

IN THE PUBLIC PROCUREMENT APPEALS AUTHORITY

APPEAL CASE NO. 37 OF 2022-23

BETWEEN

M/S FAIR CLASSY CONSTRUCTION

COMPANY LIMITED.....APPELLANT

AND

NATIONAL IRRIGATION COMMISSION.....RESPONDENT

RULING

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| 1. Hon. Justice (rtd) Sauda Mjasiri | - Chairperson |
| 2. Eng. Stephen Makigo | - Member |
| 3. Ms. Ndeonika Mwaikambo | - Member |
| 4. Mr. James Sando | - Secretary |

SECRETARIAT

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

FOR THE APPELLANT

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| 1. Mr. Mtama Mwita | - Managing Director |
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FOR THE RESPONDENT

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| 1. Ms. Magreth Shayo | - Legal Officer |
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| 2. Mr. Yahya Amour | - Director Procurement Management
Unit (DPMU) |
| 3. Mr. Fredrick Mushi | - Principal Supplies Officer |
| 4. Ms. Beatrice Assenga | - Supplies Officer |

The Appeal was lodged by M/S Fair Classy Construction Company Limited (hereinafter referred to as "**the Appellant**") against National Irrigation Commission (hereinafter referred to as "**the Respondent**"). The Appeal is in respect of Tender No. PA.137/2022-2023/HQ/W/54 for Construction of Eyasi Basin Irrigation Scheme at Karatu District Council-Arusha Region (hereinafter referred to as "**the Tender**").

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

The Tender was conducted through International 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 as "**the Regulations**")

On 9th September 2022, the Respondent through Tanzania National electronic Procurement System (TANePS) invited tenderers to participate in the Tender. The deadline for submission of Tenders was set for 10th October 2022. On the deadline, the Respondent received eight tenders including that of the Appellant.

The received tenders were subjected to evaluation and after completion, the Evaluation Committee recommended award of the Tender to M/S CRJE (East Africa) Limited at the contract price of Tanzanian Shillings Thirty Eight Billion Six Hundred Seventy Million One Hundred Thirty Seven Thousand Six Hundred Twenty One and Cents Eighteen only (38,670,137,621.18) VAT inclusive subject to negotiations.

The Tender Board at its meeting held on 14th December 2022 approved the award of the Tender as recommended by the Evaluation Committee subject to negotiations.

The Respondent through a letter dated 20th December 2022 invited M/S CRJE (East Africa) Limited to attend negotiations scheduled to take place on 28th December 2022. The negotiations took place as scheduled and M/S CRJE (East Africa) Limited reduced its total quoted price from TZS 38,670,137,621.18 to TZS 38,434,137,621.18 VAT inclusive. The Tender Board through Circular Resolution No. 34/2022-2023 dated 9th January 2023 approved the award as recommended by the negotiation committee.

On 9th February 2023, the Respondent issued the Notice of Intention to award the Tender to all tenderers who participated in the Tender process. The Notice informed the tenderers that the Respondent intends to award the Tender to M/S CRJE (East Africa) Limited at the contract price of Tanzanian Shillings Thirty Eight Billion Four Hundred Thirty Four Million One Hundred Thirty Seven Thousand Six Hundred Twenty One and Cents Eighteen only (38,434,137,621.18) VAT inclusive. The Notice also informed the Appellant that its tender was disqualified for submitting a signed



Memorandum Formats 1 and 2 without attaching Anti-bribery Policy/Code of Conduct and Compliance Program as required under Item 1.5 of Section IV - Qualification and Evaluation Criteria.

Dissatisfied with the reason given for its disqualification, on 30th January 2023, the Appellant applied for administrative review to the Respondent challenging its disqualification by asserting that the Anti-bribery Policy/Code of Conduct and compliance program were submitted as required by the Tender Document. The Appellant's complaint was submitted through TANEPS on 1st February 2023. On 2nd February 2023, the Respondent issued its decision which dismissed the Appellant's application for administrative review. The decision was issued through TANEPS.

The Respondent through a letter dated 8th February 2023 awarded the Tender to M/S CRJE (East Africa) Limited. The said award letter also required M/S CRJE (East Africa) Limited to submit a Performance Security of 10% of the contract price in the form of a Bank Guarantee within 14 days.

The record of Appeal indicates that the Appellant wrote another letter to the Respondent on 29th March 2023 complaining on the decision. On the other hand, the Respondent and M/S CRJE (East Africa) Limited signed the contract on 30th March 2023.

Aggrieved further, on 6th April 2023 the Appellant lodged this Appeal to the Appeals Authority.



The Appeals Authority notified the Respondent about the existence of the Appeal and required it to submit its reply thereon. The Respondent submitted its Statement of Reply which contained a preliminary objection (PO) on a point of law to wit:- **the Appeal is not properly before the Appeals Authority for being filed out of time.**

When the appeal was called on for hearing, the Appellant was represented by Mr. Mtama Mwita, the Managing Director and Ms. Magreth Shayo, Legal Officer represented the Respondent. The Respondent through Ms. Magreth Shayo made submissions on the preliminary objection. She submitted that the Notice of Intention to award was issued on 9th January 2023. Upon being dissatisfied with the Respondent's decision the Appellant filed an application for administrative review to the Respondent on 1st February 2023. The Respondent reviewed the matter and issued its decision rejecting the Appellant's complaint on 2nd February 2023. The legal officer contended that, if the Appellant was still dissatisfied with the Respondent's decision, it ought to have filed its Appeal to the Appeals Authority within seven working days in compliance with Section 97(2)(b) of the Act. To the contrary, the Appellant filed its Appeal on 6th April 2023 after a lapse of almost two months.

Ms. Shayo stated further that, from the facts of this Appeal it is crystal clear that the Appeal was filed beyond the stipulated time limit. Therefore, she prayed for the dismissal of the Appeal as it has been filed out of time.

Responding to the Respondent's submissions, Mr. Mtama Mwita for the Appellant submitted that after receipt of the Respondent's Notice of



Intention to award it filed its application for administrative review to the Respondent and subsequently this Appeal. However, following clarifications made by the Appeals Authority to him on the time limit requirements for filing an Appeal as provided under the Act, Mr. Mtama Mwita conceded to have filed this Appeal beyond the stipulated time limit.

ANALYSIS BY THE APPEALS AUTHORITY ON THE PO

In considering the PO raised by the Respondent, the Appeals Authority took cognizance of the fact that the Appellant conceded to have filed this Appeal beyond the stipulated time limit. Despite the Appellant's admission in this regard, the Appeals Authority deemed it proper to enlighten the Appellant on the requirement of the law in filing an Appeal before this Appeals Authority. In so doing the Appeals Authority revisited Section 97(1) and (2)(b) of the Act which reads as follows:-

"Sec. 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) or

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

the tenderer may make a 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)

The above quoted provision indicates that, if a tenderer is dissatisfied with the decision issued by the accounting officer it may refer the matter to the Appeals Authority within seven working days from the date of communication of the decision.

The record of Appeal indicates that, the Respondent issued the Notice of Intention to award on 9th January 2023. Upon being dissatisfied with the reason given for its disqualification, the Appellant applied for administrative review through a letter dated 30th January 2023 submitted to the Respondent through TANEPS on 1st February 2023. The Respondent issued its decision thereof through a letter dated 2nd February 2023. The record of Appeal indicates further that the Appellant wrote another letter to the Respondent which was not dated and was submitted through TANEPS in the Appeal Module on 20th February 2023. In the said letter the Appellant indicated that it was still dissatisfied with the Respondent's decision issued through a letter dated 2nd February 2023. The record from TANEPS indicates further that the Appellant was advised to submit its Appeal to the Appeals Authority since the Appeal module in TANEPS is not yet in operation.

Counting from 2nd February 2023, when the Respondent issued its decision on the Appellant's application for administrative review, the seven working days within which the Appellant ought to have lodged its Appeal lapsed on



13th February 2023. The Appellant filed this Appeal on 6th April 2023, beyond the stipulated time limit provided under the law.

Based on the facts of this Appeal, the Appeals Authority is of the settled view that, if the Appellant was dissatisfied with the Respondent's decision issued on 2nd February 2023, it was required to file its Appeal to the Appeals Authority within seven working days from the date it received the Respondent's decision.

Given the requirements under Section 97(1) and (2)(b) of the Act, it is clear that the Appeal is not properly before the Appeals Authority for being filed out of time.

Under the circumstances, the Appeals Authority agrees with the Respondent that the Appeal is not properly before the Appeals Authority. Consequently, we uphold the PO and dismiss the Appeal. 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.

Three handwritten signatures in black ink, positioned horizontally below the page number.

This Ruling is delivered in the presence of the Respondent and in absence of the Appellant who was duly notified this 28th day of April 2023.

HON. JUSTICE (rtd) SAUDA MJASIRI



CHAIRPERSON

MEMBERS: -

1. ENG. STEPHEN MAKIGO.....



2. MS. NDEONIKA MWAIKAMBO.....



