

IN THE PUBLIC PROCUREMENT APPEALS AUTHORITY

APPEAL CASE NO. 19 OF 2023-24

BETWEEN

M/S Y & P ARCHITECTS (T) LTD.....APPELLANT

AND

TANZANIA ELECTRIC SUPPLY COMPANY LTD.....RESPONDENT

RULING

CORAM

- | | |
|------------------------|-------------------|
| 1. Adv. Rosan Mbwambo | - Ag. Chairperson |
| 2. Eng. Stephen Makigo | - Member |
| 3. Mr. Rhoben Nkori | - Member |
| 4. Mr. James Sando | - Secretary |

SECRETARIAT

- | | |
|------------------------|------------------------------|
| 1. Ms. Florida Mapunda | - Deputy Executive Secretary |
| 2. Ms. Violet Limilabo | - Senior Legal Officer |

FOR THE APPELLANT

- | | |
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| 1. Mr. Jeremia Mtobesya | - Advocate for the Appellant |
| 2. Mr. Yassin Mringo | - Managing Director |

FOR THE RESPONDENT

- | | |
|-----------------------|-----------------------|
| 1. Mr. Mkumbo Elias | - State Attorney |
| 2. Mr. Mwiga Kasalama | - Procurement Officer |



3. Mr. Victorian Karatu

- Manager Procurement
Works and Consultancy

This Appeal was lodged by **M/S Y & P Architects (T) Ltd** (hereinafter referred to as "**the Appellant**") against the **Tanzania Electric Supply Company Ltd** commonly known by its acronym as "**TANESCO**" (hereinafter referred to as "**the Respondent**"). The Appeal is in respect of Tender No. PA/001/2022-23/HQ/C/026 for the Provision of Consultancy Services for Design, Contract Management and Supervision of Implementation of Julius Nyerere Hydropower Project (JNHPP) Corporate Social Responsibility (CSR) Projects (hereinafter referred to as "**the Tender**").

The background of this Appeal may be summarized from the documents submitted to the Public Procurement Appeals Authority (hereinafter referred to as "**the Appeals Authority**") as follows: -

The Tender was conducted through Restrictive Tendering Method as 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 as amended (hereinafter referred to as "**the Regulations**").

On 22nd September 2022, the Respondent through the Tanzania National electronic Procurement System (TANePS) invited tenderers to participate in the Tender. The invited tenderers were issued with the Request For Proposal (RFP). The deadline for submission of the technical and financial proposals was on 27th October 2022. On the



deadline, three tenderers, namely the Appellant, M/s Epitome Architects Ltd and M/S IPA Architects Ltd submitted their technical and financial proposals as required.

The technical proposals were evaluated in two stages, namely preliminary and detailed evaluation. After completion of the evaluation, results showed that M/S Epitome Architects Ltd scored 66.79 below the minimum of 75 passing point whereas the Appellant and M/s IPA Architects Ltd scored 83.77 and 75.58, respectively. The evaluation committee recommended the two firms which scored above the minimum score points to be invited for the opening of the financial proposals. The recommendations were tabled before the Tender Board at its meeting held on 24th November 2022 and were approved accordingly.

On 24th November 2022, the Respondent communicated the results of the evaluation of the technical proposals to the Appellant and M/S IPA Architects Ltd. In addition, the two tenderers were notified of the date for the opening of the financial proposals. The record of Appeal indicates that the financial proposals were opened on 29th December 2022. After completion of the evaluation, the Evaluation Committee recommended award of the Tender to the Appellant, subject to negotiations. The Tender Board at its meeting held on 11th January 2023, approved the recommendations as tabled.

On 13th January 2023, the Respondent invited the Appellant to attend negotiation meeting scheduled on 17th January 2023. The negotiations took place on 17th, 26th and 27th January 2023. The minutes of the negotiation meeting indicate that parties did not reach consensus on three



items namely, payment schedule, reduction of scope of work and overhead costs. It was agreed that the pending issues shall be discussed internally within the Respondent's office and the Appellant would be notified accordingly.

On 27th February 2023, the Respondent requested tenderers to extend the bid validity period from 27th February 2023 to 30th April 2023, to allow it to finalize the remaining parts of the procurement process. Furthermore, on 25th April 2023, the Respondent requested another extension of the bid validity period from 30th April 2023 to 20th June 2023. The third extension was requested by a letter dated 20th June 2023 which extended the bid validity period from 20th June 2023 to 31st August 2023.

On 8th March 2023, the Appellant wrote a letter to the Respondent requesting to be given feedback on the pending issues raised during negotiation meeting. On 13th March 2023, the Respondent informed the Appellant that it was still discussing internally and once they finalize the Appellant would be invited for further negotiations.

On 29th May 2023, the Appellant applied for administrative review to the Respondent challenging the delay in the finalization of the negotiations. On 9th June 2023, the Respondent informed the Appellant that it was still finalizing internal formalities before inviting it for further negotiations. The Appellant was aggrieved and on 16th June 2023, filed Appeal Case No. 47 of 2022-23 before this Appeals Authority. After hearing the parties the Appeals Authority found that the negotiations were yet to be concluded, hence it was not in a position to grant any of the reliefs prayed by the Appellant. It therefore, dismissed the Appeal on 20th July 2023.



On 26th June 2023, the Respondent's user department, through internal memo with Reference No. DMD-PRI/PC/JNHPP/04/B/473 informed the Respondent's Procurement Management Unit (PMU) that according to the framework agreement entered as part of the JNHPP contract, design and construction of the CSR project was the main contractor's obligations. Therefore, PMU was advised to initiate the process of rejecting the Tender by following the laid down procedures.

On 24th August 2023, PMU through internal memo with reference No. SMP/MPP/PMU/23/31/317 requested the Tender Board to approve the proposal for rejection of the Tender. The Tender Board at its meeting held on 25th August 2023, approved the request.

The Respondent through a letter dated 25th August 2023 notified tenderers on the rejection of the Tender. Having received the Respondent's notification on the rejection of the Tender on 11th September 2023, the Appellant filed an application for administrative review to the Respondent. The Respondent issued its decision on the Appellant's application for administrative review through a letter dated 15th September 2023. The Appellant stated that it received the said letter on 22nd September 2023. Dissatisfied with the Respondent's decision, the Appellant filed this Appeal on 4th October 2023.

Before hearing the Appeal on merits, the Appeals Authority *suo moto* brought to the attention of the parties that there is a point of law to be determined. The Appeals Authority informed the parties that after reviewing the record of Appeal in line with requirements of Section 97(1) and (2) of the Act, it observed that there was a challenge in compliance



with the time limit of filing this Appeal before the Appeals Authority. On the other hand, the Respondent raised a point of law on the Bid Validity Period. According to the Respondent the Bid Validity Period for this Tender expired on 31st August 2023.

Taking into account the two points of law raised and merits of the Appeal, three issues for determination were framed. Issue number one, whether the Appeal is properly before the Appeals Authority has two limbs, namely whether the appeal has been filed within time; and whether there is a valid tender for determination. The other two issues are whether the Respondent's act of rejecting the Tender is justified; and to what reliefs, if any, are the parties entitled.

Having framed the issues, the Appeals Authority directed the parties to address issue number one first before proceeding to other issues. On the first limb of issue number one Mr. Jeremia Mtobesya, learned counsel for the Appellant readily conceded that the appeal is time barred. His concession was based on the fact that the Appellant received the letter rejecting the Tender on 31st August 2023. On 11th September 2023, the Appellant filed an application for administrative review to the Respondent. The Respondent was required to issue its decision within seven working days from the date of receipt of an application for administrative review. The Respondent's decision ought to have been issued by 20th September 2023.

The Appellant received the Respondent's decision on 22nd September 2023 and filed this Appeal on 4th October 2023. Had the Appellant counted the dates for filing of an Appeal from 20th September 2023 as required by



Section 97(2)(a) of the Act, this Appeal should have been filed by 2nd October 2023. It was therefore, two days late.

However, the learned counsel urged the Appeals Authority to treat the two days delay as a human error and condone the delay taking into account the Appellant's efforts of ensuring that justice is attained. The learned counsel implored the Appeals Authority to invoke its powers under Rule 24(2) of the Public Procurement Appeals Rules, GN. No. 411 of 2014, as amended (hereinafter referred to as "**the Appeals Rules**") that allows the Appeals Authority to conduct its proceedings with as little formalities and technicalities as possible.

In support of his argument the learned counsel cited the case of ***Rashidi Abiki Nguwa versus Ramadhani Hassan Kuteya and Another***, Civil Application No. 431 of 2021, Court of Appeal of Tanzania at Dodoma (unreported). In this case, the Court of Appeal extended time to serve a Notice of Appeal holding that the Applicant's failure to serve the 2nd Respondent with the Notice of Appeal was due to a human error, taking into consideration that subsequent steps were taken to remedy the situation after it was realized that the service was not done.

The learned counsel submitted that since the Appellant had previously filed Appeal Case No. 47 of 2022/23 that challenged the Respondent's conduct in the same Tender process, its efforts should be taken into account when considering the two days delay in filing this Appeal.

The learned counsel stated further that the two days delay in filling this Appeal has not prejudiced the Respondent's rights in any way. The Respondent had not reacted on the delay and this meant the lateness had



not affected it. The learned counsel essentially requested to be granted extension of time to file an Appeal out of time.

In response to the Appellant's submissions Mr. Mkumbo Elias, State Attorney from the Respondent's office submitted that, it is clear from the record of Appeal and the Appellant's own admission that this Appeal was filed out of time stipulated under the law. The Appellant did not seek extension of time to file this Appeal. What the learned counsel is presently seeking is a self-extension which is not allowed.

In support of his proposition, the learned State Attorney cited the case of **Lyamuya construction company versus The Board of Registered Trustee of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010, Court of Appeal of Tanzania at Arusha (unreported). In the cited case, the Court of Appeal laid down four points that are to be substantiated by a party seeking for extension of time. The points were as follows: -

- (i) The applicant must account for all the period of delay.
- (ii) The delay should not be inordinate.
- (iii) The applicant must show diligence, and not apathy, negligence or sloppiness in the prosecution of the action that he intends to take.
- (iv) That there are other sufficient reasons, such as the existence on a point of law of sufficient importance; such as the illegality of the decision sought to be challenged.

The learned State Attorney submitted that as per the facts of this Appeal the Appellant was required to file its Appeal by 2nd October 2023. Since



the Appellant failed to file its Appeal by 2nd October 2023, it ought to have sought for extension of time prior to filing of this Appeal. The Application was to demonstrate the four points as elucidated in the Lyamuya's case (supra).

The learned State Attorney also cited the case of **Bushfire Hassan versus Latina Lucia Masanya**, Civil Application Number 3 of 2007, Court of Appeal of Tanzania (Unreported). In this case, the **Court of Appeal** stated that *"...Delay of even a single day, has to be accounted for otherwise there would be no point of having rule prescribing periods within which certain steps have to be taken..."*

The learned State Attorney submitted further that, as per the Appeals Rules, the Appeals Authority has discretion to extend time for filing an appeal. However, such discretion would only be exercised if the Appellant had applied for the same. The Appellant has not applied for extension of time to file this appeal, the learned State Attorney contended.

The learned State Attorney expounded that in exercising its discretion to grant extension time, the Appeals Authority is required to act judiciously. A part seeking for extension of time has to advance good cause which would be determined according to the circumstances of each case. In support of this proposition the learned State Attorney cited the case of ***The International Airline of the United Arab Emirates versus Nassor Nassor***, Civil Application No. 379 of 2019, Court of Appeal of Tanzania at Dar es Salaam (Unreported). In this case, the Court of Appeal stated that in order for the court to establish that there was a good cause or sufficient reason for extension of time it would depend whether the application was



brought promptly and that there are sufficient reasons for the delay. The learned State Attorney contended that the same position was stated in the case of **CRDB (1996) Limited versus George Kilindu**, Civil Appeal No. 162 of 2006, Court of Appeal of Tanzania at Dar es salaam (Unreported).

In the instant Appeal according to the learned State Attorney, the Appellant has failed to adduce sufficient reasons for the delay. Therefore, the Appeal should be dismissed with no order as to costs.

On its brief rejoinder, learned counsel for the Appellant submitted that the rejection of an Appeal is not automatic as learned State Attorney for the Respondent contended. According to Rule 17 of the Appeals Rules, rejection of Appeal would only be made by the Appeals Authority once it is established that conditions for an institution of the appeal were not adhered to. In this Appeal, the Appellant started to count the dates for filing this Appeal on 22nd September 2023 when it received the Respondent's decision on its application for administrative review believing that the same was issued within the time limit provided by the law. Thus, an act of filing this Appeal two days late suffices to be considered as a human error.

The learned counsel contended further that circumstances for extension of time should not only be confined to the circumstances adduced by the learned State Attorney for the Respondent. The circumstances for granting extension of time should be determined by the facts of each case as stated in the case of **Rashidi Abiki Nguwa** (supra).



As regards the Respondent's submissions that the Appellant should have applied for extension of time before filing this appeal, the learned counsel urged the Appeals Authority to invoke the provisions Rule 24(2) of the Appeals Rules. The learned counsel submitted that the proceedings before the Appeals Authority are to be conducted in a relaxed manner and not strictly as it is the case in the normal adversarial system. Finally, the learned counsel asked the Appeals Authority to proceed to determine the Appeal on merits as there are pertinent matters that need to be determined so as put this matter to rest.

The second limb of issue number one is whether there is a valid Tender for determination by the Appeals Authority. The learned State Attorney for the Respondent commenced his submissions on this point by pointing out that the Tender validity period expired since 31st August 2023. The expiry of the Bid Validity Period was well known to the Appellant as its last acceptance on the request for extension of the Bid Validity Period indicated that the Tender would be valid until 31st August 2023. After expiry of the Bid Validity Period, the Appellant has no cause of action because contractual relationship between the tenderer and the procuring entity had expired too.

The learned State Attorney submitted further that according to Regulation 191(1) of the Regulations, the Bid Validity Period has to be specified in the Tender Document. In the instant Tender the Bid Validity period was specified in the Tender Document as required by the law. Thus, since the Bid Validity period expired on 31st August 2023, the Appellant's application for administrative review lodged on 11th September 2023 and this Appeal



are all a nullity in the eyes of the law. Thus, this Appeal is incompetent for being filed after expiry of the Bid Validity period.

In response to the learned State Attorney's submissions, the learned counsel for the Appellant agreed with the Respondent that the Bid Validity Period expired on 31st August 2023. The learned counsel pointed out that according to paragraph 2(u) of the Respondent's Statement of Reply, the decision to reject the Tender was made by the Tender Board at its meeting held on 25th August 2023. Further that the Respondent communicated its decision to reject all the tenders to the tenderers through email dated 31st August 2023. According to the learned counsel for the Appellant the Respondent's decision to reject the Tender and notification thereof to tenderers were all made when the Tender was still valid.

The learned counsel submitted that the subsequent acts of filing an application for administrative review and thereafter this Appeal were all valid. The law allows a tenderer to challenge the procuring entity's decision to reject the tender if it is dissatisfied with such a decision. The learned counsel contended further that the notice of the rejection of the Tender was communicated on the last day of the Bid Validity Period. Thus, since the law allows a tender rejection decision to be challenged, the Appellant exhausted the available remedy by filing its application for administrative review and thereafter this Appeal immediately after receipt of notification of rejection of the Tender. Thus, the Appeal is properly before the Appeals Authority.



ANALYSIS BY THE APPEALS AUTHORITY ON THE POINTS OF LAW

The Appellant having conceded that the appeal is time barred, this point should not detain us. The Appellant however, asked the Appeals Authority to condone the delay on the ground that the same was caused by a human error. The Respondent on its part objected strongly.

The Appeals Authority reviewed Section 97(1) and (2) of the Act which read as follows: -

"97(1) A tenderer who is aggrieved by the decision of the Accounting Officer may refer the matter to the Appeals Authority for review and administrative decision.

(2) Where-

(a) the accounting Officer does not make a decision within the period specified under this Act;

(b) the tenderer is not satisfied with the decision of the accounting officer

the tenderer may make the complaint to the Appeals Authority within seven working days from the date of communication of the decision by the accounting officer or **upon the expiry of the period within which the accounting officer ought to have made a decision".**

(Emphasis added)

In view of the above quoted provisions, it is crystal clear that a tenderer who is dissatisfied with the procuring entity's decision or if the procuring entity fails to issue its decision within seven working days, a dissatisfied



tenderer is required to file its appeal to this Appeals Authority within seven working days.

The Appeals Authority agrees with the learned counsel for the Appellant's proposition that it is not bound by strict rules of procedures and evidence. His proposition is in line with Rule 24(2) of the Appeals Rules which provides that: *"The proceedings before the Appeals Authority shall be conducted with as little formality and technicality as possible and, in relation thereto, the Appeals Authority shall not be bound by strict rules of evidence or court procedures."*

However, the Appeals Authority is of the firm view that since there is a specific law that governs filing of Appeals before the Appeals Authority, the same should strictly be adhered by the tenderers.

The Appeals Authority considered the Appellant's submissions on extension of time to file an Appeal. Applications for extension of time to lodge an appeal are governed by Rule 11 of the Appeals Rules which reads as follows: -

"11. Subject to section 97(2) and (3) of the Act, an application for an extension of time to lodge an appeal out of time shall be filed with the Appeals Authority within seven days from the date when the Appellant ought to have filed his appeal using PPAA Form No. 6 as set out in the First Schedule to these Rules."

Rule 11 of the Appeals Rules requires an application for extension of time to be made within seven days from the date a tenderer ought to have filed his appeal to this Appeals Authority. Furthermore, Rule 11 requires an

application for extension of time to be filed using PPAA Form No. 6 prescribed in the First Schedule to the Appeals Rules. In addition, the said application would be complete upon payment of requisite fee of TZS 300,000 as prescribed in the Second Schedule to the Appeals Rules.

According to the record of Appeal, the Appellant submitted its application for administrative review on 11th September 2023. The Respondent was required to issue its decision by 20th September 2023. Having not received the Respondent's decision thereof within seven working days, the Appellant was required to file its Appeal to this Appeals Authority by 2nd October 2023. Since the Appeal was not filed within seven working days as required, an application for extension of time ought to have been filed by 9th October 2023. To the contrary, the Appellant made an oral application for extension of time during the hearing on 13th November 2023.

In view of Rule 11 of the Appeals Rules read together with Item 4 of the Second Schedule to the Appeals Rules, the Appellant's application for extension of time was made way out of the seven days, not in the prescribe form, PPAA Form No. 6 and the relevant fee was not paid. Thus, the Appellant's application for extension of time was invalid as it failed to comply with the three pre-requisite requirements as pointed out above.

On whether there is a valid Tender for determination by the Appeals Authority, section 71 of the Act provides guidance with regard to Bid Validity Period for tenders. It reads as follows: -

"The procuring entity shall require tenderers to make their tenders and tender securities including tender securing declaration valid for periods specified in the tendering

documents, sufficient to enable the procuring entity to complete the comparison and evaluation of the tenders and for the appropriate tender board to review the recommendations and approve the contract or contracts to be awarded whilst the tenders are still valid”.

(Emphasis supplied)

The above quoted provision requires tenders to be valid for a period specified by the procuring entity in the tendering documents up to the stage the recommendation to award the tender is approved by the Tender Board.

The record of this Appeal indicates that the Bid Validity Period was 120 days from the deadline for submission of proposals which was on 27th October 2022. There were three extensions of the Bid Validity Period to 31st August 2023.

The Appeals Authority further observed that prior to issuance of award of the Tender, the Respondent decided to reject the Tender. The Respondent's decision to reject the Tender was approved by the Tender Board at its meeting held on 25th August 2023. On 31st August 2023 the Respondent notified tenderers of its decision to reject the Tender through email. Coincidentally, 31st August 2023 was also the last date of the validity period of the Tender.

In view of the requirement of Section 71 of the Act, the Appeals Authority is of the settled view that the Respondent's decision to reject the Tender was made when the Tender was still valid. The said decision was also communicated to tenderers when the tender was still valid. Sections 95,



96 and 97 of the Act allow a tenderer to challenge any procuring entity's decision issued in relation to a particular Tender if it feels that it may have suffered loss or injury as a result of such a decision.

Basing on the requirements of sections 71, 95, 96 and 97 of the Act, the Appeals Authority finds that the Appellant's act of filing an application for administrative review and subsequently this Appeal is in order. Under the circumstances, the Appeals Authority rejects the Respondent's proposition that there is no valid tender capable of being determined by the Appeals Authority.

In view of the findings made on the first limb of issue number one that the Appeal has been filed out of time and that the application for extension of time was made in contravention of Rule 11 of the Appeals Rules read together with Item 4 of the Second Schedule to the Appeals Rules, the Appeals Authority hereby dismiss both the Appeal and the subsequent application for extension of time.

Since the point of law was raised by the Appeals Authority, we make no order as to costs.

It is so ordered.

This Ruling is binding and can be enforced in accordance with Section 97(8) of the Act.

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



This Ruling is delivered in the presence of the parties this 16th day of November 2023.

ADVOCATE ROSAN MBWAMBO



Ag. CHAIRPERSON

MEMBERS: -

1. ENG. STEPHEN MAKIGO. 

2. MR. RHOEN NKORI. 