. Finally, the Respondent prayed for the dismissal of this Appeal.

Before proceeding with the main Appeal, the Appeals Authority deemed it proper to first determine the PO raised. Given the clear position of the law under Sections 60 (3) and 96 of the Act, the Appellant readily conceded to the PO. The Respondent was in agreement and did not press for cost.

ANALYSIS BY THE APPEALS AUTHORITY

Despite the Appellant's concession to the PO raised, the Appeals Authority deems it appropriate to enlighten the Appellant on the procedural requirements for filing an application for administrative review and subsequently an Appeal. In so doing the Appeals Authority revisited Sections 60 (3), 96 (1) and (4) and 97 (1), (2) and (3) of the Act read together with Regulations 104, 105 (1), 106 (9) and 107 (1) of the Regulations as amended. For the purpose of clarity the relevant provisions are reproduced hereunder:-

*Section 60 (3) "Upon receipt of notification, the accounting officer shall, immediately thereafter issue a notice of intention to award the contract to all tenderers who **participated in the tender in question giving them seven working days within which to submit complaints thereof, if any**".*

*Section 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."*

*Section 96 (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 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**".*

Section 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”.

(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.**

[Emphasis provided]

The above quoted provisions entail that a tenderer who claims to have suffered or that may suffer any loss or injury as a result of breach of a duty imposed to a procuring entity may submit a complaint to the accounting officer within seven (7) working days of becoming aware of the circumstances giving rise to a complaint. An appeal may be filed to the Appeals Authority if the accounting officer fails to issue a decision within the stipulated time or if a tenderer is dissatisfied with the decision of the accounting officer pursuant to Section 97 of the Act read together with Regulation 107 of the Regulations. An appeal may only be filed directly to the Appeals Authority under Section 97 (3) of the Act where a procurement or disposal contract has already entered into force.

In the instant case, it is evident from the record of appeal that the Respondent issued the Notice of Intention to award the Tender on 26th November 2020 through TANePS. The Notice of Intention was dated 17th November 2020. Therefore, the Appellant became aware of the said Notice of Intention on 26th November 2020 through TANePS. The seven (7) working days within which the Appellant ought to have lodged an application for administrative review ended on 4th December 2020. The Appellant after receiving the notice of Intention to award failed to exhaust the available legal remedy of lodging an application for administrative review; instead, it filed an Appeal to the Appeals Authority. Thus, the Appellant's act in this regard contravened the requirement of the above cited provisions.

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In view of the above, the Appeals Authority is of the considered view that this Appeal is not properly before it. Consequently, we hereby uphold the PO and dismiss the appeal. Each party is to bear its own costs.

It is so ordered.

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

This Ruling is delivered on 15th day of January 2021 in the presence of the Respondent and in the absence of the Appellant.

HON. JUSTICE (RTD) SAUDA MJASIRI



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CHAIRPERSON

MEMBERS:

1. DR. LEONADA MWAGIKE.....

2. ADV. ROSAN MBWAMBO.....