

IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY
AT TANGA

APPEAL NO 135 OF 2012

BETWEEN

UNITED TALENT SERVICES LTD.....APPELLANT

AND

TANGA CITY COUNCILRESPONDENT

RULING

CORAM:

- | | |
|--------------------------------|----------------|
| 1. Hon. A.G. Bubeshi, J. (rtd) | - Chairperson |
| 2. Mr. H.S. Madoffe | - Member |
| 3. Mr. K.M. Msita | - Member |
| 4. Ms. E.J. Manyesha | - Member |
| 5. Ms. F.R Mapunda | - Ag.Secretary |

SECRETARIAT:

- | | |
|------------------|-----------------|
| 1. Mr. H.O. Tika | - Legal Officer |
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FOR THE APPELLANT:

1. Mr. Asanterabi Mfuko – Managing Director
2. Mr. Nyanda Msei – Operation Supervisor

FOR THE RESPONDENT:

1. Mr. Mkama B. Makori – Procurement Officer
2. Mr. Richard J. Mtelewa – Accountant

This Ruling was scheduled for delivery today 05th December, 2012 and we proceed to deliver it.

The appeal at hand was lodged by M/S UNITED TALENT SERVICES LTD (hereinafter to be referred to as "the Appellant") against TANGA CITY COUNCIL (hereinafter to be referred to as "the Respondent").

The said Appeal is in respect of Tender No. LGA/128/2012/2013/NC/01 for Collection of Revenue for the Financial Year 2012/2013. The said tender had nineteen (19) Lots and the Appeal at hand is confined to Lot 9 which was for collection of Bill Boards Revenue (hereinafter to be referred to as "the tender").

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

The Invitation to tender was made vide the Majira news paper of 15th May, 2012. The said invitation was also posted on the City Council's Notice Board.

The deadline for submission of the tenders was set for 12th June, 2012, whereby the following four tenders were submitted;

NAME OF BIDDER	READ OUT PRICE IN TSHS. VAT INCLUSIVE	MODE OF BID
M/s AMSTERDAM MARKETING COMPANY	6,100,000/=	PER MONTH
M/s UNITED TALENT SERVICES LIMITED	5,000,000/=	PER MONTH
M/s LEMITA COMPANY LTD	72,500,000/=	PER YEAR
M/s FAX AUCTION MART	5,875,000/=	PER MONTH

The tenders were subjected to preliminary and detailed evaluation. At the preliminary evaluation stage, they were checked for, inter alia, inclusion of the necessary documents and whether the tenders were properly signed. During that stage, all four tenders were found to be substantially responsive and were therefore considered for detailed evaluation.

During detailed evaluation the tenders of M/s AMSTERDAM MARKETING COMPANY and that of M/s FAX AUCTION MART scored ten (10) points while the Appellant's tender and that of M/s LEMITA COMPANY LTD scored nine (9) points each.

The tenders of M/s AMSTERDAM MARKETING COMPANY and M/s FAX AUCTION MART were then subjected to price comparison and they were ranked as follows;

BIDDER	READ OUT PRICE(S) IN TSHS.	RANKING
M/s AMSTERDAM MARKETING COMPANY	6,100,000/= per month	1 st
FAX AUCTION MART	5,875,000/= per month	2 nd

After price comparison, the Evaluation Committee recommended the award to be made to M/s AMSTERDAM MARKETING COMPANY at a contract price of Tshs. 6,100,000/= per month as they were found to be the highest evaluated tenderer.

The Tender Board at its meeting held on 27th June, 2012, deliberated on the Evaluation Report and directed that M/S AMSTERDAM MARKETING COMPANY be called for negotiations so that their quoted price of Tshs. 6,100,000 per month could be adjusted upwards to Tshs. 7,000,000/=.

Negotiations between the Respondent and M/S AMSTERDAM MARKETING COMPANY took place on 28th June, 2012, whereby the latter agreed to add Tshs. 400,000/= to their quoted price and that changed their tender price to Tshs. 6,500,000/= per month.

The Tender Board at its meeting held on 29th June, 2012, approved the award of the tender to M/s AMSTERDAM MARKETING COMPANY for the contract price of Tshs. 6,500,000/= per month. On the same date, the Respondent vide a letter referenced TCC/PMU/VOL I/96 communicated the award of tender to the Successful Tenderer namely, M/s AMSTERDAM MARKETING COMPANY.

The contract in respect of the said tender was signed between the Respondent and the Successful Tenderer on 1st July, 2012.

Having not received the tender results, the Appellant on 14th September, 2012 wrote a letter referenced UTSL/OL/550A to the Respondent requesting to be informed how far the tender process had gone as the tender validity period provided for in the Tender

Document had expired. The Appellant did not get a reply to the said letter.

The Appellant later on discovered that, the Respondent, vide the letter referenced TCC/J.10/17/B/22 dated 17th July, 2012, posted in different places within Tanga City, had introduced M/s AMSTERDAM MARKETING COMPANY to be the new agent for collecting Bill Boards revenue for the Financial Year 2012/2013. Having found so, the Appellant on 17th October, 2012, filed an application for administrative review to the Respondent vide a letter referenced UTSL/OL/552B on the reason that, the whole tender process was conducted contrary to the requirements of the law as they were not notified about the tender results. The said letter was copied to the Public Procurement Regulatory Authority (hereinafter to be referred as "the PPRA").

On 24th October, 2012, PPRA, vide a letter referenced PPRA/LGA/128/27, advised the Appellant to lodge their complaint to the Public Procurement Appeals Authority (hereinafter to be referred to as "the Authority) since the Accounting Officer's powers to entertain the matter had been ousted by Section 80(3) of the Public Procurement Act, Cap 410 (hereinafter to be referred to

as "the Act") due to entry into force of the procurement contract as per Section 55(7) of the Act.

The PPRA's letter was received by the Appellant on 1st November, 2012. On the same date, the Appellant received two other letters from the Respondent with reference numbers TCC/CT/A.20/4/56 dated 20th October, 2012 and TCC/PMU/VOL IV/91 dated 12th July, 2012. The said letters were received through their postal address.

The two letters from the Respondent informed the Appellant, amongst others, that their tender was not successful on the ground that their offer was lower than that of the successful tenderer. They were also informed that the tender results had already been communicated to them vide letter dated 12th July, 2012, which was sent to them through their postal address.

Having received PPRA's letter and being dissatisfied with the Respondent's delay in communicating the tender results, the Appellant lodged their Appeal to this Authority on 14th November, 2012.

SUBMISSIONS BY THE APPELLANT

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

That, they were among the four tenderers who participated in the tender under Appeal.

That, on 14th September, 2012 they wrote a letter which inquired about the tender results, but there was no response from the Respondent.

That, they later on realized that the award had already been made in June 2012 to M/s AMSTERDAM MARKETING COMPANY but they were yet to be informed about the tender results.

That, they received the tender results on 1st November, 2012, while the award was made in June 2012.

That, there was lack of communication between themselves and the Respondent which lead them to suspect that there was no transparency in the tender process.

That, they are not disputing the award made to the Successful Tenderer rather their complaint was based on the Respondent's failure to inform them on time about the tender results contrary to the law.

That, they wanted to be informed of the tender results so that they may be able to know the reasons for their disqualification and thereby be able to rectify anomalies in future tenders.

Finally, the Appellant prayed to be compensated the sum of Tshs. 1,000,000/= being costs incurred as per the following breakdown;

- i) costs for preparation of Tender Document
Tshs. 650,000/=
- ii) general inconvenience suffered to the tune
of Tshs. 350,000/=

REPLIES BY THE RESPONDENT

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

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

That, the tender was for revenue collection in which the highest evaluated tender price was one of the evaluation criteria provided in the Tender Document.

That, the Appellant quoted the lowest price compared to other tenderers and therefore they did not qualify for the award of the tender.

That, the tender results were communicated to the Appellant vide letter referenced TCC/PMU/VOL IV/91 dated 12th July, 2012.

That, there were no complaints from other tenderers that they did not receive the tender results save for the Appellant.

That, the Appellant resides in Tanga City; thus, if they allegedly did not get the Respondent's letter on the outcome of the tender they should simply had visited the Respondent's office to find out the fate of their tender.

The Respondent therefore, prayed for dismissal of the Appeal in its entirety for lack of merit.

ANALYSIS BY THE AUTHORITY

Having gone through the documents submitted and having heard the oral submissions from parties, the Authority finds it proper to satisfy itself firstly if this Appeal has been filed within time before proceeding to determine the issues in dispute, if at all.

In resolving this issue the Authority revisited the documents submitted *vis-à-vis* the applicable law so as to ascertain if it has jurisdiction to entertain the Appeal before it. In so doing, the Authority noted that, the tender under Appeal was opened on 12th June, 2012; the award was communicated to the Successful Tenderer on 29th June, 2012 and the contract between the Respondent and the said Successful Tenderer was signed on 1st July, 2012.

It was further noted that, the Respondent vide a letter dated 17th July, 2012, informed the general public that, M/s AMSTERDAM MARKETING COMPANY had been awarded the contract for collection of Bill Boards revenue

for the Financial Year 2012/2013. It was further observed that, the Respondent vide a letter dated 12th July, 2012 notified the Appellant of the tender results, though the said letter was received by the latter on 1st November, 2012.

The Authority noted further that, despite the Respondent's contention that they had properly communicated the tender results, the facts of this Appeal indicate that the Appellant became aware of the tender results on 17th October, 2012; when they saw the Respondent's letter of 17th July, 2012, introducing M/s AMSTERDAM MARKETING COMPANY as the Bill Boards' revenue collector for the Financial Year 2012/2013. The said information lead them to seek for administrative review from the Respondent on 17th of October, 2012. This clearly shows that the Appellant became aware of the circumstances which gave rise to their Appeal at the latest by 17th October, 2012. This is evidenced by their own admission through their own letter referenced UTSL/OL/552B dated 17th October, 2012, addressed to the Respondent which stated in part as follows;

"... imetulazimu kuchukua hatua ya kuandika barua hii sababu tumepata habari kwa (sic)

zabuni hii imekwishapata mzabuni na tayari
ameanza kazi hii husika...”

Literally translated as

“...we have been compelled to write this letter because it has come to our knowledge that this tender has been awarded to a tenderer who has already started to execute the contract...”

Accordingly, by the time they lodged the Appeal to this Authority on 14th November, 2012, twenty seven (27) days had elapsed, since they became aware of the circumstances giving rise to this Appeal on 17th of October, 2012.

In accordance with Section 82(2)(a) of the Act, the Appellant was supposed to lodge the Appeal within fourteen (14) days from the date when they became aware of the circumstances giving rise to this Appeal. The said Section provides as follows;

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 submitted or entertained under section 80 or 81 because of entry into force of the procurement contract and provided that the complaint or the dispute is submitted within fourteen days from the date when the supplier, contractor or consultant submitting it became aware of the circumstances giving rise to the complaint or dispute or the time when the supplier, contractor or consultant should have become aware of those circumstances;"
(Emphasis added)

From the above findings the Authority is of the settled view that, the Appeal has been lodged out of time. Accordingly, it cannot be entertained by this Authority for lack of jurisdiction. Indeed, acting on the merits of this Appeal would certainly be *ultra-vires* the Authority.

Consequently, the Appeal is hereby rejected and each party is ordered to bear their own costs.

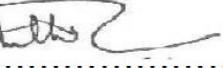
Right of Judicial Review as per Section 85 of the PPA/2004 explained to parties.

Ruling is delivered in the presence of the Appellant and in the absence of the Respondent this 5th day of December, 2012.



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JUDGE (rtd) A. BUBESHI
CHAIRPERSON

MEMBERS:

1. MR. H. S. MADOFFE.....
2. MR. K.M. MSITA.....
3. MS. E.J. MANYESHA.....