

IN THE PUBLIC PROCUREMENT APPEALS AUTHORITY

APPEAL CASE NO. 25 OF 2024 - 2025

BETWEEN

M/S GIZA SYSTEMS S. A. E.....APPELLANT

AND

**TANZANIA ELECTRIC SUPPLY
COMPANY LIMITED.....RESPONDENT**

RULING

CORAM

- | | |
|-------------------------------------|---------------|
| 1. Hon. Justice (Rtd) Sauda Mjasiri | - Chairperson |
| 2. Adv. Rosan Mbwambo | - Member |
| 3. Dr. William Kazungu | - Member |
| 4. Mr. James Sando | - Secretary |

SECRETARIAT

- | | |
|-------------------------|---------------------------|
| 1. Ms. Florida Mapunda | - PALS Manager |
| 2. Ms. Agnes Sayi | - Principal Legal Officer |
| 3. Ms. Violet Limilabo | - Senior Legal Officer |
| 4. Mr. Venance Mkonongo | - Legal Officer |

FOR THE APPELLANT

- | | |
|-------------------------|--|
| 1. Mr. Kay Felician | - Advocate - K. M. Felician &
Co. Advocates |
| 2. Mr. Biseko Nyagabona | - Advocate - K.M. Felician &
Co. Advocates |
| 3. Mr. Shabani Byabato | - Sales Accountant Manager |



FOR THE RESPONDENT

- | | |
|--------------------------|---------------------------------|
| 1. Ms. Elizabeth Kimako | - Senior Legal Officer |
| 2. Mr. Mkumbo Elias | - Senior Legal Officer |
| 3. Mr. Mohamed Yahaya | - Engineer |
| 4. Mr. Deogratias Thomas | - Principal Procurement Officer |
| 5. Mr. Mwigira Kasalama | - Procurement Officer |
| 6. Ms. Irene Binonu | - Procurement Officer |

This Appeal was lodged by **M/S Giza Systems S. A. E** (hereinafter referred to as "**the Appellant**") against the **Tanzania Electric Supply Company Limited**, commonly known by its acronym as "**TANESCO**" (hereinafter referred to as "**the Respondent**"). The Appeal is in respect of Tender No. TR212/2023/2024/G/1722 *"for Supply and Installations of OPGW Fiber Cable for Replacement of Aged ADSS Cable between Ilala-Ubungu, Ubungu-Morogoro, Morogoro-Kidatu, Kidatu-Iringa and Iringa-Kihansi, Njiro-Kiyungi. (First Phase to cover 507km (Ilala-Ubungu, Ubungo-Morogoro, Morogoro-Kidatu, Iringa-Kihansi))"* (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 International Competitive Tendering method as specified in the Public Procurement Act, No.10 of 2023 (hereinafter referred to as "**the Act**") and the Public Procurement



Regulations, GN. No. 518 of 2024 (hereinafter referred to as "**the Regulations**").

On 26th June 2024, the Respondent through National e-Procurement System of Tanzania (**NeST**) invited eligible tenderers to participate in the Tender. The deadline for submission of tenders was set on 31st July 2024. On the deadline, seven tenders, including that of the Appellant were received by the Respondent.

The received tenders were subjected to evaluation. After completion of the evaluation process, the Evaluation Committee recommended award of the Tender to M/S Giza Cable Industries S. A. E. The recommended contract price was Tanzania Shillings Twelve Billion Seven Hundred Forty-Seven Million Two Hundred Seventy-Six Thousand Six Hundred and Forty only (12,747,276,640.00) VAT Exclusive.

The Tender Board approved the award of the Tender as recommended by the Evaluation Committee subject to negotiations at its meeting held on 5th November 2024. On 18th November 2024, negotiation successfully took place whereby the proposed successful tenderer reduced the contract price from TZS 12,747,276,640.00 VAT Exclusive to Twelve Billion Six Hundred Nineteen Million Eight Hundred Three Thousand Eight Hundred Seventy-Three and Sixty Cents only (12,619,803,873.60) VAT Exclusive. The Tender Board through Circular Resolution No. 995/11/2024 approved the negotiation report.

On 21st November 2024, the Respondent issued the Notice of Intention to award the Tender. The Notice indicated that the Respondent intended to



award the Tender to M/S Giza Cable Industries S. A. E. In addition, the Notice stated that the Appellant's tender was not considered for award as it failed to comply with specific experience requirement as provided in the Tender Document.

Upon being dissatisfied with the reason given for its disqualification, on 26th November 2024, the Appellant applied for administrative review to the Respondent. Having not received responses from the Respondent, on 17th December 2024, the Appellant filed this Appeal to the Appeals Authority. The record of Appeal indicates that the Respondent's decision was issued through a letter dated 10th December 2024, which was delivered to the Appellant via e-mail on 18th December 2024.

In this Appeal, the Appellant disputes the Respondent's decision of disqualifying its tender. The Appellant contended to have complied with specific experience requirement as provided in the Tender Document. Thus, its disqualification from the Tender process was unfair.

Upon receipt of the Appeal, the Appeals Authority notified the Respondent about the existence of the Appeal and required it to submit a Statement of Reply. In its Statement of Reply, the Respondent maintained its position that the Appellant was fairly disqualified. In addition, the Respondent raised a Preliminary Objection (PO) on a point of law to wit that: -

The Appeal before this Appeals Authority has been filed out of time contrary to Section 121(2)(a) of the Act.



When the matter was called on for hearing the following issues were framed, namely: -

1.0 Whether the Appeal is properly before the Appeals Authority;

2.0 Whether the disqualification of the Appellant's tender was justified;

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

Having framed the issues, parties were required to address the Appeals Authority on the first issue which related to the PO raised by the Respondent before embarking on the merit of the Appeal.

SUBMISSIONS BY THE RESPONDENT ON THE PO

The Respondent's submissions were made by Ms. Elizabeth Kimako and Mr. Elias Mkumbo Senior Legal Officers. Ms. Kimako stated that the Appeal before the Appeals Authority has been filed out of time an act which contravened the requirement of Section 121(2)(a) of the Act. She submitted that the said provision provides that a tenderer may submit a complaint or dispute directly to the Appeals Authority if the accounting officer has failed to issue a decision within the time prescribed under the law. A tenderer which has not received the procuring entity's decision on its application for administrative review is required to file an Appeal to the Appeals Authority within five working days from the date the procuring entity was required to issue its decision.

Ms. Kimako submitted that the Notice of Intention to award the Tender was issued to the Appellant on 21st November 2024 through NeST. The



cool off period of five working days started to run from 21st November to 28th November 2024. On 26th November 2024, the Appellant applied for administrative review to the Respondent. The Respondent was required to issue its decision on the application for administrative review within five working days that is, on or before 4th December 2024.

Ms. Kimako submitted that due to its internal arrangement, the Respondent communicated its decision to the Appellant on 18th December 2024. However, the Appellant was not required to wait for the Respondent's decision. After a lapse of five working days within which the Respondent was required to issue its decision, the Appellant was required to file its Appeal to the Appeals Authority between 5th and 11th December 2024. To the contrary, the Appellant filed this Appeal on 17th December 2024, three working days later. Therefore, the Appeal has been preferred out of time contrary to the requirement of Section 121(2)(a) of the Act. Thus, the same should not be entertained for being improperly before the Appeals Authority.

Ms. Kimako submitted that Section 3(1) of the Law of Limitation Act, [CAP. 89 R.E. 2019], requires a matter which has been filed out of the prescribed time under the law to be dismissed. She stated that, since this Appeal has been filed out of time specified under the Act, the same should be dismissed.

In support of her submissions Ms. Kimako cited the case of ***Sarepta Network Investment (SANEICO) Versus Bukoba District Council and Another***, Civil Case No. 16 of 2021, (HC) Bukoba District Registry. In this case the Court cited the case of ***Iga versus Makerere University***



(1972) EA 65, where the Court stated that indeed, the law of limitation knows neither sympathy nor equity. In emphasizing on this point the Court of Appeal of Tanzania in the case of **Barclays Bank of Tanzania Limited versus Phylisiah Hussein Mchemi**, Civil Appeal No. 19 of 2016 (Unreported) made reference to the case of **John Cornel versus A. Grevo (T) Limited**, Civil Case No. 70 of 1998, High Court Tanzania, DSM 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 gets caught in its web."

Ms. Kimako also relied in the case of **Luhumbo Investment Limited versus National Bank of Commerce Limited and Two Others**, Civil Appeal No. 503 of 2020, (CA), at Shinyanga.

In support of the submissions made by Ms. Kimako, Mr. Mkumbo Elias stated that having observed that the time for filing an appeal had already lapsed, the Appellant was required to seek for extension of time to file an Appeal out of time. The application for extension of time was to be filed within seven days after a lapse of time for filing of an Appeal. Mr. Mkumbo submitted that the Appellant did not seek for extension of time. It directly proceeded to file this Appeal. Thus, its Appeal was filed out of the time prescribed under the law.

Mr. Mkumbo stated that a delay of even a single day has to be accounted for since the same should not be taken for granted. In support of his argument in this regard, Mr. Mkumbo relied on the Case of **Hyasintha**



Malisa versus John Malisa, Civil Application No. 167/01 of 2021, (CA) at Dar es Salaam.

Mr. Mkumbo concluded his submissions by stating that based on the requirements of the law and principles stated in the above cited cases, the Appeals Authority should maintain its earlier position issued in respect of PPAA Appeal Case No. 12 of 2023-24 between ***BAMM Solutions (T) Ltd versus Hanang District Council***. In the said Appeal, the Appeals Authority dismissed the Appeal for being filed out of time prescribed under the law.

Mr. Mkumbo further prayed for the dismissal of the Appeal with costs. He urged the Appeals Authority to grant costs as was granted in PPAA Appeal Case No. 1 of 2013-14 between ***M/S Cool Care Services Limited versus Surface and Marine Transport Authority***. In the referred Appeal, the Appeals Authority allowed the Appeal and ordered the Respondent to compensate the Appellant a sum of Tanzania Shillings 120,000.00 being filing fees for the Appeal.

SUBMISSIONS BY THE APPELLANT ON THE PO

The Appellant's submissions were made by Mr. Biseko Nyagabona and Mr. Kay Felician, learned Advocates. Mr. Nyagabona commenced his submissions by stating that the Notice of Intention to award the Tender was issued on 21st November 2024. Upon being dissatisfied with the reason given for its disqualification, on 26th November 2024, the Appellant applied for administrative review to the Respondent. The Respondent was required to issue its decision within five working days.



The Respondent issued its decision through a letter dated 10th December 2024, which was received by the Appellant on 18th December 2024. The Appellant filed this Appeal on 17th December 2024, within the time limit if the filing date could be considered with effect from 10th December 2024.

The Appeals Authority required the learned counsel for the Appellant to consider Section 121(2)(a) of the Act relied upon by the Respondent that provides guidance on filing of an Appeal to the Appeals Authority if the procuring entity fails to issue its decision within the specified time limit. Having considered the referred provision, Mr. Felician conceded that the Appeal was filed out of time prescribed under the law. However, he sought the indulgence of the Appeals Authority to apply the overriding objective principle regardless of the fact that the Appeal has been filed out of time.

ANALYSIS BY THE APPEALS AUTHORITY ON THE PO

1.0 Whether the Appeal is properly before the Appeals Authority

In resolving this issue, the Appeals Authority reviewed the record of Appeal. It observed that on 21st November 2024, the Respondent issued the Notice of Intention to award the Tender. The Notice indicated that the Appellant was disqualified for failure to comply with specific experience requirement. The Appellant was dissatisfied with the reason given for its disqualification, thus on 26th November 2024, it applied for administrative review to the Respondent. When the Appellant did not receive a response from the Respondent, on 17th December 2024, it filed this Appeal to the Appeals Authority.



The Appeals Authority reviewed Sections 120(6) and (8) and 121(2)(a) of the Act. The referred provisions require an accounting officer of a procuring entity after receipt of an application for administrative review from a tenderer, to issue its decision within five working days or seven working days if it has formed an independent review team. The provisions require that if the procuring entity fails to issue its decision within the specified time limit, an aggrieved tenderer should file an Appeal directly to the Appeals Authority within five working days from the last date the procuring entity was required to issue its decision. Sections 120(6) and (8) and 121(2)(a) of the Act read as follows: -

"120.-(6) Within five working days after the submission of the complaint or dispute, or within seven days in case an independent review panel is constituted, the accounting officer shall deliver a written decision which shall-

(a) state the reasons for the decision; and

(b) if the complaint or dispute is upheld in whole or in part indicate the corrective measures to be taken.

(8) Where the accounting officer does not issue a decision within the time specified in subsection (7), the tenderer submitting the complaint or dispute to the procuring entity shall be entitled immediately thereafter to institute proceedings under section 121 and upon institution of such proceedings, the competence of the accounting officer to entertain the complaint or dispute shall cease.



121.- (2) A tenderer may submit a complaint or dispute directly to the Appeals Authority if-

*(a) the accounting officer has not given a decision within the time prescribed under this Act, provided that a complaint or dispute **is submitted within five working days after expiry of the period within which the accounting officer ought to have made a decision.**"*

(Emphasis added)

After relating the above quoted provisions to the facts of the Appeal, the Appeals Authority observed that the Appellant has submitted its application for administrative review to the Respondent on 26th November 2024, within five working days as required by the law. The Respondent was required to issue its decision within five working days or seven working days if it had formed an independent review team. Counting from 26th November 2024, the five working days within which the Respondent was required to have issued its decision expired on 4th December 2024. However, no decision was issued.

As the Respondent failed to issue its decision within the prescribed time, the Appellant had a right to submit an Appeal directly to the Appeals Authority within five working days from the date the Respondent was required to have issued its decision. The Appellant was required to submit its Appeal on or before 12th December 2024. To the contrary, the Appellant filed this Appeal to the Appeals Authority on 17th December 2024 beyond five working days prescribed under the law. From the above



observation, the Appeals Authority is of the settled view that the Appeal has been filed out of time contrary to the requirement of the Act.

The Appeals Authority considered the Appellant's argument that it should apply the overriding objective principle in this Appeal as the delay in filing the Appeal was caused by the Respondent's failure to issue its decision within the specified time limit. Based on the requirements of Sections 120(8) and 121(2)(a) of the Act quoted hereinabove, the Appeals Authority observes that the overriding objective principle cannot be applied to cure contravention of the law of limitation. The limitation of time touches the jurisdiction of the Appeals Authority.

Consequently, the Appeals Authority sustains the preliminary objection and concludes the first issue in the negative that the Appeal is not properly before the Appeals Authority for being filed out of time.

The Appeals Authority hereby dismiss the Appeal. In view of the fact that the Appellant conceded to have filed the Appeal out of time, the Appeals Authority orders each party to bear its own costs.

It is so ordered.

This decision is binding and can be enforced in accordance with Section 121(7) of the Act.

The Right of Judicial Review as per Section 125 of the Act is explained to the parties.

A handwritten signature in blue ink, appearing to be 'J. R. J.', is located at the bottom of the page.

This Ruling is delivered in the presence of the parties this 15th day of January 2025.

HON. JUSTICE (rtd) SAUDA MJASIRI



.....
CHAIRPERSON

MEMBERS: -

1. ADV. ROSAN MBWAMBO.....



2. DR. WILLIAM KAZUNGU.....

