IN THE PUBLIC PROCUREMENT APPEALS AUTHORITY

APPEAL CASE NO. 21 OF 2023-24

BETWEEN

M/S STEP – PB JV.....APPELLANT

AND

TANZANIA INSURANCE REGULATORY AUTHORITY.....RESPONDENT

DECISION

CORAM

1. Adv. Rosan Mbwambo - Ag. Chairperson
2. Mr. Pius Mponzi - Member
3. Dr. William Kazungu - Member
4. Mr. James Sando - Secretary

SECRETARIAT

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

FOR THE APPELLANT

1. Mr. Dennis Malamba - Advocate, Edward & Associates
2. Ms. Veronica Kulanga - Project Manager Officer

FOR THE RESPONDENT

1. Ms. Grace Lupondo	- State Attorney, OSG
2. Mr. Jamal Mwasha	- Senior Legal Officer
3. Mr. Joseph Ogunda	- Legal Officer
4. Mr. Charles Bieda	- Head of Procurement Management Unit
5. Mr. Andrew Msina	- Principal Accountant
6. Mr. Thomas Tungu	- Senior Supplies Officer

This Appeal has been preferred by **M/S STEP – PB JV** (hereinafter referred to as **"the Appellant"**) against the **Tanzania Insurance Regulatory Authority** commonly known by its acronym as "**TIRA**" (hereinafter referred to as "**the Respondent"**). The Appeal is in respect of Tender No. IE/019/2022/2023/HQ/W/02 for the Proposed Construction of TIRA Building on Plot No. 8, Block "G", Njedengwa Area in Dodoma City (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 National Competitive 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 2nd August 2023, the Respondent through the Tanzania National electronic Procurement System (TANePS) invited eligible tenderers to participate in the Tender. The deadline for submission of tenders was initially set on 18th August 2023. However, it was later on extended to 23rd August 2023. On the deadline, the Respondent received eight tenders including that of the Appellant.

The received tenders were subjected to evaluation. After completion of the evaluation process, the evaluation committee recommended award of the Tender to M/S AMI & VAI Investment Co. Ltd subject to post-qualification and negotiations. The proposed contract price was Tanzania Shillings Five Billion Nine Hundred Seventy Eight Million Eight Hundred Nine Thousand Two Hundred Seventy Four and Sixty Cents only (TZS 5,978,809,274.60) VAT inclusive. The Evaluation Committee's recommendations were tabled before the Tender Board at its meeting held on 8th September 2023 and were approved accordingly.

The record of Appeal indicates that negotiations between M/S AMI & VAI Investment Co. Ltd and the Respondent took place on 21st September 2023. During negotiations, M/S AMI & VAI Investment Co. Ltd gave a discount of TZS 3,150,000.00 that changed the original quoted price of TZS 5,978,809,274.60 to TZS 5,975,659,274.60 VAT inclusive. The results of the negotiations were approved by the Tender Board through Circular Resolution No. 33 of 22nd September 2023. Through the same Circular Resolution, the Tender Board approved award of the Tender to M/S AMI & VAI Investment Co. Ltd.

On 25th September 2023, the Respondent issued the Notice of intention to award which informed tenderers that it intends to award the Tender to M/S AMI & VAI Investment Co. Ltd at a contract price of Tanzania Shillings Five Billion Nine Hundred Seventy Five Million Six Hundred Fifty Nine Thousand Two Hundred Seventy Four and Sixty Cents only (TZS 5,975,659,274.60) VAT inclusive. The Notice also informed the Appellant that its tender was not successful as it quoted a higher price.

Dissatisfied with the reason given, on 27th September 2023 the Appellant applied for administrative review to the Respondent. On 4th October 2023, the Respondent issued its decision which dismissed the Appellant's application for administrative review. On 9th October 2023, the Appellant submitted to the Respondent a notice of intention to Appeal to the Appeals Authority. On 17th October 2023, the Appellant filed this Appeal.

When the matter was called on for hearing, the Respondent raised a preliminary objection on the point of law that the appeal is time barred. Counsel for the Appellant pointed out that he has been taken by surprise and he would need sometimes to prepare for the response. He asked for 15 minutes adjournment. The Appeals Authority having noted similar concerns gave the parties thirty (30) minutes to prepare for the submissions on this point. The Appeals Authority also directed the parties to specifically address it on sections 97(1) and (2) of the Act and Rule 9(1) of the Public Procurement Appeals Authority Rules of 2014 as amended (hereinafter referred to as "**the Appeals Rules**").

In determining both the preliminary objection and the appeal on merits, the following issues were framed: -

1.0 Whether the Appeal is time barred.

2.0 Whether the Tender process was conducted in accordance with the law. This issue has two limbs, namely:-

2.1 Whether the extension of the deadline for submission of tenders complied with the law; and

2.2 Whether the tender opening results were made available on TANePS.

3.0 What reliefs, if any, are the parties entitled to?

The Appeals Authority directed the parties to address issue number one first. Mr. Dennis Malamba, learned counsel for the Appellant commenced the submissions by pointing out that the course of action for this Appeal arose after the Appellant received the Notice of Intention to award on 25th September 2023. Being dissatisfied, on 27th September 2023 the Appellant filed an application for administrative review. The Respondent issued its decision through a letter dated 4th October 2023. The letter was sent through an email on 5th October 2023 at 22:48 hours which was opened the following day, on 6th October 2023.

The learned counsel submitted that the time for filing an Appeal before this Appeals Authority started to run from 6th October 2023. The Appellant lodged this Appeal through an email sent on 16th October 2023, at 16:50 hours. On the same day, that is 16th October 2023 at 17:57 hours the Appeals Authority issued the control number for payment of the requisite

filing fee. According to the learned counsel the Appellant was unable to make the payment due to system challenges. Consequently, the fee was paid on 17th October 2023.

In view of the above sequence of events, the learned counsel stated that the Appeal was filed within time and in accordance with Section 97(1) and (2) of the Act, Regulation 106(9) of the Regulations and Rule 9(1) of the Appeals Rules.

Ms. Grace Lupondo, learned State Attorney from the Office of the Solicitor General commenced her response submissions by stating that the law demands that the time of reckoning for filing an appeal to the Appeals Authority should start to run from the date the procuring entity communicates its decision on the tenderer's application for administrative review.

The learned State Attorney contended that the Respondent's decision on the application for administrative review was issued on 4th October 2023. She stated that the Respondent's decision was sent to the Appellant on the same day through ordinary post and email on 5th October 2023. According to the learned State Attorney, the Appellant acknowledged in paragraph 2.6(v) of the Statement of Appeal to have received the Respondent's decision on 4th October 2023. Counting from 4th October 2023, the Appellant ought to have filed its Appeal by 13th October 2023. To the contrary, the Appellant filed its Appeal on 17th October 2023, beyond the prescribed time.

The learned State Attorney contended that it is a cardinal principle of the law that parties should be bound by their own pleadings. In this Appeal,

the Appellant in paragraph 2.6(v) of the Statement of Appeal acknowledged to have received the Respondent's decision on its application for administrative review on 4th October 2023. Thus, the Appellant cannot change the date of receiving the Respondent's decision on its application for administrative review during the hearing.

In support of her proposition, the learned State Attorney cited the case of ***Martin Fredrick Rajab versus Ilemela Municipal Council and Another***, Civil Appeal No. 197 of 2019, Court of Appeal of Tanzania at Mwanza (unreported). The Court of Appeal held in this case that "*whereas the pleadings show that the Appellant purchased land from Deusi Sauye, Robi, Sikini, Mwita Kichele, Boke Matiku and Gozibert Buza, at the trial the Appellant recounted what was in dispute is the land he had purchased from Boki Matiku. It is a cardinal principle of the law of the civil procedure founded upon prudence that parties are bound by their pleadings and thus, no party is allowed to present a case contrary to the pleadings*".

The learned State Attorney submitted that the Respondent's decision was also sent to the Appellant through email on 5th October 2023. Even if it could be taken that the Appellant became aware of the Respondent's decision on 5th October 2023, it was still required to file its Appeal by 16th October 2023. Yet, the filing fee was paid on 17th October 2023. It is the submission of the learned State Attorney that an appeal is deemed to have been filed upon submission of the Statement of Appeal and payment of the requisite filing fee. Therefore, the Appellant's Appeal was filed on 17th October 2023, beyond the time limit, the learned State Attorney contended.

In support of her arguments, the learned State Attorney made reference to the case of ***Sarepta Network Investment (SANEICO) versus Bukoba District Council and the Honourable Attorney General***, Civil Case No. 16 of 2021, High Court of Tanzania at Bukoba (unreported). In this case the court held that: "*it is the principle of the law that a suit that is time barred by statute must be rejected by the court because in such a suit, the court is barred by the law from granting any remedy or relief*".

In emphasizing this point, the learned State Attorney cited another case of ***Barclays Bank Tanzania Limited versus Phylisiah Hussein Mchemi***, Civil Appeal No.19 of 2016, Court of Appeal of Tanzania (unreported). In this case, the court cited with approval the case of ***John Cornel versus A. Grevo (T) Limited***, Civil Case No. 70 of 1998, High Court of Tanzania, Dar es Salaam Registry, where it was held that "*However unfortunate it may be for the plaintiff; the law of limitation is on actions knows no sympathy or equity. It is a merciless sword that cuts across and deep into all those who get caught in its web*".

The learned State Attorney also cited the case of ***M/S Simba Logistic Equipment Supply Ltd versus Tanzania Zambia Railway Authority***, Appeal Case No.5 of 2023-24 whereby this Appeals Authority invoked Section 97 of the Act and dismissed the Appeal for being filed out of time. The learned State Attorney urged the Appeals Authority to apply the same principle it applied in the cited Appeal and dismiss this Appeal with costs for being filed out of time.

On its brief rejoinder, the learned counsel for the Appellant reiterated his submissions made earlier on that the Appellant received the Respondent's decision on its application for administrative review on 6th October 2023. The said decision was sent to the Appellant through email on 5th October 2023 at 22:48 hours. The email was sent beyond working hours and was received by the Appellant on 6th October 2023. Thus, counting from 6th October 2023, the Appellant was required to file its Appeal by 16th October 2023. Since the Appeal was filed on 16th October 2023, the same was filed within the stipulated time limit.

In addition, the learned counsel distinguished all the cited cases by the Respondent on the ground that the same are not relevant under the circumstances of this Appeal. The learned counsel stated further that the raised point of law is not pure point of law as it needs ascertainment of facts. According to the case of ***Mukisa Biscuit Manufacturing Co. Ltd versus West End Distributors Ltd*** (1969) E.A 696, the point of law should be able to be determined out of the pleadings. However, this point law needs ascertainment of facts. Thus, it is not a pure point of law. The learned counsel concluded his submissions by praying that the point of law should be disregarded and the Appeal be heard on merits.

ANALYSIS BY THE APPEALS AUTHORITY OF THE POINT LAW

The Appeals Authority started its analysis on this part by considering the Appellant's proposition that the point of law raised is not a pure point of law as its determination would require ascertainment of facts. The Appeals Authority is aware of the principle laid down in the case of ***Mukisa Biscuit***

Manufacturing Co. Ltd (supra) relied upon by the Appellant. However, the Appeals Authority is also mindful of the decision of the Court of Appeal in the case of ***Ali Shabani and 48 others versus Tanzania National Roads Agency and another,*** Civil Appeal No. 261 of 2020, Court of Appeal of Tanzania at Tanga (unreported). In this case it was held as follows:-

> "*it is clear that an objection as it were on the account of time bar is one of the preliminary objection which courts have held to be based on the pure point of law whose determination does not require ascertainment of facts or evidence.* ***At any rate, we hold the view that no preliminary objection will be taken from abstract without reference to some facts plain on the pleadings which must be looked at without reference examination of any other evidence***".

In view of the above position of the Court of Appeal, the Appeals Authority rejects the Appellant's proposition.

The Appeals Authority revisited Section 97(1) and (2)(a) and(b) of the Act read together with Rule 9(1) of the Appeals Rules 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.***

R. 9(1) A person who is dissatisfied with the matter or decision giving rise to a complaint or dispute may lodge an appeal with the Appeals Authority within seven working days from the date when he became aware of the circumstances giving rise to the complaint or dispute or when the tenderer should have become aware of those circumstances, whichever is earlier".

(Emphasis added)

The above quoted provisions state clearly that a tenderer who is dissatisfied with the procuring entity's decision, may file an appeal to the Appeals Authority within seven working days.

The record of Appeal indicates that the Respondent through a letter dated 25th September 2023 notified the Appellant that its tender was not successful as it had a higher price. Dissatisfied with reason given, on 27th September 2023 the Appellant applied for administrative review to the Respondent. The Respondent through a letter dated 4th October 2023

issued its decision with respect to the Appellant's application for administrative review.

The Appeals Authority revisited parties' contentions on this point whereby on one hand the Appellant claimed to have received the Respondent's decision through email on 6th October 2023. Consequently, the Appellant alleged to have lodged its Appeal on 16th October 2023 within seven working days as required by the law. Thus, the Appeal was lodged within time prescribed by the law.

On the other hand, the Respondent contended to have sent its decision to the Appellant through ordinary postal mail on 4th October 2023. The Respondent asserted that the Appellant acknowledged the receipt of the Respondent's decision on 4th October 2023 in its Statement of Appeal. In addition, the Respondent claimed to have sent its decision to the Appellant through email on 5th October 2023. The Respondent stated that if the Appellant had received the Respondent's decision on 4th October 2023, it was required to file its Appeal by 13th October 2023. In the alternative, had the Appellant received the Respondent's decision by 5th October 2023, it ought to have lodged its Appeal by 16th October 2023. To the contrary, the Appeal was lodged on 17th October 2023. Thus, the Appeal was lodged out of time.

The Appeals Authority revisited the available documents and observed that none substantiates the service of the Respondent's decision to the Appellant on 4th October 2023. The only document that substantiates proof of service is a copy of email that was sent to the Appellant on 5th October 2023 at 22:48 hours. In the absence of any other sufficient proof, the

Appeals Authority is of the firm view that the Respondent's decision on the Appellant's application for administrative review was sent to the Appellant on 5th October 2023 at 22:48 hours.

In view of the above facts, it is obvious that the service was made beyond working hours. Thus, it is certain that the Respondent's decision was received by the Appellant on 6th October 2023 which was a Friday. Counting seven (7) working days from 6th October 2023, the Appellant was required to file its Appeal by 17th October 2023. The record of Appeal indicates that the Appeal was filed on 17th October 2023. The Appeals Authority therefore, finds that the Appeal was filed within time. Under the circumstances, the Appeals Authority proceeds to determine the Appeal on merits.

SUBMISSIONS BY THE APPELLANT ON MERITS OF THE APPEAL

Mr. Dennis Malamba, learned counsel for the Appellant adopted the Appellant's Statement of Appeal in support of his submissions. On the first limb of issue number two, the learned counsel submitted that the Tender was conducted in contravention of the law. The extension of the deadline for submission of tenders was done contrary to the requirements provided in the Tender Document. He made reference to Clauses 21.3, 22.1 and 23.2 of the Instruction to Tenderers (ITT) as modified by Clause 24 of the Tender Data Sheet (TDS). This clause requires extension of the deadline for submission of tenders to be made not later than seven days before the tender opening date.

The learned counsel pointed out that according to the Invitation to Tenders, the deadline for submission of tenders was on 18th August 2023 at 03.30. The Appellant submitted its tender on 17th August 2023 at 23:40 hours in compliance with the requirements of the Tender. The learned counsel submitted that on 18th August 2023 at 03:30 the Tender was closed on TANePS. However, to the Appellant's surprise when it visited the TANePS window on 20th August 2023, it observed that the deadline for submission of tenders had been extended to 23rd August 2023 at 15:30 hours.

The learned counsel submitted that Clause 24 of the TDS requires the Respondent to notify tenderers on the extension of the deadline for submission of tenders seven days prior to the expiry of the original specified deadline. To the contrary, the Respondent extended the deadline for submission of tenders after the initially specified deadline has already lapsed. The learned counsel elaborated that had the Respondent intended to extend the deadline for submission of tenders, it ought to have done so prior to the deadline for submission of tenders in compliance with Clause 24 of the TDS. Thus, the Respondent's extension of the deadline for the submission of tenders contravened the requirements of the Tender Document.

On the second limb, the learned counsel submitted that it is the requirements of the law that after the deadline for submission of tenders the results of the Tender opening should be displayed on TANePS. According to the official announcement, the Tender opening was scheduled on 18th August 2023 at 4:00:00. After the specified time had passed, the

Appellant revisited the TANePS window but the Tender opening results were not displayed.

Further even after the extended deadline for submission of tenders on 23rd August 2023 had passed, the Tender opening results were not displayed on TANePS. Thus, the Respondent's act of not displaying the Tender opening results as required, contravened the principle of transparency and fairness, the learned counsel contended.

The learned counsel also submitted that paragraph 2(e) of the Respondent's Statement of Reply indicates that on 9th October 2023 the Respondent awarded the Tender to the successful tenderer. The Respondent should not have proceeded with Tender process prior to the expiration of the seven working days for filing this Appeal. Thus, the Respondent's act of awarding the Tender prior to the expiration of the time for filing this Appeal contravenes the requirements of the law, the learned counsel submitted.

Finally, the learned counsel prayed for the following reliefs: -

i) Award proposed to the successful tenderer be nullified;

ii) The Respondent be ordered to re-advertise the Tender in compliance with law; and

iii) The Respondent be ordered to compensate the Appellant for all costs incurred in relation to this Appeal.

REPLY BY THE RESPONDENT

The Respondent's submissions on the merits of the Appeal were led by Ms. Grace Lupondo, learned State Attorney. She commenced her submissions on the first limb of the second issue by stating that Sections 110 and 111 of the Evidence Act, Cap 6, R.E 2019 requires one who alleges must prove. In this Appeal, the Appellant alleged that extension of the deadline for submission of tenders was made after expiry of the initially specified deadline and after the Tender window on TANePS was closed. The Appellant has not proved any of the above allegations, the learned State Attorney contended.

According to the learned State Attorney the original Invitation to Tenders uploaded on TANePS indicated that "*All tenders must be properly filled in and submitted through TANePS at or before 03:30 PM on Wednesday, 18th August 2023. Tenders will be opened promptly thereafter through TANePS*". The learned State Attorney contended that at the time of filling in the Tender information on TANePS, the deadline for submission of tenders was erroneously written in 12 hours while the TANePS is set in 24 hours format. Having observed that there was a challenge on the time set on the deadline for submission of tenders, the Respondent extended the deadline for submission to 23rd August 2023 at 15:30 hours.

The learned State Attorney submitted that the extension was done after consultations with the Public Procurement Regulatory Authority (PPRA). PPRA approved the extension of the deadline for submission of tenders. The same was also approved by the Tender Board at its meeting held on

17th August 2023. After obtaining all necessary approvals on 17th October 2023, the Respondent notified all tenderers on the extension and prior to expiration of the initially specified deadline.

It was the submissions of the learned State Attorney that the extension of the deadline for submission of tenders was made to avoid uncertainties on the differences of time format set in the Invitation to Tender and that of TANePS. Further, the extension gave the Appellant and other tenderers extra time for preparation of responsive tenders. It was thus more advantageous to tenderers including the Appellant, the learned State Attorney contended.

On the proposition that the Respondent failed to comply with Clause 24 of the TDS, the learned State Attorney submitted that the referred clause is meant for the tenderers to request for extension of the deadline. The clause does not relate to the extension by the Respondent. In addition, Clause 24 of the TDS appears to have amended Clause 22.3 of the ITT which does not exist. Clause 22.2 of the ITT allowed the Respondent, in exceptional circumstances, to extend the deadline for submission of tenders. Also, the provision does not provide the time limit for issuing such an extension.

The learned State Attorney expounded that Regulation 13(5) of the Regulations allows a procuring entity to extend the deadline for submission of tenders. The provision requires the procuring entity to notify tenderers on the extension promptly. The provision does not specify the time limit

within which the extension of the deadline for submission of tenders is to be made, either.

The learned State Attorney submitted that the extension of the deadline for submission of tenders did not relate to the alteration or amendment of the Tender Document that would necessitate tenderers to be accorded more time for consideration of the introduced changes. The extension was caused by the discrepancy of the time format in the Invitation to Tender and that of TANePS. Under the circumstances, the learned State Attorney contended that the extension of the deadline for submission of tenders was made in compliance with the requirements of Clause 22.2 of the ITT and Regulation 13(5) of the Regulations. Therefore, the extension of the deadline for submission of tenders was done in accordance with the requirements of the law. The learned State Attorney submitted that the Appellant had not indicated how the extension has prejudiced its right from participating in the Tender process.

Regarding non-availability of the Tender opening results on TANePS, the learned State Attorney submitted that on 18th August 2023 the tender opening results were not displayed on TANePS. This was due to the fact that the deadline for submission of tenders was extended to 23rd August 2023. Therefore, tenders were not opened on 18th August 2023. After the deadline on 23rd August 2023 at 16:00 hours, the Tender opening results were all made available on TANePS.

The learned State Attorney submitted further that had the Appellant faced a challenge in viewing the Tender opening results on TANePS, it should

have contacted PPRA or the Respondent. In the absence of any proof from the Appellant that the Tender opening results were not available on TANePS, the learned State Attorney urged the Appeals Authority to reject the Appellant's contentions on this point.

On the Appellant's prayer that the Tender should be re-advertised, the learned State Attorney submitted that since the extension of the deadline for submission of tenders was made in accordance with the law, such a prayer should be disregarded. On costs, the learned State Attorney submitted that the prayer was too general as the amount of costs should have been specifically pleaded and proved. She cited the case of ***Bambrass Star Services Station versus Mrs Fatuma Mwale***, (2002), TLR at pg 390, in support of her proposition.

The learned State Attorney concluded her submissions by praying for dismissal of the Appeal for lack of merits with costs.

On his brief rejoinder, the learned counsel for the Appellant submitted that it had proved that the Respondent's extension of the deadline for submission of tenders was made in contravention of Clause 24 of the TDS. The learned counsel stated further that having realized that the extension of the deadline for submission of tenders was made in contravention of Clause 24 of the TDS, the Respondent should have re-advertised the Tender. To the contrary, the Respondent proceeded with the Tender process. The learned counsel therefore prayed that the Appeal should be allowed with costs.

ANALYSIS BY THE APPEALS AUTHORITY

2.0 Whether the Tender process was conducted in accordance with the law

In this Appeal, the Appellant challenged the manner in which the Tender process was conducted by raising two grounds of Appeal. These are that the extension of the deadline for submission of tenders was done in contravention of the law and that the Respondent erred in law for not displaying the Tender opening results on TANePS. We shall start with the first limb: **Whether the extension of the deadline for submission of tenders was made in accordance with the law"**

According to the Invitation to Tender, the deadline for submission of tenders was on 18th August 2023 at 03.30pm. On one hand, the Appellant contended to have submitted its tender on 17th August 2023 at 23:40 hours prior to the deadline for submission of tenders. On the other hand, the Respondent asserted that having realized that there was a mismatch on the deadline time for submission of tenders in the Invitation to Tender and on TANePS, on 17th August 2023 it extended the deadline for submission of tenders to 23rd August 2023 at 15:30 hours.

The Appeals Authority reviewed the record of Appeal and observed that the Appellant became aware of the extension of the deadline for submission of tenders on 20th August 2023 when it visited TANePS window. During the hearing, the Members of the Appeals Authority asked the Appellant to clarify if it took any action after observing the irregular extension of the deadline for submission of tenders. In response thereof, the Appellant

stated that it did not take any action against the Respondent's act of extending the deadline for submission of tenders. Therefore, the Appellant challenged the Respondent's act when it filed an application for administrative review and subsequently this Appeal.

It is undisputed that there was extension of the deadline for submission of tenders and that the Appellant became aware of the said extension on 20th August 2023.

The Appeals Authority revisited Sections 95 and 96 of the Act which provide guidance on procedures to be followed by a tenderer who is dissatisfied with the manner the tender has been conducted. Sections 95 and 96(1) and (4) of the Act read as follows: -

> *"95(1)* ***Any tenderer who claims to have suffered or that may suffer any loss or injury as a result of a breach of a duty imposed on a procuring entity by this Act may seek review in accordance with sections 96 and 97.***
>
> *96 (1) Any complaints or dispute between procuring entities and tenderers which arise in respect of procurement proceedings, disposal of public assets by tender and awards of contracts shall be reviewed and decided upon a written decision of the accounting officer of a procuring entity and give reasons for his decision.*
>
> *96(4) The accounting officer shall not entertain a complaint or dispute* ***unless it is submitted within seven working***

days from the date the tenderer submitting it became aware of the circumstances giving rise to the complaint *or dispute or when that tenderer should have become aware of those circumstances, whichever is earlier"*

(Emphasis added)

The above quoted provisions state in clear terms that a tenderer who is dissatisfied with the procuring entity's conduct may file an application for administrative review to the accounting officer of the respective procuring entity within seven working days of becoming aware of the circumstances giving rise to the complaint.

In view of the sequence of events summarized hereinabove, the Appellant became aware of the extension of the deadline for submission of tenders on 20th August 2023. In paragraph 2.6(II) of the Statement of Appeal and in its oral submissions, the Appellant admitted to have realized the irregularity on the extension of the deadline for submission of tenders on 20th August 2023. According to Sections 95 and 96(1) and (4) of the Act, upon being aggrieved with irregular extension of the deadline for submission of tenders, the Appellant was required to challenge the Respondent's act by filing an application for administrative review to the Respondent.

Counting from 20th August 2023, the Appellant ought to have filed its application for administrative review to the Respondent by 29th August 2023. The Appellant failed to do so. Thus, the Appeals Authority cannot determine this ground of Appeal as the same has been brought out of time prescribed under the law.

The second limb of issue number two is **whether the tender opening results were made available on TANePS as required by the law.** The Appeals Authority considered the Appellant's contentions that the Tender opening results were not displayed on TANePS as required by the law. The Appellant alleged that the tender opening results were to be displayed from 18th August 2023 when it was the deadline for submission of tenders. The Tender results were also not displayed on TANePS even after the extended deadline for submission of tenders. On the other hand, the Respondent insisted that the Tender results were available on TANePS after expiry of the extended deadline for submission of tenders.

From the facts of this Appeal, it is certain that the Appellant became aware that the Tender opening results were not available on TANePS from 18th August 2023. Given the findings on the first limb of this issue, the Appeals Authority is also of the firm view that this ground of Appeal cannot be determined as same has been brought in contravention of Sections 95 and 96 of the Act.

3.0 What reliefs, if any, are the parties entitled to?

Taking cognizance of the findings hereinabove, the Appeals Authority hereby dismiss the Appeal and allows the Respondent to proceed with the Tender process. Since the reasons for this decision is not based on parties' submissions, we make no order as to costs.

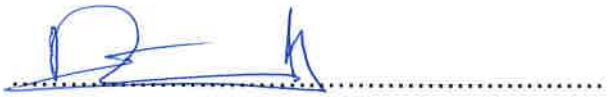
It is so ordered.

This decision 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 decision is delivered in the presence of the parties this 23rd day of November 2023.

ADVOCATE ROSAN MBWAMBO



Ag. CHAIRPERSON

MEMBERS: -

1. MR. PIUS MPONZI.....

2. DR. WILLIAM KAZUNGU.....