

IN THE PUBLIC PROCUREMENT APPEALS AUTHORITY

APPEAL CASE NO. 14 OF 2022-23

BETWEEN

**M/S BHARYA ENGINEERING & CONTRACTING
COMPANY LTDAPPELLANT**

AND

**TANZANIA NATIONAL ROADS AGENCY - COAST
REGION.....RESPONDENT**

RULING

CORAM

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| 1. Adv. Rosan Mbwambo | - Ag. Chairperson |
| 2. Eng. Stephen Makigo | - Member |
| 3. Dr. William Kazungu | - Member |
| 4. Ms. Florida Mapunda | - Ag. Secretary |

SECRETARIAT

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

FOR THE APPELLANT

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| 1. Ms. Edith Michael Mtweve | - Advocate -Victory Attorneys &
Consultants |
| 2. Mr. Bharya Sarbijit | - Chief Executive Officer-BECCO Ltd |
| 3. Mr. Alex Matogoro | - Chief Accountant |



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| 4. Mr. Elisante Mkumbo | - Materials Engineer |
| 5. Mr. Ramadhan Rashid | - Engineer |

FOR THE RESPONDENT

- | | |
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| 1. Mr. Kenan Komba | - Chief Legal Counsel |
| 2. Mr. Gurisha Muwanga | - Senior Legal Counsel |
| 3. Mr. Juma Ngaile | - In charge of procurement |
| 4. Ms. Heririsper Mollel | - In charge of Development Projects Unit |

M/S Bharya Engineering & Contracting Company Ltd (hereinafter referred to as "**the Appellant**") has preferred this appeal against **Tanzania National Roads Agency - Coast Region** (hereinafter referred to as "**the Respondent**"). The Appeal arises from Tender No. AE/001/2022-23/CR/W/42 for Rehabilitation Works along Msoga-Msolwa Road (hereinafter referred to as "**the Tender**"). Material background of the appeal as obtained from the records before the Public Procurement Appeals Authority (hereinafter referred to as "**the Appeals Authority**") may be summarized as follows: -

The Tender was conducted through Restricted 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 by GN. No. 333 of 2016 (hereinafter referred to as "**the Regulations**").

On 1st July 2022, the Respondent through Tanzania National e-Procurement System (TANePS) invited seven tenderers to participate in

the Tender. Deadline for submission of Tenders was set on 8th July 2022. On the deadline four tenders including that of the Appellant were received.

Tenders were then evaluated and after completion of the evaluation process, the Evaluation Committee recommended award of the Tender to M/S Del Monte (T) Ltd at a contract price of TZS 6,833,283,410.00 VAT inclusive (Tanzanian Shillings Six Billion Eight Hundred Thirty Three Million Two Hundred Eighty Three Thousand Four Hundred Ten only) subject to negotiations.

The Tender Board at its meeting held on 22nd July 2022, approved the award of the Tender to M/S Del Monte (T) Ltd as recommended by the Evaluation Committee. The negotiations were successfully conducted on 3rd August 2022.

On 10th August 2022, the Respondent issued a Notice of Intention to award the Tender. The Notice informed tenderers that it intends to award the Tender to M/S Del Mont (T) Ltd at the contract price of TZS 6,722,455,700.00 (Tanzanian Shillings Six Billion Seven Hundred Twenty Two Million Four Hundred Fifty Five Thousand Seven Hundred only). The Notice also informed the Appellant that its tender was disqualified for three reasons namely: -"

- i. *Failure to meet the qualification criteria on experience of works of a similar nature and complexity between 2017/18 and 2021/2022;*
- ii. *Failure to demonstrate availability of adequate working capital;*
and
- iii. *The Appellant has been engaged in fraudulent practice for submitting non existing contract No.*

TRD/RM/MBY/2017/2018/T/05 with a contract sum of TZS 3,085,642,211.54 for periodic maintenance works of Tanzania highway at Mlima Nyoka which was executed at the Regional Managers Office TANROADS Mbeya."

Dissatisfied with the reasons given for its disqualification, on 15th August 2022, the Appellant applied for administrative review. On 17th August 2022, the Respondent issued its decision dismissing the application for administrative review. On 20th August 2022, the Appellant wrote a letter to the Regional Manager, TANROAD Mbeya asking for rectification of the details in a defect liability certificate that had led to the allegation of fraud. On 26th August 2022 the regional manager wrote a letter in response indicating that the defect liability certificate had mistakenly referred to a wrong contract number.

Believing that the allegation of fraud has been cleared the Appellant wrote to the Respondent on 26th August 2022 insisting that the Respondent should re-consider its decision. On 30th August 2022, the Respondent responded reiterating its position as communicated on 17th August 2022. Still aggrieved the Appellant filed this Appeal on 1st September 2022.

The Respondent accordingly filed its statement of reply followed by a notice of Preliminary Objection (PO) on the point of law to wit:

"The Appellant's Appeal before this Appeals Authority is untenable in law for being filed out of time contrary to Section 97(2)(b) of the Act."

When the appeal was called on for hearing the Appellant had the services of Ms. Edith Michael Mtweve, learned advocate. Mr. Kenan Komba, Chief Legal Counsel and Mr. Gurisha Muwanga, Senior Legal Counsel represented the Respondent. The Respondent through Mr. Gurisha Muwanga Senior Legal Counsel made submissions in chief on the preliminary objection. Ms. Mtweve, learned counsel accordingly, responded. However, following some questions posed by the Appeals Authority to the learned counsel for the Appellant and after consultation with her client she finally conceded to the preliminary objection.

The learned counsel while conceding that the appeal has been filed out of time, she orally prayed for extension of time to file an appeal out of time. According to the learned counsel the Respondent had raised serious allegations on fraudulent practices against the Appellant. These allegations may result into serious consequences including debarment of the Appellant should the Respondent's decision not subjected to an appeal before the Appeals Authority. The Appellant contended that the firm has been operating since 1972. Therefore, the allegation of fraudulent practices levelled against the Appellant would tarnish its image if not challenged by way of an appeal to the Appeals Authority. The learned counsel added that should the Appeals Authority allow this application, hearing of the intended Appeal would unveil serious irregularities in the impugned Tender.

The learned counsel submitted further that the Appeals Authority is not bound by strict rules of procedures and evidence as is in the court of law. Therefore, the counsel prayed that the extension of time be granted so that justice could be done in this Tender process.

The Respondent strongly objected to the application for extension of time. According to the Respondent what is before the Appeals Authority is an appeal and not an application for extension of time. Therefore, this application should not be granted.

Applications for extension of time to lodge an appeal out of time are governed by Rule 11 of the Public Procurement Appeals Rules, 2014 as amended in 2017 (the Appeals Rules). It reads: -

"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."

From the contents of the above quoted provision and as rightly submitted by the learned counsel for the Appellant, the Appeals Authority has powers to entertain and where appropriate grant an application for extension of time.

The Appeals Authority also agrees with the learned counsel for the Appellant's proposition that it is not bound by rules of procedures and evidence. Her 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."*

Rule 11 of the Appeals Rules as quoted above requires that an application for extension of time should be filed using PPAA Form No. 6

prescribed in the First Schedule to the Appeals Rules. Apparently, this application has been made orally. Oral applications are otherwise called informal. Informal applications are allowed where circumstances allow. On this we have in mind the proviso to Rule 2 of Order XLIII of the Civil Procedure Code Cap 33 R.E. 2019 and Rules 45(a), 48(1) and 50(2) of the Court of Appeal Rules of 2009. Coupled with the provision of Rule 24(2) of the Appeals Rules above quoted the Appeals Authority finds that since proceedings before it may be conducted with little formality and technicality, an application for extension of time to file an appeal out of time under Rule 11 of the Rules may be made in writing or orally.

However, that is not all. Another requirement for making an application for extension of time under Rule 11 of the Appeals Rules is that the application should be made within seven days from the date the Appellant ought to have filed his appeal.

The decision sought to be appealed against should this application be granted was issued on 17th August 2022. Counting from 17th August 2022, the Appeal ought to have been lodged on 29th August 2022. Had the Appellant delayed to file an Appeal within the prescribed time limit, the application for extension of time ought to have been filed by 5th September 2022. On 6th October 2022, the Appellant made an oral application. Therefore, the application for extension of time orally made on 6th October 2022 is way out of the seven days prescribed period.

The Appeals Authority concludes that as rightly conceded by the learned counsel for the Appellant this Appeal is time barred. The Appeals Authority hereby dismiss both the Appeal and the subsequent application for extension of time. 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 7th day of October 2022.

ADVOCATE ROSAN MBWAMBO


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Ag. CHAIRPERSON

MEMBERS: -

1. ENG. STEPHEN MAKIGO.....

2. DR. WILLIAM KAZUNGU.....