

**IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY**

APPEAL CASE NO. 14 OF 2016-17

BETWEEN

M/S AUTHENTIX INCAPPELLANT

AND

ENERGY AND WATER UTILITIES

REGULATORY AUTHORITY.....RESPONDENT

RULING

CORAM

- | | | |
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| 1. Hon. Vincent K.D. Lyimo, J. (rtd) | - | Chairman |
| 2. Ms. Monica P. Otaru | - | Member |
| 3. Eng. Aloys Mwamanga | - | Member |
| 4. Ms. Florida R. Mapunda | - | Ag. Secretary |

SECRETARIAT

- | | | |
|---------------------------|---|---------------|
| 1. Ms. Violet S. Limilabo | - | Legal Officer |
| 2. Mr. Hamisi O. Tika | - | Legal Officer |

FOR THE APPELLANT

1. Mr. Sinare Zaharan - Advocate, ENS Africa Tanzania Attorneys
2. Mr. Johann Van Niekerk – Managing Director, Southern & East Africa
3. Ms. Hope Paul - Legal Officer, ENS Africa Tanzania Attorneys
4. Ms. Roseline A.L Wandera - Authentix

FOR THE RESPONDENT

1. Mr. Deogratius Kumalija - Head of Procurement Management Unit
2. Mr. John Mhangate - Senior Legal Officer

This Ruling was scheduled for delivery today, 26th January, 2017 and we proceed to do so.

The Appeal at hand was lodged by **M/s AUTHENTIX, INC** (hereinafter referred to as “**the Appellant**”) against the Energy and Water Utilities Regulatory Authority, commonly known by its acronym EWURA (hereinafter referred to as “**the Respondent**”).

The Appeal is in respect of Tender **NO. AE/024/2016-17/HQ/N/21** for Provision of Fuel Marking 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 facts of the Appeal may be summarized as follows:

The Respondent vide the Daily news Newspaper dated 26th September, 2016, invited tenderers to submit tenders under the International Competitive Tendering procedures(ICB) specified in 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 (hereinafter referred to as GN. No. 446/2013).

The deadline for the submission of tenders was set for 25th October 2016. Nine firms purchased the tender document and only three tenders were received on or before the deadline from the following firms:-

- i) M/s Aunthentix, Inc
- ii) M/s SGS Tanzania Superintendence Company Limited
- iii) M/s SICPA SA, in association with Global Fluids International (T) Limited.

The above tenders were then subjected to evaluation which was conducted in three stages namely; Preliminary, Detailed and Post-Qualification evaluation.

During the Preliminary Evaluation for commercial responsiveness, the tenders by M/s Aunthentix, Inc and M/s SGS Tanzania Superintendence Company Limited were disqualified for failure to meet eligibility requirements. Specifically, the Appellant's tender was disqualified for failure to submit a registered Power of Attorney authorizing the signatory of the tender to commit the tenderer as provided for under Clause 17 of the Bid Data Sheet (hereinafter referred to as "**the BDS**"). The only remaining tender by M/s SICPA SA, in association with Global Fluids International (T) Limited qualified for the Detailed and Post-Qualification evaluation. The Evaluation Committee found his tender to be substantially responsive to the Tender Document and was therefore proposed for the award of the contract at a contract price for a unit rate of Six United States Dollar one hundred ninety five cents per cubic meter (USD. 6.195/M³) VAT inclusive for the period of three years. The Evaluation Committee further recommended negotiations with the proposed successful tenderer on the price pursuant to Section 76(2) of the Act.

The Tender Board at its meeting held on 6th December, 2016, approved negotiations with the proposed successful tenderer.

On 15th December 2016, the negotiation meeting between the Respondent and the proposed bidder was successful conducted.

The Tender Board at its meeting held on 20th December 2016, approved the recommendations of the Evaluation Committee and awarded the contract to M/s SICPA SA, in association with Global Fluids International (T) Limited at a negotiated contract price of USD 5.15 VAT exclusive for marking 1,000 liters.

That, on 21st December, 2016, the Respondent issued the notice of intention to award the contract to all bidders who participated in the Tender.

Aggrieved, the Appellant on 23rd December, 2016, sought for administrative review to the Respondent's Accounting Officer asserting that it had been unfairly disqualified. The Appellant was challenging the Respondent's findings on the Appellant's filed Power of Attorney.

On 23rd December 2016, the Respondent's Accounting Officer delivered his decision by dismissing the complaint for lack of merits.

Dissatisfied, on 26th December 2016, the Appellant applied for further review to the Respondent submitting a newly registered Power of Attorney.

Having received no replies from the Respondent, the Appellant on 9th January 2017 lodged this appeal, after which the Appeals Authority notified the Respondent accordingly and called for responses thereto. In the course of filing its replies, the Respondent raised two points of Preliminary Objection (POs) to wit; (a) the Appeal has been filed hopelessly out of time, (b) the Appellant had raised new issues at the Appellate level and consequently prayed for the dismissal of the Appeal.

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

RESPONDENT'S SUBMISSIONS ON THE POs

a) That the Appeal was filed hopelessly out of time

In support of his first point of the PO, the Respondent submitted that, basing on various correspondences between its office and the Appellant, the Appeal was filed out of time. The Respondent asserted that, it issued the notice of intention to award on 21st December 2016 and was received by the Appellant on the same date. Dissatisfied, the Appellant challenged the Respondent's intention by its letter dated 22nd December 2016 and which was served on the Respondent on 23rd December 2016. The Respondent issued its decision on that same day.

The Respondent submitted further that, if the Appellant was dissatisfied with its decision dated 23rd December 2016, he ought to have filed his Appeal to the Appeals Authority as the cause of action arose on 23rd December 2016. The Respondent submitted that, according to Section 97(2) of the Act, appeals to the Appeals Authority are to be lodged within seven (7) working days, which means that the Appellant ought to have lodged his appeal by 4th January 2017 at the latest. Since the Appellant lodged his Appeal on 9th January 2017, he did so after eleven (11) days had elapsed and without prior leave. Thus, this Appeal should be dismissed.

b) That some of the Appellant's grounds of Appeal are new as they were not submitted to the Respondent for administrative review.

Arguing in support of the second PO, the Respondent submitted that, the grounds of Appeal under items i, ii, iii, v, vi and vii were all new complaints which ought to have been filed to the Respondent's Accounting Officer for administrative review. That the Appellant had not complained and therefore by virtue of the procurement

legislation he should be estopped from complaining at this stage. He prayed that new issues be struck out of the record.

APPELLANT'S REPLIES TO THE PO

The learned counsel for the Appellant submitted that, the Appeal is properly before the Appeals Authority as it was lodged within time. The learned counsel insisted that the cause of action arose on 30th December 2016 when the Appellant received the Respondent's decision. According to the Appellant, the Respondent's decision was sent to him via email on 30th December 2016; hence counting from that date, the seven working days within which they were required to lodge their Appeal expired on 10th January 2017. Thus, the Appeal was lodged within time.

Members of the Appeals Authority enquired from the learned counsel on the sequence of events based on Appellant's letter dated 26th December 2016 acknowledging receipt of the Respondent's letter dated 23rd December 2016. The Appellant admitted to have received the letter on 23rd December 2016 and upon that admission the learned counsel indicated that he would no longer argue the remaining PO.

DECISION OF THE APPEALS AUTHORITY

In view of the above admission, the Appeals Authority agrees with the submissions by the Respondent that the Appeal was lodged out of time and without leave. Consequently, the P.Os are hereby upheld and the Appeal is hereby dismissed. It is so ordered.

Each party to bear its own costs.

Right of Judicial Review as per Section 101 of the Act is open.

This Ruling is delivered in the presence of the Respondent and in absence of the Appellant this 26th January, 2017.

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HON. VINCENT K.D. LYIMO, J. (RTD)

CHAIRPERSON

MEMBERS:

1. MS. MONICA P. OTARU *M. Otaru*

2. ENG. ALOYS MWAMANGA *A. Mwamanga*