

IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY.

APPEAL CASE NO. 20 OF 2015-16

BETWEEN

M/S EQUITY AVIATION SERVICES (T) LTD.....APPELLANT

AND

TANZANIA AIRPORTS AUTHORITY.....RESPONDENT

AND

M/S MWANZA GROUND HANDLING SERVICES CO. LTD. INTERESTED
PARTY

RULING

CORAM

1. Hon. Vincent K.D.Lyimo, J. (rtd) - Chairman
2. Mrs. Rosemary A.Lulabuka - Member
3. Ms. Monica P. Otaru - Member
4. Ms. Florida Mapunda - Ag: Secretary

SECRETARIAT

Mr. Hamisi O. Tika - Legal Officer

FOR THE APPELLANT.

1. Joseph O. Ngiloi - Advocate, Makoa Attorneys
2. Mr. Elias Kissamo - Advocate, Makoa Attorneys
3. Ms. Rosemary Kacungira - Managing Director.
4. Mr. Moses Kamau

FOR THE RESPONDENT

1. Joachim E.Maambo - Senior Legal Officer
2. Mr. Mtengela Hanga - Head, Procurement Management Unit.
3. Ms. Scolastica Mukajanga - Chief Marketing Officer.

FOR THE INTERESTED PARTY

1. Dr. Kibuta Ongamuhana - Advocate, Ako Law chambers
2. Mr. Julius Kalolo Bundala - M.A Ismail & Co, Advocates,
3. Mr. Alan Kileo - Advocate, Ako Law chambers
4. Mr. Wilson Mukebezi - Advocate, Ako Law chambers
5. Mr. Salim Ajib - Chairman
6. Mr. Said Alrumhi - Chief Executive Officer
7. Ms. Fatuma Mwinyi - Director
8. Mr. Norbart Mwaifami - Trainee, Ako Law Chambers.

This Ruling was scheduled for delivery today 29th January 2016 and we proceed to do so.

This Appeal was lodged by M/s EQUITY AVIATION SERVICES (T) LIMITED (hereinafter referred to as "the Appellant") against the TANZANIA AIRPORTS AUTHORITY (hereinafter referred to as "the Respondent"). M/s Mwanza Ground Handling Services Company Limited joined as an Interested Party.

The Appeal is in respect of Tender NO. AE/27/ 2014-2015/JNIA/N/41 for Provision of Ground Handling Services at Julius Nyerere International Airport (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 facts of the Appeal may be summarized as follows:

The Respondent through the Daily News newspaper dated 22nd June 2015 invited Class I, Ground Handling Licensed tenderers to submit bids under Restricted Tendering Procedures specified in the Public Procurement Act, Act No. 7 of 2011 (hereinafter referred to as “the Act”) and the Public Procurement Regulations, GN.No. 446 of 2013 (hereinafter referred to as G.N. No. 446/2013).

The deadline for the submission of the tenders which had been set for 24th July 2015 was extended to 21st August 2015, whereby four tenders were received from the following listed firms:

- i. M/s Equity Aviation Services (T) Ltd
- ii. M/s National Ground Handling Co. Ltd
- iii. M/s Mwanza Ground Handling Co. Ltd and
- iv. M/s Wings Flight Services Ltd.

The tenders were subjected to evaluation process which was conducted in two stages namely; preliminary and detailed evaluation of Technical and Financial proposals.

The Evaluation Committee ranked the bidders and after doing so, it recommended the award of the Tender to M/s Mwanza Ground Handling Co. Ltd. for the period of ten (10) years subject to pre-contract negotiations.

The Tender Board at its meeting held on 12th October 2015, approved the recommendations and awarded the Tender to M/s Mwanza Ground Handling Co. Ltd.

On 15th October 2015 the Respondent through its letter with Ref: ED.32/208/01.I/82, addressed to all bidders, issued the Notice of Intention to Award the Tender to the Interested Party. Aggrieved, the Appellant, on 3rd November 2015 through a letter with Ref. No TAA/N41/2015, requested for administrative review by the Respondent's Accounting Officer on five grounds namely:-

- i. That the Respondent's Intention to award letter referred to a different tender i.e. tender NO. AE-027/2014-2015/JNIA/N/41 which was for provision of Ground Handling Services at Julius Nyerere International Airport –TB III while the tender was for provision of Ground Handling Services at Julius Nyerere International Airport- Dar es salaam.
- ii. That the entire opening process of the tender was tainted with massive irregularities of the law in that the Secretary of the Tender Board neglected and /or refused to prepare minutes of the bid opening and ensure that all bidders' representative signs the same.

- iii. That, the successful bidder neglected to submit Bid Form which formed the fundamental part of the document constituting its bid. The said information was realized during the tender opening ceremony.
- iv. That, the Notice of Intention to Award letter was tainted with fundamental error of law since bidders bid separately but the letter from the Respondent addressed three unsuccessful bidders with no reasons attached.
- v. That, the proposed successful bidder neglected to abide with mandatory requirement of ITB Clause 11 and 13 of which no bidder was at liberty to dispense with.

In response to the above complaint, on 13th November 2015 the Respondent's Accounting Officer through their letter with Ref. CED.32/208/06.C/22 dismissed the Appellant's application for lack of merits. Dissatisfied, the Appellant, on 23rd November 2015 by its letter Ref. No. TAA/N41/2015 sought for yet another administrative review by the Respondent's Accounting Officer, stating that their former letter dated 3rd November 2015 was a mere inquiry into the reasons for their disqualification and not an application for administrative review. The Respondent did not react to this second request.

Having received no replies from the Respondent, the Appellant on 30th December 2015 filed this Appeal, whereby the Appeals Authority notified all the bidders who had participated in the tendering process. In that event, the Respondent supported by the Interested Party filed a Preliminary Point of Objection (PO), resisting the Appeal on the ground that this Appeals

Authority had no mandate to entertain the same, it having been filed out of time. The parties prayed for the Appeal to be dismissed with costs.

On the date of hearing of the Appeal, this Appeals Authority deemed it proper to determine the PO before addressing the merits.

THE RESPONDENT'S SUBMISSIONS ON THE PRELIMINARY OBJECTION

Arguing in support of the PO, the learned counsel for the Respondent submitted that the Appellant received the Respondent's letter of Notice of Intention to Award the Tender on 16th October 2015 through an e-mail. And in response thereto, the Appellant on 3rd November 2015, wrote to the Respondent's Accounting Officer seeking for administrative review. The learned counsel submitted that on the basis of sequence of events and by virtue of Section 97(1) and (2) of the Act read together with Regulation 231(1) of G.N. 446/2013, the Appellant should have submitted his request for administrative review to the Accounting Officer within fourteen days from the date of receipt of Respondent's letter dated 15th October 2015. In that respect, the Appellant had to lodge his Appeal on or before 29th October 2015. To the contrary, the Appellant's letter requesting for administrative review was received eighteen (18) days from the date of receipt of the Notice of Intention to Award the Tender. The Respondent also pointed out that even if the Appellant wanted to ground his Appeal from the date he sought for the second administrative review, fourteen days expired on or before 6th December 2015. For that matter, the Appellant had waived his right to appeal by virtue of Regulation 231(9) of G.N. 446/2013.

As shown, on 23rd November 2015, the Appellant sought for another administrative review by the Respondent's Accounting Officer. The Accounting Officer however, did not respond to the request since he had prior delivered his decision; and that the issues contained therein were the same. If the Appellant was dissatisfied with the Respondent's inaction, he ought to have proceeded by appealing to this Appeals Authority within fourteen working days in terms of Section 97(2) of the Act.

The Respondent went on to submit that by operation of the law, the Appellant's fourteen working days started to run on 14th November 2015 after they had received the decision of the Accounting Officer and had to expire on 6th December 2015. Alternatively, after the Respondent had failed or declined to issue a decision on the complaint made on 23rd November 2015, the Appellant's fourteen working days started to run on 7th December 2015 and lapsed on 28th December 2015. Therefore, the Appellant was bound to lodge his Appeal on or before that date and not otherwise. As the Appellant lodged his Appeal to the Appeals Authority on 30th December 2015, the Appellant was late in instituting the Appeal contrary to Section 97 (2) cited above. Thus, counting in whichever way, his Appeal was filed out of time.

The Respondent therefore prayed for the dismissal of the Appeal for being filed out of time.

SUBMISSIONS BY THE INTERESTED PARTY ON THE PRELIMINARY OBJECTION

Dr. Kibuta learned counsel for the Interested Party informed the Appeals Authority that there were two actions taken by the Appellant and those

were - a) the request for the administrative review and b) appeal to the Appeals Authority.

The learned counsel submitted that on 15th October 2015, the Appellant was notified by the Respondent of its intention to award the Tender to the Interested Party. This notification was received by the Appellant on 16th October 2015, a day from the date of service. In which case, the last day for the Appellant to complain within time was on 31st October 2015. The Appellant did not do so. Instead, he filed his letter requesting for administrative review on 3rd November 2015. That complaint was time barred. For strange reasons, the Appellant put up another request for review to the Respondent on 23rd November 2015. That is, thirty eight (38) days later, if we count from 15th October 2015. In so far as the requests for administrative reviews to the Accounting Officer were concerned, they were all out of time.

Secondly, the Notice of Intention to Appeal lodged by the Appellant to the Appeals Authority is indicated to be an appeal against the Respondent's decision dated 13th November 2015. The learned counsel strongly asserted that since this is the decision the Appellant is challenging, then Rule 8 of the Public Procurement Appeals Rules G.N. NO.411/ 2014, requires the same to have been filed within seven days. In this case, according to the Appellant himself, the decision being appealed against is that made on 13th November 2015, and in terms of Rule 8(1) cited above, the Appellant's Appeal ought to have been lodged on 30th November 2015. To the contrary, they failed to comply with the law. Therefore, by virtue of Rule

17(1) of G.N. NO 411/2014, the Appeals Authority is enjoined to reject the Appeal for failure to satisfy the requirements set.

Accordingly, the learned counsel argued that whether the Appeal was triggered by the request for administrative review filed by the Appellant to the Accounting Officer on 4th November 2015 or by the Appellant's letter dated 23rd November 2015, either way these actions were taken out of time. Furthermore, no extension of time was sought by the Appellant from the Appeals Authority to warrant this Appeal in terms of Section 98 of the Act and Rule 11 of G.N. No.411/2014. The learned counsel further argued that even assuming that the Appellant would have requested for extension of time, he has no good reasons to warrant extension of time more so because on 17th November 2015 the concession agreement was signed between the parties.

Counsel for the Interested Party submitted that with the factual legal position and the statement of Appeal thereof, the Appeal was filed out of time and that in the absence of an order for extension of time; this Appeals Authority has no mandate to entertain the same. The Appeals Authority should therefore reject the Appeal since the Appellant has failed to move it.

In a brief rejoinder, the Respondent and the Interested Party insisted that the Appellant cannot rely on a provision of the ITB which goes contrary to specific legislation. The Appellant had opportunity to call for clarifications from the Respondent and in as far as he did not use that opportunity, he is to blame.

THE APPELLANT'S REPLIES ON THE PRELIMINARY OBJECTIONS

The learned counsel for the Appellant implored the Appeals Authority and submitted that the Appeal was properly before the Authority and it should therefore remain undisturbed. The learned counsel insisted that the Respondent's letter dated 15th October 2015 did not conform to the specific provisions of Regulation 231(4) of G.N.446/2013. It was not a decision capable of being challenged by a way of administrative review. The Appellant further insisted that the Respondent's letter of Intention to Award the Tender should have contained specific issues under Regulation 231(2) and (4) of G.N. 446/2013. The Respondent's Notice of Intention to Award the Tender did not reflect the requirements so stated. Hence, the Appellant could not have complained based on that letter.

To buttress the argument that the Respondent's Notice did not conform to the required legislation, the Appellant made reference to the mode of communication the Respondent had used to communicate to the Appellant. The learned counsel for the Appellant submitted that the Respondent had employed a private means of communicating contrary to the Instructions to Bidders - ITB Clause 36. The Appellant stated that the Respondent used a private and unknown e-mail address of one of his employees (private g-mail) one Mtengela Hanga which was not official and that they could not have acted on the same. Therefore, the official communication from the Respondent to them was that made on 23rd October 2015. And that on 3rd November 2015, they requested to be given the reasons as to why their tender was unsuccessful and not the request for administrative review as contended by both the Respondent and the Interested Party. According to

the Appellant, counting from 23rd November 2015, they were within the time prescribed by the law. That, on 13th November 2015, the Respondent gave reasons to the Appellant as requested and that they are appealing against that decision. It was further argued that since Clause 42 of the ITB part G, provided for an appeal to be lodged within twenty eight (28) days, the Appeal was filed within time. The Appellant called on the Appeals Authority to disregard the prescribed period of fourteen (14) days stated under the Act and the Regulations.

ANALYSIS BY THE APPEALS AUTHORITY

The Appeals Authority having gone through the tender proceedings including various documents submitted by both parties and oral submissions during the hearing, it is of the settled view that the PO has been centred on the main issue whether the Appeal is properly before it.

At the centre of this controversy is whether the Appellant's letter dated 3rd November 2015 can be treated as an application for administrative review as presented by the Respondent and the Interested Party or a mere request for reasons for disqualification as put by the learned counsels for the Appellant. It is pertinent to quote in extenso, the Appellant's letter in question. It reads thus:-

" 3rd November, 2015

RE: TAA/N41/2015...

REF: TENDER NO.AE-027/2014-2015/JNIA/41 FOR THE PROVISION OF GROUND HANDLING SERVICES AT JULIUS NYERERE INTERNATIONAL AIRPORT –TB III

Sub: Application for Administrative Review.

Please refer your letter with ref:ED.32/208/01.I/82 dated October 15, 2015 regarding the captioned subject.

The substance of the above referred letter is with regard to your intention to Award TENDER NO.AE-027/2014-2015/JNIA/41 to M/s Mwanza Ground Handling Services for a period of ten years we are extremely dissatisfied with your intention to award this tender on the following grounds;

- i. N/A*
- ii. N/A...*

That owing to the above, the applicant seeks the following reliefs:

- 1. The TAA to suspend the intention to award the tender*
- 2. The TAA to state clearly the grounds which cause the applicant's bid to be determined unsuccessful.*
- 3. An independent and impartial team be constituted to re-evaluate the tender in compliance with ITB and the interest of justice.*

The applicant humbly believes that this application for review is in conformity with ITB Clause 43, the issues raised are weighty and reliefs sought will be granted.

We humbly submit". (Emphasis Added).

The Appellant and his counsels have insisted that the above letter was a mere request for reasons for their disqualification from the tender process. As already indicated herein above, the Respondent promptly gave to the Appellants the reasons for not been selected for the award of the Tender. The Appellant did not take any action until on 3rd November 2015 when he

filed the above letter calling for administrative review. The Appeals Authority revisited the Respondent's letter of Intention to award dated 15th October 2015 and observed that the Respondent could not have included the *reasons for the Appellant's disqualification* since the Appellant had not been disqualified in the tender proceedings as contended in their corresponding letters. The facts show that the Appellant was not ranked highest to deserve award of the Tender. It should be borne in mind that the disputed tender was a concession whereby all bidders had been substantially responsive. No bidder had been disqualified on any ground. The letter reads in part:

"Sub-Intent for Award

Reference is made to your offer for the above mentioned tender.

I regret to inform you that your company has not been successful in the above mentioned tender.

This is to inform you that we are intending to award M/s Mwanza Ground Handling Services a contract for Provision of Ground Handling Services at JNIA for a period of ten (10) years subject to successful pre-contract negotiations.

The above named firm was ranked the highest among the submitted bidders after combining technical and financial scores..." (Emphasis Supplied)

The Appeals Authority closely revisited the Appellant's letter dated 3rd November 2015, by which he purports to have requested for the reasons for his disqualification and observed that it was a request for administrative review by the Accounting Officer. The Appeals Authority observed that the letter clearly specified through its sub title and contents thereof, that the

Appellant was requesting for administrative review by the Accounting Officer after he was served with the Notice/letter of intention to award the Tender to the proposed successful tenderer. Furthermore, the Appellant's letter contained some reliefs which the Appellant sought from the Respondent. It is the Appeals Authority's considered view that if at all the Appellant intended to be given reasons as he contended; he would not have included detailed information as contained therein.

The Appeals Authority revisited the tender document to ascertain Appellant's assertion that he was not officially served and observed that Clause 8 of the Bid Data Sheet (BDS) empowered the Secretary to the Tender Board, in this case Mr. Mtengela Hanga, the Respondent's Head of the Procurement Management Unit to give clarification to all queries from tenderers. It is surprising therefore that the Appellant strenuously sought to disown and discredit the e-mail communication by the said Mtengela.

From the above, it is the settled view of the Appeals Authority that the Appellant's letter dated 3rd November 2015 was one calling for administrative review. Technically and legally, the counting of days within which to take any action started to run from 4th November 2015 and not otherwise.

Turning to the second limb of the Appellant's submission based on Clause 42 of the ITB, Section 96(7) of the Act requires the Accounting Officer to deliver a decision within fourteen days. In this case, the Respondent had to issue a decision on or before 6th December 2015. To the contrary, the Respondent did not issue a decision. The Appeals Authority observed

further that under Section 97(2) (a) of the Act, the Appellant was under obligation to lodge his Appeal straight to the Appeals Authority within fourteen working days from the date the Accounting Officer ought to have given the decision. For purposes of clarity the above cited provision is reproduced hereunder;

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; or

b) N/A

the tenderer may make a complaint to the Appeals Authority within fourteen working days from the date of communication of decision by the accounting officer

(Emphasis Added)

Thus, counting from 6th December 2015, when the Accounting Officer ought to have made the decision, the Appellant's fourteen working days lapsed on 28th December 2015. As the Appeal was lodged on 30th December 2015, it was so filed two (2) days late. In this regard therefore, the Appeals Authority concurs with the Respondent and the Interested Party that the same was filed out of time. Further, the Appeals Authority considered the Appellant's submissions that his Appeal was within time since Clause 42.1 of the Tender Document provided for twenty eight days within which the aggrieved bidder may appeal. In deliberating this matter,

the Appeals Authority revisited Clauses 41.1 and 42.1 of the ITB and observed that indeed they provide for twenty eight days within which a bidder who have suffered loss may request for administrative intervention. However, the twenty eight days provided under the above referred clause 42.1 apply only if the letter of intention to award the tender has not been communicated to the bidders as clearly provided for under Regulation 105(1) and (2) of G.N. 446/2013 which reads;

105 (1) Any application for administrative review shall be submitted in writing or electronically to the accounting officer of a procuring entity and copy shall be served to the Authority (PPRA) within twenty eight days of the tenderer becoming or should have become aware of the circumstances giving rise to the complaint or dispute.

*(2) The requirements of sub-regulation (1) shall not apply to complaints submitted in response to the notice of intention to award the contract issued to tenderers pursuant to section 60(3) of the Act.
(Emphasis Added)*

From the above provisions, the Appeals Authority is of the firm view that much as the Appellant's complaint emanated from the Notice of Intention to Award the tender issued by the Respondent, Clause 42.1 of the ITB cannot be relied upon to override the specific provisions of the law. In other words, no agreement can be executed in contravention of specific provisions of the law. The Appellant's submission regarding this matter therefore fails.


In view of the above, the Appeals Authority observes that immediately after the Appellant was given the decision by the Respondent's Accounting Officer dated 13th November 2015, which they received on 16th November 2015 dismissing the complaint, he ought to have appealed to this Appeals Authority within fourteen working days in terms of Section 97(2) (a) of the Act cited above. He was therefore required to lodge his Appeal on or before 7th December 2015. The Appeals Authority concurs with the Interested Party that much as the Appellant's Notice of Intention to Appeal to the Appeals Authority emanated from the decision made on 13th November 2015, any deviation from the time line so specified is unacceptable. In view of the above, the Appeals Authority hastens to agree with the Respondent and the Interested Party that this Appeal was filed out of time and without leave to do so.

Consequently, the PO is upheld and the Appeal is dismissed. Each party to bear its own costs.

It is so ordered.

The right of Judicial Review as per Section 101 of the Public Procurement Act 2011 is explained to the parties.


This Ruling is delivered in the presence of the Appellant, Respondent and the Interested Party and their counsels this 29th January, 2016.



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JUDGE (rtd) V.K.D LYIMO

CHAIRMAN

MEMBERS

1. MRS. ROSEMARY A. LULABUKA 
2. MS. MONICA P. OTARU 