

IN THE PUBLIC PROCUREMENT APPEALS AUTHORITY

APPEAL CASE NO. 5 OF 2022-23

BETWEEN

M/S AUTOTERMINAL JAPAN LIMITED.....APPELLANT

AND

TANZANIA BUREAU OF STANDARDS.....RESPONDENT

RULING

CORAM

- | | |
|---------------------------|-------------------|
| 1. Adv. Rosan S. Mbwambo | - Ag. Chairperson |
| 2. Mr. Pius M. Mponzi | - Member |
| 3. Dr. William M. Kazungu | - Member |
| 4. Ms. Florida R. Mapunda | - Ag. Secretary |

SECRETARIAT

- | | |
|------------------------|------------------------|
| 1. Ms. Agnes Sayi | - Senior Legal Officer |
| 2. Ms. Violet Limilabo | - Senior Legal Officer |

FOR THE APPELLANT

- | | |
|-------------------------|-----------------------------------|
| 1. Mr. Sigsbert Ngemera | - Advocate, MNL Law Chambers |
| 2. Ms. Lilian Kweka | - Legal Officer, MNL Law Chambers |
| 3. Mr. Judith Mpira | - Legal Officer, MNL Law Chambers |
| 4. Lucy Faustine | - Legal Officer, MNL Law Chambers |

FOR THE RESPONDENT

- | | |
|-----------------------|---------------------------------|
| 1. Mr. Daniel Nyakiha | - State Attorney |
| 2. Mr. Ayoub Sanga | - State Attorney |
| 3. Ms. Lucy Mallya | - State Attorney |
| 4. Ms. Pauline Mnyera | - Principal Procurement Officer |

This is an appeal by M/S Autoterminal Japan Ltd (hereinafter referred to as **"the Appellant"**) against Tanzania Bureau of Standards commonly known by its acronym as **"TBS"** (hereinafter referred to as **"the Respondent"**). The Appeal arises from Tender No. PA/044/2021-2022/HQ/NC/19 for Provision of Pre-Shipment Verification of Conformity to Standards (PVOC) Services for Used Motor Vehicles for Tanzania Bureau of Standards (hereinafter referred to as **"the Tender"**). Its background may be summarized as follows: -

On 4th March 2022, the Respondent through Tanzania National e-Procurement System (TANePS) invited eligible tenderers to participate in the Tender. Deadline for submission of tenders was set for 1st April 2022. By the deadline, four (4) tenders were received.

The received tenders were accordingly evaluated. After completion of the evaluation process, the Evaluation Committee recommended award of the contract to M/s Quality Inspection Services Inc. Japan and M/s EAA Company Ltd subject to due diligence. The Tender Board at its meeting held on 30th April 2022 approved the award as recommended by the Evaluation Committee. The due diligence was conducted between 25th May

2022 and 2nd June 2022. The due diligence team recommended award of the Tender to M/s EAA Company Ltd.

On 5th July 2022, the Respondent issued a Notice of Intention to award the contract to all tenderers. The said Notice informed the tenderers that it intended to award the contract to M/s EAA Company Ltd at a fixed inspection rate of USD 150.00 per motor vehicle for a period of three years. The Notice also informed the Appellant that it was disqualified due to its failure to attach a copy of a bank guarantee contrary to the requirement under Clause 17.1 of the Instructions to Tenderers (ITT); and that the Appellant submitted altered Form of Tender contrary to Clause 13.1 of the ITT.

The Appellant stated that having been aggrieved, on 13th July 2022 it lodged an application for administrative review to the Respondent challenging its disqualification. The record of Appeal indicates that there was no decision issued with respect to the application for administrative review. On 4th August 2022, the Appellant lodged the Appeal in this Public Procurement Appeals Authority (hereinafter referred to as "**the Appeals Authority**").

GROUND OFS OF APPEAL

The Appellant complained that the reason for its disqualification advanced by the Respondent is unfounded because a copy of a bank guarantee was attached well in compliance with Clause 15 of the Tender Data Sheet (TDS) and Clause 17.1 of the ITT. It is also complained that the

Respondent erred in fact and law for disqualifying the Appellant allegedly for altering the Form of Tender contrary to Clause 13.1 of the ITT while the said Clause 13.1 of the ITT does not exist in the Tender Document. Therefore, the Appellant prayed for a declaration that it complied with the Tender requirements; that an award may be issued to the Appellant; costs; and any other reliefs the Appeals Authority may deem just.

REPLY BY THE RESPONDENT

The Respondent's reply was preceded by two points of Preliminary Objection (PO) namely that: -

- (a) *"The Appeal is vexatious, frivolous and untenable in law for want of the decision by the procuring entity capable of being appealed against as the Appellant did not exhaust remedies available by lodging complaint, contrary to Section 96(1) of the Public Procurement Act, 2011 as amended.*
- (b) *In alternative to point of objection No.1 above, the Appeal before this Appeals Authority is untenable in law for being filed out of time contrary to Section 96(6) of the Act."*

The Respondent's reply to the Appellant's grounds of Appeal may be summarized as follows:-

It is stated that the Appellant has been disqualified from the Tender process for submitting a bid bond instead of the bank guarantee as required by Clause 17.1 of the ITT and Clause 15 of the TDS. That the



Appellant was also disqualified for altering the Form of Tender by adding unwanted information regarding administration fees contrary to the requirement provided in the standard Form of Tender issued. The form required tenderers to comply with conditions stipulated under Clause 23 of the Special Conditions of Contract (SCC). Finally, the Respondent prayed for dismissal of the Appeal in its entirety. The Appeals Authority has also been asked to allow the Respondent to proceed with the performance of the contract entered with M/S EAA Company Ltd as signed on 19th July 2022; and any other relief deemed fit and just by the Appeals Authority.

When the matter was called on for hearing the Appeals Authority directed that it would hear both the PO and the merits of the Appeal and the following issues were framed:-

- 1.0 Whether the Appeal is properly before the Appeals Authority;**
- 2.0 Whether the disqualification of the Appellant's tender was justified; and**
- 3.0 What reliefs, if any, are the parties entitled to?**

RESPONDENT'S SUBMISSIONS ON THE PO

The Respondent was represented by Mr. Daniel Nyakiha and Mr. Ayoub Sanga, learned State Attorneys. They submitted that in order for a tenderer to file an appeal before the Appeals Authority there should be a decision of

a procuring entity appealed against. The procuring entity's decision is made following a complaint or an application for administrative review filed before it. In the instant case no complaint or an application for administrative review was filed before the Respondent. There is consequently no procuring entity's decision to be appealed against.

In support of this proposition the learned State Attorneys cited the case of ***M/S Aqua Power Tanzania Ltd (T/A Turbine Tech) versus the Public Procurement Appeals Authority and 3 Others***, Miscellaneous Civil Cause No. 32 of 2021, High Court of Tanzania (Main Registry) at Dar es Salaam (unreported). In this case the court held that the Appeals Authority should only handle appeals arising out of applications for administrative review.

It was submitted that the Appellant purported to have lodged its application for administrative review through a letter dated 13th July 2022 attached to the Statement of Appeal. According to the Respondent there was no proof that such a letter was served and received by the Respondent. The letter does not bear the Respondent's stamp, name and signature. In support of their proposition the learned State Attorneys cited the case of ***National Bank of Commerce Ltd and another versus Ballast Construction Company Ltd***, Civil Appeal No. 72 of 2017, Court of Appeal of Tanzania at Tanga (unreported) where it was stated that:

"In our case, it is evident that the notice under consideration bears neither the signature nor the stamp of a person whom it was served".

The case of **Raphael Ologi Andrea versus Musoma Urban Water Supply and Sanitation Authority**, Civil Appeal No. 468 of 2020, Court of Appeal of Tanzania at Musoma (unreported) was also cited. In this case the Court held that:-

"Indeed the notice of appeal appearing at pages 151-152 of the record of Appeal was not copied to the Respondent and was not duly served on the respondent because there is no indication to that effect. There is no name of the recipient, rubber stamp or anything to prove that the Respondent ever received the notice".

It was submitted for the Respondent that in the absence of proof that the purported application for administrative review was lodged with the Respondent it is obvious that the Appellant did not exhaust the requirement of Sections 95, 96 and 97 of the Public Procurement Act, No. 7 of 2011, as amended in 2016 (hereinafter referred to as "**the Act**") and Regulation 107 of the Public Procurement Regulations, Government Notice No. 446 of 2013, as amended by GN. No. 333 (hereinafter referred to as "**the Regulations**"). The cited provisions require tenderers who are dissatisfied with the tender process to file an application for administrative review before filing an Appeal to this Appeals Authority. The Appeal to this

Appeals Authority should be based on the decision of the procuring entity on the application for administrative review.

Thus, the Appellant's failure to exhaust the review procedures as provided under the law renders this Appeal invalid.

The Respondent also responded to the Appellant's proposition that this point of preliminary objection is not a pure point of law as per ***Mukisa Biscuits Manufacturing Company Ltd vs. West End Distributors Ltd (1969) EA 696*** where the court held that:-

"A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct, it cannot be raised if any fact has to be ascertained."

According to the learned State Attorneys, looking at the holding in Mukisa Biscuits' case it acknowledges that preliminary objections do arise out of pleadings. Further that the position of the law in Mukisa's case was expounded in the case of ***Moto Matiko Mabanga versus Ophir Energy PLC and 6 others***, Civil Appeal No. 119 of 2021, Court of Appeal of Tanzania at Dar es salaam (unreported). In this case the Court of Appeal quoting its own decision in ***Ali Shaban and 48 Others Vs Tanzania National Roads Agency and Another***, Civil Appeal No. 261 of 2020 Court of Appeal of Tanzania at Tanga (Unreported) stated that:-

" It is clear that an objection as it were on account of time bar is one of the preliminary objection which courts have held to be based on 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 the instance case the preliminary objection arises out of the facts as stated in the statement of appeal and attachments. The point raised relates to jurisdiction and limitation. It is a pure point of law envisaged in Mukisa Biscuits' case; the learned counsels insisted.

As regards the second PO, the Respondent submitted that the Appeal is time barred as it was filed in contravention to the requirement of Sections 95, 96 and 97 of the Act. According to the Respondent, the Appellant upon being dissatisfied with the Notice of intention to award ought to have submitted the application for administrative review to the Respondent within seven working days. Counting from 5th of July 2022 when the Notice of Intention to award was issued, the seven working days for filing an application for administrative review ended on 15th July 2022.

The Appellant purported to have filed an application for administrative review on 13th July 2022, although the same was not received by the Respondent. Assuming that the said application for administrative review was received, the Respondent in compliance with Section 96(6) of the Act

was required to issue its decision within seven working days. Counting from 13th July 2022 when the Appellant purported to have lodged its application for administrative review, the Respondent should have issued its decision by 25th July 2022. Upon the Respondent's failure to issue the decision within the stipulated time, the Appellant was required to lodge its Appeal to this Appeals Authority within seven working days pursuant to Section 97(2) of the Act. That is to say, the Appellant ought to have lodged its Appeal by 3rd August 2022. The Appellant lodged the Appeal on 4th August 2022, a day late.

In support of their argument the learned State Attorneys cited the case of ***Fortunatus Lwanyantika Masha and Another versus Claver Motors Limited***, Civil Appeal No. 144 of 2019, Court of Appeal of Tanzania at Mwanza (unreported) whereby the court held with approval the decision of the High Court in the case of ***John Cornel versus A. Grevo (T) Limited*** Civil Case No. 70 of 1998. In the referred case the High Court stated that:-

"However, unfortunate it may be for the plaintiff; the law of limitation is on actions knows no sympathy or equity. It is merciless sword that cuts across and deep into all those who get caught in its web."

The learned State Attorneys concluded their submissions insisting that the Appeal is time barred and prayed for its dismissal. They did not press for costs.

SUBMISSIONS BY THE APPELLANT ON PO

Mr. Sigsbert Ngemera, learned counsel for the Appellant commenced his submissions by stating that the second PO is couched as a game of chance with intention that the appeal should not be heard on merits. The learned counsel submitted that this trend was rebuked in the case of ***Hector Sequiraa versus Serengeti Breweries Limited***, Civil Application No. 395/18 of 2019, Court of Appeal of Tanzania at Dar es salaam (unreported). In that case the Court stated that:-

"the law does not allow riding two horses at the same time because it amounts to an abuse of court process."

The learned counsel submitted that parties to a case are to be bound by their pleadings and not otherwise. The Appellant filed the application for administrative review to the Respondent on 13th July 2022. The said application was duly served by Mr. Wilbroad Peter, a Regional Manager of the Appellant. According to the Regional Manager the application for administrative review was received by a secretary in the Respondent's office. The learned counsel stated further that Tender Document is silent about the service of the application for administrative review. There is no provision which requires that for service of an application for administrative review to be effective it must be stamped and signed by the receiver as alleged by the Respondent.

The counsel submitted further that challenging the contents of the application for administrative review at this juncture is a matter of evidence



and the same should be disregarded. The learned counsel stated that preliminary objection should be a pure point of law and there should not be a recourse to facts or evidence as it was stated in the case of ***Mukisa Biscuits Manufacturing Company Ltd vs. West End Distributors Ltd (1969) EA 696***. Thus, arguing a PO basing on the contents of the application for administrative review contravenes the principle set in the above landmark case. Annexure 4 to the Statement of Appeal simply proves that the application for administrative review was lodged to the Respondent within the stipulated time limit.

As the application for administrative review was properly lodged, the Respondent ought to have issued its decision within the time prescribed by the law. Despite several follow ups, the Appellant did not receive the Respondent's decision on the application for administrative review. It received a verbal communication on 1st August 2022 through Mr. Wilbroad Peter, the Appellant's Regional Manager that the Respondent does not intend to entertain its application for administrative review. The learned counsel stated that after receipt of such communication from the Respondent, the Appellant lodged this Appeal.

The learned counsel submitted that, according to Section 96(4) of the Act, an Appeal to this Appeals Authority has to be lodged upon being aware of the circumstances giving rise to an appeal. The Appellant became aware of the circumstances giving rise to this Appeal after being informed that the

Respondent would not entertain its application for administrative review on 1st August 2022. The Appellant then filed its Appeal on 4th August 2022.

The learned counsel's attention was drawn to Section 96(7) of the Act. This section states that where a procuring entity fails to issue its decision with respect to the application for administrative review within the stipulated time limit, a tenderer is required to file its Appeal to this Appeals Authority within seven working days. Having been made aware of Section 96(7) of the Act, the learned counsel readily conceded that the Appeal was filed beyond the stipulated time limit.

The learned counsel stated that Section 3 of the Law of Limitation Act, CAP 89 (R.E 2019) states clearly that an appeal filed out of time should be dismissed. On costs the Appellant asked the Appeals Authority to have them waived.

ANALYSIS BY THE APPEALS AUTHORITY ON PO

In relation to the first PO, in order to ascertain if there was an application for administrative review, the Appeals Authority reviewed the record of Appeal. The Appeals Authority observed that Annexure 4 as attached to the Statement of Appeal contained a letter dated 13th July 2022 addressed to the Respondent. The letter is titled "*APPEAL TO BE AWARDED A CONTRACT FOR THE PROVISION OF PRE-SHIPMENT OF CONFORMITY TO THE STANDARDS (PVOC) FOR USED MOTOR VEHICLES...*". The said letter indicates that the Appellant was challenging reasons given for its disqualification from the Tender process.

Much as the said letter was addressed to the Respondent, the Respondent denied having received it. The Respondent contended that the Appellant did not file an application for administrative review and therefore there was no decision of the Respondent capable of being appealed against. On the other side, the Appellant claimed to have served the Respondent with the application for administrative review.

During the hearing the Appellant was asked to substantiate the mode used in serving the application for administrative review. In response thereof the Appellant stated that, the application for administrative review was physically delivered to the secretary at the Respondent's office by one Mr. Wilbroad Peter, the Appellant's Regional Manager. The Appellant submitted that a recipient did not sign anywhere as a proof that the said application for administrative review was served. The Appellant also contended that it did not have a dispatch book where the Respondent could sign.

The Appeals Authority reviewed the Appellant's application for administrative review and observed that it did not contain any proof which indicates that the same was served to the Respondent. From this fact, the Appeals Authority is of the view that the Appellant was duty bound to establish that the application for administrative review was duly served to the Respondent. The Appellant failed to establish before the Appeals Authority that the service was effected.

The Appeals Authority agrees with the Respondent's proposition that, for a service to be effective there should be a proof to that effect. The Respondent's position was drawn from the case of ***National Bank of Commerce Ltd and another versus Ballast Construction Company Ltd*** and the case of ***Raphael Ologi Andrea versus Musoma Urban Water Supply and Sanitation Authority*** (supra). In both cases the court indicated that in order to have an effective service there should be a name of the recipient, stamp, signature or any other evidence which proves that the served document was received.

In the absence of proof that its application for administrative review was served to the Respondent, the Appeals Authority finds that the Appellant did not file the application for administrative review. The Appellant's failure in this regard contravenes the requirement of Sections 96(1) and (4) of the Act which read as follows:-

Sec. 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.

(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."

Having found that there was no application for administrative review, consequently there could be no decision to be appealed against. The Appeals Authority is therefore of the settled view that, there is no proper appeal before it as the Appellant failed to exhaust the review procedures provided for in the Act.

Having so held, the Appeals Authority need not delve into the other limb of the PO as well as the merits of the Appeal.

The Appeals Authority hereby dismiss the Appeal for being improperly before it. Since the Respondent did not press for costs, 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 07th day of September 2022.

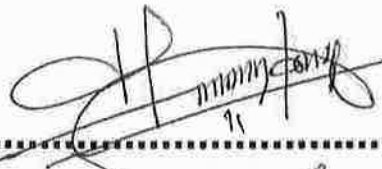
ADV. ROSAN S. MBWAMBO



Ag: CHAIRPERSON

MEMBERS: -

1. MR. PIUS M. MPONZI



2. DR. WILLIAM M. KAZUNGU



