

IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY
AT DAR ES SALAAM
APPEAL CASE NO. 16 OF 2015-16

BETWEEN
M/S INTERSYSTEMS HOLDINGS LTD.....APPELLANT
AND
PUBLIC PROCUREMENT REGULATORY
AUTHORITY.....RESPONDENT

DECISION

CORAM

- | | | |
|-------------------------------------|---|-----------|
| 1. Hon. Vincent K.D Lyimo, J. (rtd) | - | Chairman |
| 2. Mrs. Rosemary A. Lulabuka | - | Member |
| 3. Eng. Aloys J. Mwamanga | - | Member |
| 4. Mr. Ole-Mbille Kissioki | - | Secretary |

SECRETARIAT

- | | | |
|---------------------------|---|-------------------------|
| 1. Mrs. Toni S. Mbilinyi | - | Principal Legal Officer |
| 2. Ms. Florida R. Mapunda | - | Senior Legal Officer |
| 3. Ms. Violet S. Limilabo | - | Legal Officer |
| 4. Mr. Hamis O. Tika | - | Legal Officer |

FOR THE APPELLANT

Mr. John Tangatya - Managing Director

FOR THE RESPONDENT

1. Ms. Agnes Sayi - Senior Legal Officer – PPRA
2. Ms. Maria G. Mng'ong'o - Legal Officer
3. Mr. Mohamed Y. Ally - Procurement Officer
4. Mr. Ben W. Kigoma - Legal Officer - Kongwa District Council
5. Mr. Fridolin Matembo - Procurement Officer – Kongwa District Council
6. Mr. Herbert Kisazi - District Water Engineer

This decision was scheduled for delivery today 14th January 2016 and we proceed to do so.

The Appeal was lodged by M/S INTERSYSTEMS HOLDINGS LTD. (hereinafter referred to as “the Appellant”) against the PUBLIC PROCUREMENT REGULATORY AUTHORITY commonly known by its acronym PPRA (hereinafter referred to as “the Respondent”).

The Appeal is against a debarment order arising from an alleged termination of Contract No. LGA/022/2011/2012/HQ/W/8/24 for Piped Water Construction for Chigwingwili Project (hereinafter referred to as “the Contract”).

The facts of the Appeal may be summarized as follows:

The Appellant's company was engaged in a contract which started execution in 2013 to construct piped water system called the Chigwingwili Project. From the few documents availed to the Public Procurement Appeals Authority (hereinafter called “the Appeals Authority”) at one point, the Procuring Entity terminated the Contract for non compliance by the Appellant but the same was revived and extended. The Project was scheduled to be completed in 2014, but the completion period was again extended to May 2015. There are suggestions that the contractor resisted to hand over the project to the employer for what was alleged to be failure by the employer to pay for work done in terms of the contract. The Appeals Authority was not given a copy of the signed contract and as such the terms and conditions of the same are not clear.

Sometime in October 2015, the Appellant read from one of the local news papers, namely *Tanzania Daima* dated 7th October 2015 that his company had been debarred by the Respondent from participating in public procurement for two (2) years from October 2015 to October 2017. Following such debarment, the Appellant made some follow-up with the Respondent through his letter with Ref. No. GN/INT/HW/KO/48 dated 9th

October 2015 requesting for reasons that led to debarment. Further to that the Appellant also wrote another letter with Ref. No. IN/GID/5/015 dated 15th October 2015 requesting the Respondent to serve them a copy of the debarment letter and at the same time informed the Respondent regarding change of mail address. The Respondent did not reply to Appellant's queries until 23rd November 2015 when the Appellant decided to appeal to this Appeals Authority.

On 7th December 2015, the Appeals Authority notified the Respondent of the pending Appeal and required them to file their responses.

On receiving notification of the Appeal, the Respondent raised a Preliminary Objection (PO) which centred on the jurisdiction of this Appeals Authority to entertain the Appeal. Briefly stated, the Respondent argued that the Appeal had been filed out of time; it should therefore not be entertained by the Appeals Authority.

In view of the objection raised and as a matter of procedure, the Appeals Authority was obliged to resolve the Preliminary Objection before addressing the merits of the Appeal. During the hearing of the PO, the Appeals Authority observed that Mr. John Tingatya, the Managing Director for the Appellant, was a disadvantaged person whose hearing was badly impaired. Although Mr. Tingatya could clearly and audibly explain himself, he could hardly hear and was unable to follow or respond to issues pertaining to this Appeal. In addition, he informed the Members of the Appeals Authority that the other director in charge of the company's

operations had passed away and that there was no one else to seriously follow up the proceedings. In the light of those developments, the Appeals Authority by consent of the parties, decided to determine the Appeal on the basis of the documents filed by the respective parties.

RESPONDENT'S SUBMISSION ON THE PO

The Respondent submitted that the Appeal should be dismissed for being filed out of time contrary to the provisions of Regulation 103 of the Public Procurement Regulations G.N. No. 446/2013 (hereinafter called "G.N. 446 of 2013"). The Respondent insisted that the Appellant became aware of the debarment decision through Tanzania Daima newspaper dated 7th October 2015, as shown by his letter addressed to the Respondent under Ref. No. GN/INT/HW/KO/48 dated 9th October 2015. Instead of lodging the Appeal within twenty-one (21) days stipulated under the law, the Appellant filed his Appeal on 1st December 2015, beyond the time so prescribed. Thus his Appeal should not be entertained.

APPELLANT'S SUBMISSION ON THE PO.

The Appellant admitted to have read the debarment decision/notice in the Tanzania Daima of 7th October 2015. However, he asserted that he had not been served with official letter or notice by the Respondent regarding the debarment. He insisted that he had made a follow-up to the Respondent's office where he was required to put his complaint in writing, a matter with which he had complied. Even after he had reduced his complaints into writing, he was told that the letter for debarment decision had already

been sent through his postal address. The Appellant asserted that he informed the Respondent about the change of address and requested them to issue to him the debarment letter. To his dismay, he was informed by one of the Respondent's officials that the person responsible for release of such communication was out of the office. When the Appellant complained to the Respondent that he was being delayed in the process, he was told not to worry because time will start to run against him from the date he officially receives the debarment letter. Thus the Appellant argued that he could not have lodged the intended Appeal basing on the information from the news papers without the official letter of debarment containing the reasons for such debarment.

The Appellant went further to submit that the Respondent had bad intentions because according to him, on 9th October 2015 when he visited the Respondent's offices, the letter of debarment was still in the office and the Respondent refused to issue it to him. He had managed to establish that fact because following the change of mail address; he made a follow up on the person who had been issued with the Appellant's postal address only to discover that the debarment letter which he received on 23rd November 2015 had in fact been posted on 9th October 2015.

Finally the Appellant prayed for the PO to be dismissed/struck out and the Appeal to be heard on its merits.

ANALYSIS OF THE APPEALS AUTHORITY ON THE PO

Having gone through the documents submitted by parties, the Appeals Authority is of the view that one issue calls for determination and that is whether the Appeal is properly before the Appeals Authority.

The Appeals Authority observed that the Appellant had become aware of the debarment notice from Tanzania Daima newspaper and took appropriate action of demanding to be given reasons for the alleged debarment by the Respondent. On the other hand, the Respondent insisted that it served the notice via Appellant's Postal address. The Appellant argued that there was change of mail box. The Appeals Authority takes cognizance of the fact that the Appellant had made frantic and futile efforts to find out the reasons for the alleged debarment. The issue of service of notice is one which requires investigation whether or not the alleged notice of debarment was in fact served onto the Appellant. The Appeals Authority finds it prudent that the same be left for determination in the main case. On the basis of the foregoing, the Appeals Authority dismissed the PO and proceeded to determine the Appeal on its merits.

SUBMISSION BY THE APPELLANT

A close scrutiny of the documents submitted by the Appellant shows that the Appellant has only one ground of appeal, and that is their Company was debarred for a period of two (2) years without being accorded a right to be heard. The Appellant made reference to the decision which was communicated to them through the Respondent's letter with Ref. No.

PPRA/LGA/022/"A"/55 dated 7th October 2015. The Appellant asserted that he received the said letter on 23rd November 2015.

The Appellant argued that the Respondent was required to call upon them to show cause why they should not be debarred before making the decision to debar them, insisting as he did, that the Respondent merely acted on unconfirmed information from Kongwa District Council which had defaulted in making payments under the Contract.

Regarding termination of the contract, the Appellant submitted that, they were issued with the letter of termination on 12th December 2014 but was dated 17th September 2014, and replied to the said letter on 23rd December 2014. The Appellant complained of the unfair termination and as a result, the procuring entity through its letter with Ref. No. HW/KOG/J.10/1/136 dated 16th February 2015, invited the Appellant for negotiation on how to successfully implement the project.

Submitting further, the Appellant indicated that at a meeting of the parties held on 19th February 2015, the Procuring Entity, that is, Kongwa District Council was at fault because the Appellant had executed the project to $\frac{3}{4}$ of the completion stage without being paid as per the terms and conditions of the contract. As a result, on 12th March 2015 the Appellant and Kongwa District Council signed a new memorandum in which the Project was set for completion in May 2015. The Appellant complained that while the above negotiations were on, and before being paid for works done, they were debarred without being given any opportunity to be heard.

Finally the Appellant prayed for the following reliefs;

- i. Costs of the Appeal; and
- ii. Any other costs the Appeals Authority deems fit to grant.

SUBMISSION BY THE RESPONDENT

The Respondent's submission in reply to the Appellant's grounds of Appeal may be summarised as follows:-

That, the Respondent decision to debar the Appellant had complied with all the procedures. He asserted that the Appellant was notified through their letter with Ref. No. PPRA/LGA/022/"A"/48 dated 24th June 2015 sent to the Appellant's postal address by a registered mail No. RD029240033TZ. In addition, the Respondent advertised in the PPRA website and in the Procurement Journal No. 33 of 18th August 2015, and No. 34 of 25th August 2015, which required the Appellant to submit his defence within fourteen days. The Respondent stated that the Appellant did not respond to the notices despite several reminders. The Respondent argued that the Appellant's letter Ref. No.IN/GID/5/015 dated 15th October 2015, which refers to change of address was received by them after the Respondent's letters on intention to debar and the debarment decision had been sent to Appellant's former postal address. The Respondent denied to have been aware of the Appellant's new postal address.

That, since the Appellant failed to submit his defence as required by the Respondent then the Respondent through its Board Resolution No. 8 of 1st

October 2015 decided to debar them for a period of two years from October 2015-October 2017.

In reacting to failure by Kongwa District Council to pay the Appellant in terms of the contract, the Respondent without adducing proof, merely stated that the Appellant had been paid.

Finally the Respondent prayed for dismissal of the Appeal for lack of merits.

ANALYSIS BY THE APPEALS AUTHORITY

It will be observed that all issues relating to the execution of the Contract or management thereof between the Appellant and Kongwa District Council are issues which ought to have been deliberated upon by the parties had the Appellant responded to the Notice of Intention for debarment. In view of this observation, the Appeals Authority will not delve into those issues which are within the mandate of the Respondent. Therefore, there are two issues for determination by this Appeals Authority. And these are:-

1. Whether the Appellant was debarred without being heard; and
2. What relief, if any, are the parties entitled to.

Having framed the above issues, the Appeals Authority proceeded to resolve them as follows;

1. Whether the Appellant was debarred without being heard.

In resolving this issue the Appeals Authority reviewed the documents and observed that, the Respondent issued a notice of intention to debar the Appellant on 24th June 2015 and the same was sent to the post office for service to the Appellant on 25th June 2015. That was registered document No. RD029240033. The Appeals Authority noted that there were 3 reminders in respect to postal address No. 2411. The said letter was finally returned to the Respondent uncollected.

The Appeals Authority considered the Appellant's contention that he informed the Respondent about his change of address after becoming aware of the debarment decision. The Appellant could be blamed for changing address without informing the Procuring Entity, that is, Kongwa District Council. But on the other hand the letter of intention to debar the Appellant though sent in compliance with Regulation 96 (1) of GN. No. 446/2013 had been returned uncollected. The implication was that the Appellant had not been traced and served with the same. Under the circumstances, the Appellant is presumed not to have been served and the Respondent should not have continued with the debarment.

It should be noted that for a tenderer to be able to respond to the notice of debarment, he must have received the same as per Regulation 96 (4) of GN. No.446/2013 which read as follows;

Reg. 96 (4) "The tenderer shall respond to the notice referred to in sub-regulation (3) of this regulation within fourteen days from the date of receiving the notice".

Since the Respondent was aware that the Appellant did not receive the notice, they were duty bound to find other means to send the said notice and to establish contact with the Appellant, notwithstanding that the said notice had been posted in the PPRA Journal and website whose access are limited. The Appeals Authority finds that the Appellant was denied a right to be heard before issuing the debarment decision.

The Appeals Authority observed further that, the Appeal is against debarment decision arising from termination of the contract by Kongwa District Council. Then the Appeals Authority deemed it proper to determine the nature of the debarment proceedings, the subject matter of this Appeal. Under Regulation 93 (1) (2) of G.N. No. 446/2013 debarment proceedings may be initiated by the Authority (that is PPRA) as a result of audit or investigation conducted by it, or any other person. Where proceedings are initiated by a Procuring Entity, it should be pursuant to section 83 of the Public Procurement Act (hereinafter referred to as "the Act"). It is apparent from the documents submitted to the Appeals Authority that the Respondent only relied on the copy of the letter of termination issued by Kongwa District Council. Even if the Respondent relied on the said letter to presume that Kongwa District Council initiated the debarment then the requirement of Section 83 of the Act was not complied with. And assuming that the proceedings were based on the

investigation or resulted from auditing, there is no evidence adduced to that effect.

Based on the documents provided, the Appeals Authority finds no evidence of such vital information being attached to the letter of Intention to debar, if any. On the contrary, the Respondent proceeded to debar the Appellant without hearing. The Appeals Authority considers this to be a serious omission on the part of the Respondent.

Therefore, the Appeals Authority concludes the first issue that, the Appellant was debarred without being heard.

2. What reliefs, if any, are the parties entitled to.

The Appeals Authority took cognizance of its findings in the first issue. Consequently, the debarment order is lifted and the Respondent is ordered to announce it in the same way it used to announce the Appellant's debarment.

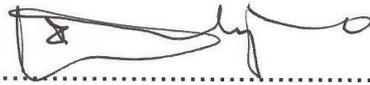
The Appeals Authority orders the Respondent to compensate the Appellant a sum of TZS. 200,000.00 being appeal filing fees.

The parties to the contract to exhaust the remedies available in their contract document in case they have any contractual dispute. Appeal allowed.

The Decision is binding upon the parties and may be executed in any court of competent jurisdiction in terms of Section 97(8) of the Act.

The right to Judicial Review as per Section 101 of the Act explained to parties.

This Decision is delivered in absence of the Appellant and in presence of the Respondent this 14th January 2016.



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VINCENT K.D.LYIMO, JUDGE (RTD)

CHAIRMAN

MEMBERS

1. MRS. ROSEMARY A. LULABUKA



2. ENG. ALOYS J. MWAMANGA

