

**IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY**

AT DAR ES SALAAM

APPEAL CASE NO. 32 OF 2013-14

BETWEEN

M/S FUTURE TRADING COMPANY LIMITED.....APPELLANT

AND

TANZANIA PORTS AUTHORITY.....RESPONDENT

RULING

CORAM:

- | | |
|--------------------------------------|-----------------|
| 1. Hon. Augusta G. Bubeshi, J. (rtd) | - Chairperson |
| 2. Ms.Esther J. Manyesha | -Member |
| 3. Mr. Haruni S. Madoffe | - Member |
| 4. Eng. Francis T. Marmo | - Member |
| 5. Mr. Ole-Mbille Kissioki | - Ag. Secretary |

SECRETARIAT:

- | | |
|--------------------------|--------------------------|
| 1. Mrs. Toni Mbilinyi | -Principal Legal Officer |
| 2. Mr. Hamisi O. Tika | - Legal Officer |
| 3. Ms.Violet S. Limilabo | -Legal Officer |

FOR THE APPELLANT:

1. Mr. Godfrey M. Silayo -Advocate, Godan & Co. Advocates

FOR THE RESPONDENT

1. Mr. Christian C. Chiduga –Executive Assistant to the
Director General
2. Mr. Plasduce Mbusa -Legal Officer
3. Mr. Erick Mlambo -Legal Officer
4. Mr. Alex Seneu -Legal Officer

This Ruling was scheduled for delivery today 25th April, 2014, and we proceed to deliver

The Appeal at hand was lodged by **M/s FUTURE TRADING COMPANY LIMITED** (hereinafter referred to as "**the Appellant**" against the **TANZANIA PORTS AUTHORITY** commonly known by its acronym, **TPA** (hereinafter referred to as "**the Respondent**").

The said Appeal is in respect of Tender No. AE/016/2013-14/CTB/G/18 **for Printing and Supply of the Calendars and Diaries for the year 2014**, (hereinafter referred to as "**the tender**").

According to the documents submitted to the Public Procurement Appeals Authority (hereinafter referred to as "**the Authority**"), as well as oral submissions by parties during the hearing, the facts of the Appeal may be summarized as follows:

The Respondent vide the Mwananchi Newspaper dated 16th, August, 2013, and their official website, invited tenderers to submit their tenders for the tender under appeal.

The said tender was conducted through National Competitive Bidding Procedures provided in the Public Procurement (Goods, Works, Non Consultant Services and Disposal of Public Assets by Tender) Regulations, 2005 (hereinafter referred to as "**the GN.NO.97 of 2005**")

The deadline for the submission of tenders was set for 29th October, 2013, whereby sixteen tenders were received from the following firms;

S/N	Tenderer's Name	Quoted price in Tshs
1	M/s Rinz Advertising Company Ltd	33,040,000.00
2	M/s Rainbow Printers	28,060,200.00
3	M/s Digital Ltd	20,296,000.00
4	M/s Minhaal General Traders and Stationery	17,700,000.00 53,100,000.00
5	M/s PRT General Supplies Ltd	100,477,000.00
6	M/s Colour Print Tanzania Ltd	86,553,000.00
7	M/s M.I. Printing Stationery Supplies Ltd.	17,818,000.00 10,915,000.00 44,250,000.00
8	M/s Professional Photolab Ltd	87,615,000.00
9	M/s I & J Graphic Designs Ltd	117,469,000.00

10	M/s Future Trading Company Limited	69,148,000.00
11	M/s Capital One Ltd	200,310,900.00
12	M/s Comprint International Ltd	64,000,000.00
13.	M/s Masido Enterprises and General Supplies	21,240,000.00
14	M/s Tanzania Printing Services Ltd	141,836,000.00
15	M/s Five Star Printers Ltd	83,780,000.00
16	M/s CI Group Ltd	188,175,800.00

The tenders were subjected to evaluation which was conducted in two stages namely; preliminary and detailed evaluation.

At the preliminary evaluation stage, nine tenders were disqualified for failure to comply with the requirements of the Tender Document.

The remaining seven tenders were then subjected to detailed evaluation, whereby the Evaluation Committee checked for compliance with specifications provided for under Sections VI and VII of the Tender Document by inspecting the samples. In

that process, one tender by M/s PRT General Supplies Ltd was disqualified while the remaining five tenders were subjected to arithmetic correction of errors. The tenders by M/s Printing and Stationery Supplies Ltd and M/s Comprint International Ltd were found with errors which were corrected before price comparison was done. The tender by M/s Future Trading Company Ltd was found to be the lowest in Lots 2 and 3 respectively, when compared to others.

Therefore, the Evaluation Committee recommended award of the tender to M/s Future Trading Company Ltd for Lots 2 and 3 at a contract price of Tshs 10,620,000.00 and Tshs 37,170,000.00 respectively, subject to successful negotiations on reduction of delivery time of the goods to be below 45 days after the award and improvement on the branding laser engraving of TPA Logo.

The Tender Board at its meeting held on 2nd December, 2013 approved the recommendations made by the Evaluation Committee.

On 18th December, 2013, the Respondent vide a letter referenced SU/3/3/09 communicated their intention to award the tender to the Appellant subject to successful negotiations.

On 6th January, 2014, the Appellant and the Respondent met for negotiation but they did not agree on the delivery time for some of the tendered items.

On 24th January, 2014, the Tender Board deliberated on the Negotiations Report and reversed its decision to award the tender to the Appellant and directed for cancellation of the tender on the ground that the delivery time for the items required could not be met.

On the same date, the Appellant as well as the other tenderers were informed about the cancellation of the tender vide a letter referenced SU/3/3/01.

Being dissatisfied with the said cancellation of the tender, on 13th March, 2014, the Appellant lodged their Appeal to this Authority.

SUBMISSIONS BY THE APPELLANT

The Appellant's documentary, oral submissions as well as responses from questions raised by the Members of the Authority during the hearing may be summarized as follows:

That, the Appellant was among the tenderers who participated in the tender.

That, their Appeal emanates from the cancellation of the tender by the Respondent.

That, the Respondent invited the Appellant to a negotiations meeting to discuss on delivery period of the tender after they were found to be responsive.

That, the negotiation meeting was successfully done and there was no dispute with regard to the nature of diaries to be supplied to the Respondent. However, they were not availed with a copy of the minutes of the negotiations.

That, amongst other things, during the negotiations, it was agreed by the Respondent to accept blue colours instead of their corporate colours for Diaries in Lot 2 and a variety of mixed colours for Diaries in Lot 3 due to time constraint and the demand of the Respondent to be supplied with the Diaries earlier.

That, it was further agreed that, the Appellant would shorten delivery period of the goods for the tender from 45 days to two weeks.

That, immediately after the negotiations, the Respondent orally asked the appellant to start mobilizing materials for the tender and assured them to be given a letter of award and a contract thereof.

That, upon being assured by the Respondent, they started mobilizing materials and other resources including preparation of Diary Blocks and designs containing Respondent's logo to be engraved on the Diaries.

That, apart from the above preparations, the Appellant deposited a sum of Tshs. 2,074,400/- to the Respondent as Bid Security.

That, in addition to the above deposit, the Appellant bought 500 Diaries from Karen General Supply for purposes of printing and supplying them to the Respondent worth Tshs. **32,838,000/-**

That, contrary to the above agreement, the Respondent neither issued an award letter to them nor was the contract concluded with them.

That, on 31st January, 2014 they wrote a letter to the Respondent reminding them about exchange of details for the tender for the sake of printing the Diaries which were seasonal materials in nature as they had agreed.

That, while they were waiting for the response to their letter and letter of award of the tender and the signing of the contract thereof, the Respondent vide a letter dated 24th February, 2014 which letter was received by the Appellant on 4th March, 2014 cancelled the tender.

That, the Appellant have suffered a loss of **Tshs. 47,790,000.00** (forty seven million and seven Hundred and Ninety Thousands shilling only), as a result of Respondent's illegal cancellation of the tender.

That, the Diaries intended to be supplied to the Respondent are a large stock lying in a rented godown at Chang'ombe area and

that, the Appellant is still incurring continuing loss for paying weekly charges for storage of the same.

That, the Appellant believes that, cancellation of the tender was done irregularly and in contravention of the laid down procedures regarding cancellation of tender, award or intention to award under Public Procurement Act and its Regulations.

The Appellant however, did not indicate reliefs sought in their Statement of Appeal lodged before the Authority. During the hearing, the Appellant invoked Section 97(5) (a) of the Public Procurement Act, 2011 and Rule 5(a) of the Public Procurement Appeal's Rules of 2005 to request the Authority to order the Respondent to pay the Appellant a sum of Tshs. 41,283,790/- as per the following breakdown;

- i. Tshs. 35,589,390/- being the purchase price of the Diaries.
Tshs. 3,500,000/- being the Advocates' fees.
- ii. Tshs.120, 000/- being the Appeal filing fees.
- iii. Tshs. 2,074,400/- being costs incurred to pay for the Bid Security.
- iv. Any other relief(s) the Authority may deem fit and just to grant.

REPLIES BY THE RESPONDENT

On receiving notification of the Appeal by the Appellant, the Respondent raised one point of law which centred on the legality of the Appellant's Appeal for failure to contain the reliefs sought

as required by Rule 8(1) of GN.NO.205 of 2005. Furthermore during the hearing of this Appeal, the Respondent raised two more Preliminary Objections which centred on the jurisdiction of this Authority to entertain the Appeal. The said two other objections were that;

ii. The Appeal is time barred in terms of Section 82 of the Public Procurement Act, 2004.

iii. The Authority had no jurisdiction to entertain this Appeal.

In view of the objections raised and as a matter of procedure, the Authority is obliged first to resolve the Preliminary Objections before addressing the merits of the Appeal.

RESPONDENT'S SUBMISSIONS ON THE PRELIMINARY OBJECTIONS.

In expounding their Preliminary Objections, the Respondent submitted as follows;

With regard to the first Preliminary Objection, the Respondent submitted that, the cancellation of the tender was done by them on 14th February, 2014, and the communication to the Appellant regarding the same was done on 24th February, 2014. Therefore, the Appellant ought to have lodged their Appeal to this Authority within fourteen days from the date when they became aware of the circumstances giving rise to their complaint

which was 24th February, 2014. To the contrary, the Appeal before this Authority was lodged on 3rd March, 2014, which was outside the time limit provided for under Section 82(1) of the Public Procurement Act (hereinafter referred to "**as the Act**").

With regard to the second Preliminary Objection, the Respondent submitted that, Rule 8 (1) of Public Procurement Appeals Rules (hereinafter referred to as "**the GN NO. 205 of 2005**") requires the Statement of Appeal to contain reliefs which a respective Appellant is seeking to be granted by the Authority. Since, the Appellant's Statement of Appeal did not contain reliefs sought; their Statement of Appeal supporting the Appeal was a mere narration of sequence of events which do not warrant intervention of this Authority. Furthermore, the Appellant had contravened Rule 8(1) of GN.NO 205 of 2005. Therefore, their Appeal bears no legs to stand on.

With regard to the third Preliminary Objection, the Respondent submitted that, there was no contract between the Appellant and the Respondent in terms of Section 55(7) of the Act, since there was no award of the tender which was communicated to the Appellant. That, being so, the Appellant ought to have followed proper channels for review of their complaints as provided for under the law. Failure by the Appellant to follow the laid channels by the law ousts jurisdiction of this Authority to

entertain this Appeal. The Respondent therefore prayed for the Appeal to be struck out.

APPELLANT'S REPLIES ON THE PRELIMINARY OBJECTIONS.

The Appellant's oral replies on the first point of Preliminary Objection may be summarized as follows;

That, the Respondent's letter written on 24th February, 2014 reached them on 3rd March, 2014, while their Appeal was lodged on 14th March, 2014. Counting from the date when they received the Respondent's letter to the date when they lodged their Appeal, it is obvious that, their Appeal was filed within time as provided for under the Public Procurement Act of 2011; the Respondent cannot challenge that.

With regard to the second Preliminary Objection, the Appellant conceded to have not indicated the reliefs they were seeking for before the Authority. However, they thought that, the same could have been made orally during the hearing since; the content of PPAA Form number 2 does not contain a relief section. Furthermore, the Authority could have invoked the powers provided for under Rule 11 of GN.NO 205 of 2005 to issue a directive to the Appellant to amend their Statement of Appeal since lack of relief(s) in the Statement of Appeal cannot prevent the Appeal from being heard. Furthermore, the omission to indicate reliefs in a Statement of Appeal is a curable defect

and that, the omission of that provision in PPAA Form No.2 is a manifestation of a conflict between the Rule itself and PPAA Form NO. 2 which is part of the Rules.

With regard to the third Preliminary Objection, the Appellant submitted that, the Authority has powers to entertain this Appeal in terms of Rule 5(a) of GN.NO.205 of 2005, since, the said provision empowers the Authority to entertain Appeals regarding award or proposed award of contract. That, since they were given the letter of intention to be awarded the tender by the Respondent, then, Rule 5(b) of GN.NO.205 of 2005 is applicable in this regard.

Finally, the Appellant prayed for dismissal of the Preliminary Objections raised for lack of merits and the Appeal to be heard on its merits.

ANALYSIS BY THE AUTHORITY

It should be noted from the outset that, during the hearing of this Appeal, the Appellant made their submission based on the Public Procurement Act of 2011 while the Respondent based their submissions on and actions on the Public Procurement Act of 2004. Given that controversy, the Authority deemed it prudent to resolve first which is the applicable law in this tender before analysing the issues raised.

In order to resolve the above controversy, the Authority reviewed the availed documents and observed that, the Appeal

before this Authority emanates from the tender which was floated back on 16th August, 2013. The question of the applicable law for tenders whose processes started before coming into operation of the Public Procurement Act, 2011 on 15th December, 2013, has been abundantly clarified through Public Procurement Regulatory Authority's circular referenced AB 131/200/01/"A"/94 dated 17th February, 2014, which was issued after consultation with the Attorney General which stated inter alia;

Procurement processes/issues initiated under Public Procurement Act 2004.

“Within procuring entities, there are procuring processes which were initiated under the repealed Public Procurement Act, 2004. Upon the coming into operation of Public Procurement Act, 2011 on the 15th December, 2013, these procurement processes/issues were not yet completed and still are pending.

By virtue of Section 107(2) of the Public Procurement Act, 2011 and Section 32 of the Interpretation of Laws Act,

Cap 1, all procurement processes or issues which commenced under the repealed Public Procurement Act, 2004, that is, before the coming into operation of the Public Procurement Act, 2011, will continue to be handled and decisions made under the Public

Procurement Act, 2004 until they are finalized. Any processes or issues started after 15th December, 2013 should follow Public the Procurement Act, 2011". (Emphasis Added)

The Authority hastens to agree with this interpretation and concludes that the Applicable law in this tender is the Public Procurement Act, 2004 Act together with its Regulations. The Authority wishes to add that, indeed the Public Procurement Act, 2011 has no retrospective effect.

Having resolved the above controversy and having heard the oral submissions by parties in relation to the objections raised, the Authority proceeds to resolve them by framing the following issue;

Whether the Appeal is properly before the Authority.

Having identified the main issue, the Authority further proceeded to resolve it by framing three sub issues, namely;

- i. Whether the Authority has jurisdiction to entertain this Appeal.**
- ii. Whether failure to State reliefs sought in the Statement of Appeal is fatal.**
- iii. Whether the Appeal is time barred in terms of Section 82 of the Public Procurement Act, 2004.**

Having identified the sub-issues, the Authority analysed them as follows:

i. Whether the Authority has jurisdiction to entertain this Appeal.

In resolving this sub issue, the Authority observed that there was no procurement contract between the parties in terms of Section 55(7) of the Public Procurement Act of 2004. Clearly all that existed was a letter of Intention to award by the Respondent to award the tender subject to successful negotiations. The Appellant so conceded but relied upon Rule 5 of GN.NO 205 of 2005. The Authority is of the considered view that, since there was no procurement contract, the Appellant ought to have exhausted the review mechanisms provided for under Sections 80 and 81 of the Act by lodging their complaint first to the Respondent's Accounting Officer then to the Public Procurement Regulatory Authority (hereinafter referred to as "**the PPRA**") before coming to this Authority.

The Authority revisited Rule 5 of GN.NO. 205/2005 relied upon by the Appellant and observed that its applicability is subject to compliance to procedures provided for under sections 79, 80, 81 and 82 of the Act. The said Rule reads as follows;

R.5 "Except for a decision , matter, act or omission arising from the provision of sub section(2) of section 72 and, subject to sections 79,81 and 85 of

the Act, an appeal shall lie from the following matters:

- (a) acceptance or rejection of a bid;**
- (b) award or proposed award of contract;**
- (c) inclusion of unacceptable provisions in the tender documents;**
- (d) unacceptable tender process; or**
- (e) decision, act or omission of the procuring entity or reviewing authority". (Emphasis added).**

The Authority is of the view that, the provisions on which the Appellant relied relate to matters/ grounds upon which an Appeal may be lodged to this Authority. This Rule has nothing to do with Authority's jurisdiction which is regulated by Sections 80, 81 and 82 of the Act. In a nutshell, the critical thing in determining the jurisdiction of the Authority gravitates, inter alia, around award of procurement or disposal contract. If no contract has come into force an aggrieved tenderer cannot appeal directly to this Authority. On the other hand, if no contract has come into force, the Appellant must first go to the Accounting Officer, PPRA and ultimately to this Authority.

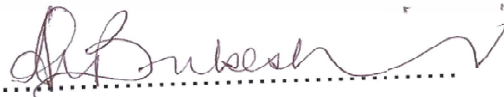
Since it is not disputed that no contract has entered into force, automatically, this Appeal cannot be entertained by the Authority for want of jurisdiction.

In view of this finding, and further in view that, the Appellant lodged their appeal on the basis of inapplicable law as earlier stated, the Authority sees no point to delve on the other Preliminary Objections raised and merits of this Appeal.

Accordingly, the Authority rejects the Appeal and orders each party to bear their own costs.

Rights of Judicial review as per section 101 of PPA/ 2011 explained to parties.


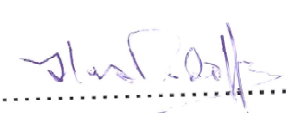
Ruling is delivered in the presence of the Appellant and the Respondent this 25th day of April, 2014.



JUDGE (rtd) A. BUBESHI

CHAIRPERSON

MEMBERS:

1. Ms. E. J. Manyesha.....
2. Mr. H.S. Madoffe.....
3. Eng. F.T. Marmo