

IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY
AT TABORA

APPEAL CASE NO. 139 OF 2012

BETWEEN

M/S CENTRAL SQUARE TECH CO. LTD...APPELLANT

AND

REGIONAL ADMINISTRATIVE

SECRETARY TABORA.....RESPONDENT

RULING

CORAM

- | | |
|---------------------------------|----------------|
| 1. Hon. A. G. Bubeshi, J. (rtd) | -Chairperson |
| 2. Eng. F.T. Marmo | - Member |
| 3. Mr. K. M. Msita | - Member |
| 4. Ms. B.G.Malambugi | -Ag. Secretary |

SECRETARIAT

- | | |
|-----------------------|-----------------|
| 1. Ms. F. R. Mapunda | - Legal Officer |
| 2. Ms. V. S. Limilabo | - Legal Officer |

FOR THE APPELLANT

1. Mr. Mwinyi O. Mgumia – Managing Director
2. Mr. I. J. Mwenda – Administrative Officer

FOR THE RESPONDENT

1. Mr. Richard B. Njagwa – Principal Supplies Officer
2. Mr. Richard J. Lugomela – Legal Officer
3. Mr. Patrick D. Kapaya – Supplies Officer
4. Mr. Alex William – Ag. Regional Manager – TEMESA
5. Mr. Deogratias Kabisa – Technician (Electrical)-
TEMESA
6. Mr. Baltazar E. Swai – Supplies Officer

This ruling was scheduled for delivery today 30th January, 2013 and we proceed to deliver it.

The Appeal at hand was lodged by M/s CENTRAL SQUARE TECH CO. LTD (hereinafter referred to as "the Appellant") against the REGIONAL ADMINISTRATIVE SECRETARY TABORA (hereinafter referred to as "the Respondent").

The said Appeal is in respect of Tender No. RAS/016/2011/12/W/03A for Electrical Installation for the Regional Commissioner's Residential House in Tabora Region (hereinafter referred to as "the tender").

According to the documents submitted before the Authority as well as oral submissions during the hearing, the facts of the Appeal may be summarized as follows:

The Respondent vide an advertisement posted on the Regional Commissioner's Notice Board on 14th September, 2012, invited electrical contractors to submit tenders for electrical installation to the Regional Commissioner's residential house.

The deadline for submission of tenders was set for 25th September, 2012, and the following three tenders were submitted.

S/No	Tenderer's Name	Quoted price in TSHS
1.	M/s Shindano Electrical Contractor	49,999,200/-
2.	M/s Monmar and Sons Co. Ltd	51,718,739/-
3.	M/s Central Square Tech Co. Ltd	57,761,784/-

The said tenders were subjected to evaluation which was carried out in three stages, namely, Preliminary Evaluation, Detailed Evaluation and Post qualification. At the Preliminary Evaluation stage tenders were checked for commercial responsiveness and technical

responsiveness. In checking for commercial responsiveness all tenders were found to be commercially responsive. However, in checking for technical responsiveness the tender submitted by M/s Shindano Electrical Contractors was found to be non responsive for failure to show adequate working tools for the project; hence, they were disqualified.

The remaining two tenders were subjected to Detailed Evaluation, whereby, the tender of M/s Monmar and Sons Co. Ltd was found to have an arithmetical error of Tshs. 800. The said error was corrected and after correction the tender was ranked as the lowest evaluated; therefore, qualified for post-qualification.

During Post-qualification M/s Monmar and Sons Co. Ltd was considered qualified and thus recommended for award of the tender at a corrected tender price of Tshs. 51,717,939/-.

The Tender Board at its meeting held on 30th October, 2012, approved the award of the tender as recommended by the Evaluation Committee. Soon

after, the award was communicated to M/s Monmar and Sons Co. Ltd, the Successful Tenderer.

Thereafter, the Appellant became aware of the tender award after seeing the name of M/s Monmar and Sons Co. Ltd written on the Sign Board erected at the site of the works.

On 14th November, 2012, the Appellant vide a letter without reference wrote to the Public Procurement Regulatory Authority (hereinafter referred to as PPRA) complaining that one of the members of the Evaluation Committee has a business relationship with M/s Monmar and Sons Co. Ltd, the Successful Tenderer.

On 23rd November, 2012, PPRA vide a letter referenced PPRA/RAS/016/48, replied to the Appellant's letter and informed them that, they could not entertain their complaint since the contract had already entered into force. Thus, they were advised to lodge their Appeal to the Public Procurement Appeals Authority (hereinafter referred to as "the Authority"). The said letter was received by the Appellant on 8th December, 2012.

Having received PPRA's letter, the Appellant lodged their Appeal to this Authority on 20th December, 2012.

On receiving notification of the Appeal, the Respondent raised a point of Preliminary Objection on the ground that, the Appellant did not comply with the review procedures; hence, the Appeal was improperly before the Authority.

Before analyzing on the submissions by parties on the merits of the Appeal, the Authority deems it proper to revisit the parties' submissions on the Preliminary Objection.

THE RESPONDENT'S SUBMISSIONS ON THE PRELIMINARY OBJECTION

The Respondent's Preliminary Objection was that;

The Appellant had contravened Clause 47.1 of the Instructions to Bidders (hereinafter referred to as ITB) as they were required to submit their

complaints first to the Accounting Officer before submitting the same to PPRA.

In substantiating the point of Preliminary Objection, the Respondent submitted that, the Appellant was required to file their complaint to the Respondent after being dissatisfied with the tender results, pursuant to Clause 47.1 of the ITB. However, the Appellant filed their complaint directly to PPRA contrary to Clause 47.1 of the ITB. The Respondent contended further that, Clause 49.1 of the ITB provides clear guidance that complaints to PPRA may be lodged if the Accounting Officer has failed to issue a decision within the prescribed time or where the tenderer is dissatisfied with the Accounting Officer's decision. In this Appeal the Appellant had lodged their complaint directly to PPRA, thus they failed to exhaust the first review stage as per Section 79(1) of the Public Procurement Act of 2004, Cap 410 (hereinafter referred to as 'the Act'). Hence, their Appeal should be struck out for failure to observe the review procedures.

THE APPELLANT'S REPLIES ON THE PRELIMINARY OBJECTION

In reply to the Preliminary Objection the Appellant submitted that, they had lodged their complaint to PPRA pursuant to guidance provided for under Item 35 of the Bid Data Sheet (hereinafter referred to as BDS) which clearly indicates that, the complaints by dissatisfied tenderers were to be lodged to PPRA. The Appellant contended further that, they could not lodge their complaint to the Respondent since there was no decision issued which they were dissatisfied with. Hence, they decided to lodge their complaint to PPRA as to their knowledge, PPRA as a regulator was capable of handling their concerns. Furthermore, PPRA's direction to them that they should file their Appeal to this Authority indicated that they had complied with the review procedures. Thus, their Appeal is properly before this Authority, concluded the Appellant.

Having considered the submissions by parties on the Preliminary Objection the Authority proceeded to revisit

parties' submissions on the merits of the Appeal as hereunder:

SUBMISSIONS BY THE APPELLANT ON THE MERITS OF THE APPEAL

The Appellant's arguments as deduced from documents availed to this Authority, as well as oral submissions and responses to questions raised by the Members of the Authority during the hearing, may be summarized as follows:

That, Mr. Deogratias Kabisa who was among the members of the Evaluation Committee has a business relationship with M/s Monmar and Sons Co. Ltd, the company which had been awarded the tender under Appeal.

That, Mr. Deogratias Kabisa was a representative of M/s Monmar and Sons Co. Ltd in the meeting of Electrical Contractors Association of Tabora, held on 20th October, 2010, where he was elected to be the interim Secretary of the said association.

That, Mr. Deogratias Kabisa's conduct in representing M/s Monmar and Sons Co. Ltd in the Electrical Contractors Association indicated that he has a business relationship or owns some of the shares in the said company.

That, the relationship between Mr. Deogratias Kabisa and M/s Monmar and Sons Co. Ltd has been observed in other incidences, for instance, the application for power supply submitted to Tanzania Electric Supply Company Limited (TANESCO) dated 12th November 2007, bears his name as a representative of M/s Monmar and Sons Co. Ltd.

That, due to the business relationship which existed between the two, Mr. Deogratias Kabisa ought to have declared his direct interest with M/s Monmar and Sons Co. Ltd when he was appointed to be among the evaluators.

That, being a member of the Evaluation Committee it was not possible for Mr. Deogratias Kabisa not to

influence the award of tender to M/s Monmar and Sons Co. Ltd.

That, Mr. Deogratias Kabisa is an employee of TEMESA-Tabora Region. His duties include, amongst others, to prepare engineer's estimates in electrical works for Government projects in Tabora Region. That being the case, it was possible for him to divulge those estimates to M/s Monmar and Sons Co. Ltd.

That, Mr. Deogratias Kabisa having a conflict of interest, should not have allowed the said company to tender for the tender under Appeal.

That, the Appellant suspects that the tender price quoted by M/s Monmar and Sons Co. Ltd, was priced by Mr. Deogratias Kabisa.

That, Mr. Deogratias Kabisa is the supervisor for the projects on behalf of the Government Office (TEMESA) and under such circumstances M/s Monmar and Sons Co. Ltd could not be disqualified even if they failed to execute the works satisfactorily.

That, the Appellant was not informed of the tender results; however, they discovered that the award had already been made after seeing M/s Monmar and Sons Co. Ltd on the site executing the works.

That, the Respondent deliberately did not inform the Appellant about the tender results, since they knew that the latter might complain on some issues which had transpired in the said tender process.

Finally, they prayed for the following orders;

- Stern action be taken against Mr. Deogratias Kabisa for being unfaithful to his employer,
- Warning be issued to the Respondent for failure to inform the Appellant of the tender results within the stipulated period,
- Warning be issued to M/s Monmar and Sons Co. Ltd that they should not tender for electrical works in Tabora Region due to their relationship with Mr. Deogratias Kabisa, an employee of TEMESA,

- Mr. Deogratias Kabisa had contravened Section 37(6) of the Act because he signed a personal covenant form stating that he had no conflict of interest with tenderers while that was not true. This is a serious offence and therefore he should be ordered to pay the Appellant compensation to the tune of Tshs. 230,000/- as per the following breakdown;

i. Fees for review to PPRA	Tshs. 10,000/-
ii. Appeal filing fees	Tshs. 120,000/-
iii. Transport charges	Tshs. <u>100,000/-</u>
	Total Tshs. <u>230,000/-</u>

REPLIES BY THE RESPONDENT ON THE MERITS OF THE APPEAL

The Respondent'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 not awarded the contract as their tender price was higher than that of M/s Monmar and Sons Co. Ltd.

That, according to the Respondent's knowledge Mr. Deogratias Kabisa is an employee of TEMESA- Tabora Region.

That, they were not aware of the business relationship between M/s Monmar and Sons Co. Ltd and Mr. Deogratias Kabisa when they appointed him to be a member of the Evaluation Committee.

That, Mr. Deogratias Kabisa had filled the Personal Covenant form as required by Section 37(6) of the Act and there was no declaration made regarding the alleged conflict of interest. However, Mr. Deogratias Kabisa himself, in response to the question raised by the Authority stated that, he did not declare any conflict of interest because he was no longer working with M/s

Monmar and Sons Co. Ltd, though he had worked with them previously on some of the projects.

That, Mr. Deogratias Kabisa did not prepare the engineer's estimates on his own as claimed by the Appellant since the estimates are normally prepared by TEMESA's staff working as a team.

That, Mr. Deogratias Kabisa had played the supervisory role in the disputed tender process as he supervised the project together with other employees of TEMESA, he being an electrical technician.

That, the Appellant should have alerted them on the alleged conflict of interest by Mr. Deogratias Kabisa and that would have avoided this dispute.

Finally, the Respondent prayed for the dismissal of the Appeal with costs.

ANALYSIS BY THE AUTHORITY

Having gone through the documents submitted and having heard the oral arguments from parties, the Authority is of the view that the Appeal is based on the following issues:

- Whether the Appeal is properly before the Authority;
- Whether the award of tender to M/s Monmar and Sons Co. Ltd was proper at law; and
- To what reliefs, if any, are the parties entitled to.

Having identified the issues in dispute, the Authority proceeded to resolve them as hereunder:

1.0 Whether the Appeal is properly before the Authority

In resolving this issue the Authority considered the Respondent's arguments on the Preliminary Objection

which centred on the jurisdiction of this Authority to entertain the Appeal. In course of so doing, the Authority deems it proper to revisit Clause 47.1 of the ITB which was relied upon by the Respondent in that it was not complied to by the Appellant when filing their complaint to PPRA. The said clause provides as follows;

“Any application for administrative review shall be submitted in writing to the head of a Procuring Entity and a copy given to the Public Procurement Regulatory Authority at the address shown in the BDS”.

In order to ascertain the validity of the Respondent’s arguments that the Appellant was required to lodge their complaint to them before it was lodged to PPRA, the Authority revisited the facts of this Appeal and observes that, the Appellant filed their complaint to PPRA after learning that the award of the tender had been made to M/s Monmar and Sons Co. Ltd.

During the hearing the Appellant submitted that, they became aware of the said award after they saw the name of the Successful Tenderer on the Sign Board erected on the site of the works as they had never received any notification from the Respondent on the tender results. Having learnt that the award had already been made to M/s Monmar and Sons Co. Ltd they were aggrieved; thus, they lodged their complaint to PPRA on 14th of November, 2012.

From the facts of this Appeal, the Authority is of the firm view that, neither the Respondent's arguments nor the Appellant's replies to the Preliminary Objection were correct on the reasons that, once an award has been communicated to the Successful Tenderer, by virtue of Section 55(7) of the Act, a contract enters into force. Thus, all complaints or disputes arising thereafter have to be lodged directly to this Authority pursuant to Section 82(2)(a) of the Act. For purposes of clarity the Authority reproduces the said provisions as hereunder:

“S. 55(7) The procurement contract shall enter into force when a written acceptance of a tender has been communicated to the successful supplier, contractor or consultant”
(Emphasis supplied)

S. 82(2) “A supplier, contractor or consultant entitled under section 79 to seek review may submit a complaint or dispute to the Public Procurement Appeals Authority;

- a) if the complaint or dispute cannot be entertained under section 80 or 81 because of entry into force of the procurement contract and provided that the complaint or dispute is submitted within fourteen days from the date when supplier, contractor or consultant submitting it became aware of the circumstances giving rise to the complaint or dispute or the time when supplier, contractor or consultant

should have become aware of those circumstances." (Emphasis added)

According to the Respondent's oral submissions the award was communicated to M/s Monmar and Sons Co. Ltd on 30th October, 2012, and not 30th June, 2012 as indicated in the letter of award submitted to this Authority. The contract was signed on 31st October, 2012 while notifications to unsuccessful tenderers were dated 14th November, 2012. That means, at the time the Appellant lodged their complaints to PPRA the procurement contract was already in force. Hence, they were required to lodge their complaint directly to this Authority as it has the sole original jurisdiction.

Based on the parties' arguments on the Preliminary Objection the Authority is of the settled view that, the Respondent's submissions on the Preliminary Objection and the Appellant's replies thereto are highly erroneous and are an indication that both parties are totally ignorant of the dispute review mechanism as enshrined under the Act and its Regulations.

The Authority wishes to enlighten the parties that, the dispute settlement mechanism under Part VII of the Act provides for two avenues which tenderers may follow in submitting procurement complaints or appeals.

Under the first avenue dissatisfied tenderers are required to invoke the three stages of review where a complaint or dispute arises before a procurement contract enters into force. In such a situation, a dissatisfied tenderer has to start the review procedures by invoking Section 80 of the Act which requires complaints to be submitted first to the accounting officer. Upon being dissatisfied with the accounting officer's decision or if the accounting officer fails to issue a decision within the prescribed time, the tenderer has the right to file their complaint to PPRA pursuant to Section 81 of the Act. In case they are dissatisfied with PPRA's decision or if PPRA fails to issue a decision within the stipulated time, then, the tenderers have to file their Appeal to this Authority pursuant to Section 82 of the Act.

The second avenue comes into play only when the procurement contract has entered into force as per Section 55(7) and dissatisfied tenderers are required to invoke Section 82(2)(a) of the Act, already cited, which require tenderers to refer their complaint or dispute directly to this Authority.

In view of the above findings, the Authority rejects the Respondent's Preliminary Objection on the ground that the Appellant was not required to file their complaint to them since the procurement contract had already entered into force. The Authority equally rejects the Appellant's replies to the Preliminary Objection as they were not required to file their complaint to PPRA.

Accordingly, the Authority overrules the point of Preliminary Objection as raised by the Respondent.

However, based on the analysis made on the Preliminary Objection, the Authority on its own motion considered the following point of law to wit; whether

the Appeal as filed was within time as stipulated under the law.

The Authority observes that, the Appellant became aware of the tender results on or about 14th of November, 2012, when they saw the Sign Board erected on the site of the works showing M/s Monmar and Sons Co. Ltd as the electrical contractor for the tender under Appeal. Thereafter, they filed their complaint to PPRA and subsequently to this Authority on 20th December, 2012.

The Authority revisited its clarification made earlier on in this ruling on the review procedures and observes that, Section 82(2)(a) of the Act requires dissatisfied tenderers to lodge their Appeal directly to this Authority within fourteen days of becoming aware of the circumstances giving rise to a dispute where the procurement contract has already entered into force pursuant to Section 55(7) of the Act.

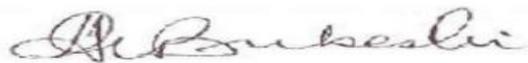
As already noted above, the Appellant became aware of the circumstances giving rise to this dispute by 14th November, 2012, when they filed their complaint to PPRA. Counting from 14th November, 2012, the statutory fourteen days expired on 1st December, 2012, within which the Appellant was required to lodge their Appeal to this Authority. However, the Appeal was lodged on 20th December, 2012, twenty days (20) after the statutory fourteen days had elapsed. Thus, the Appeal was lodged hopelessly out of time.

Based on the above findings, the Authority is satisfied that the Appeal was lodged out of time; hence, the Appeal is not properly before the Authority. Therefore, the Authority has no jurisdiction to entertain the same.

Accordingly, the Appeal filed is hereby rejected and the Authority sees no basis to proceed with the merits thereof as framed in issues two and three. Thus, having rejected the Appeal, the same is ordered struck out and each party to bear their own costs.

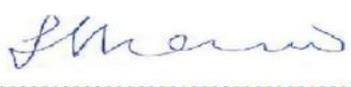
Right of Judicial Review as per Section 85 of the PPA/2004 explained to parties.

This ruling is delivered in the presence of the Appellant and the Respondent this 30th January, 2013.



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JUDGE (rtd) A. BUBESHI
CHAIRPERSON

MEMBERS:

1. ENG.F.T.MARMO 
2. MR. K. M. MSITA 