IN THE PUBLIC PROCUREMENT APPEALS AUTHORITY

APPEAL CASE NO. 31 OF 2021-22

BETWEEN

Ms NORAH JONATHAN KAAYA.....APPELLANT

AND

MUHIMBILI UNIVERSITY OF

HEALTH AND ALLIED SCIENCE.....RESPONDENT

RULING

1. Hon. Justice (Rtd) Sauda Mjasiri - Chairperson
2. Eng. Stephen Makigo - Member
3. Dr. William Kazungu - Member
4. Ms. Florida Mapunda - Ag. Secretary

SECRETARIAT

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

FOR THE APPELLANT

1. Ms. Norah Kaaya - Consultant
2. Mr. Robert R. Rutaihwa - Advocate - Codex Law Chamber

FOR THE RESPONDENT

1. Mr. Pisteo Abel - State Attorney
2. Ms. Tumaini Slaa - Ag. Secretary to the Counsel
3. Prof. Gidion Kwesigabo - Associate Professor- Principal Investigator Transforming Health Profession Education in Tanzania
4. Mr. Hassan S. Rubeya - Procurement Officer

This Appeal was lodged by Ms. Norah Jonathan Kaaya (hereinafter referred to as **"the Appellant"**) against Muhimbili University of Health and Allied Science (hereinafter referred to as "**the Respondent**"). The Appeal is in respect of Tender No. PA/007/2021/2022/IC/02 for Provision of Service for the Mid-Term Evaluation (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 using combined technical and quality selection procedure as specified under the Public Procurement Act, No. 7 of 2011 as amended in 2016 (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**").

The Respondent vide a letter dated 23rd December 2021, invited the Appellant to submit its Technical and Financial proposals for the Tender.

The deadline for submission was set for 4th January 2022. By the deadline the Appellant submitted her proposals as required.

The Technical and financial proposals were subjected to evaluation and after completion, the Evaluation Committee recommended award of the Tender to Ms Norah Jonathan Kaaya at the contract price of TZS 19,960,000/= (Nineteen Million Nine Hundred Sixty Thousand) only VAT inclusive. The Tender Board through circular resolution No. 13 of 2021/2022 approved the award as recommended by the Evaluation Committee.

According to the Appellant, prior to the notification of the award, she was required to perform certain tasks related to the project, thus was provided with some documents namely; project proposal, project work plan, project monitoring, evaluation and learning framework, project implementation plan & project study approach and methodology and was required to review them. The Appellant complied with the directives given. The Appellant also indicated that there were several correspondences between her and the Respondent until on the 7th March 2022 when she received a call from the Respondent informing her that the Tender has been rejected due to financial constraints.

On 9th March 2022, the Appellant wrote an email to the Respondent indicating that, it was not challenging the rejection of the Tender but claiming compensation of TZS 7,840,000/- being costs of the executed works. Having not received any response from the Respondent, on 17th

March 2022, the Appellant wrote a letter to the Respondent claiming to be paid compensation for the work done.

On 12th April 2022, the Respondent issued its decision which rejected the Appellant's request for compensation. Aggrieved further, on 9th May 2022, the Appellant lodged this Appeal.

When the matter was called on for hearing, the Appeals Authority *suo motu* raised an issue as to whether the Appeal is properly before it. Parties also agreed on other three issues which were approved by the Appeals Authority. The Agreed issues were:-

1.0 Whether the Appeal is properly before the Appeals Authority;

2.0 Whether there was justifiable ground for rejection of the Tender;

3.0 Whether there was a contractual relationship between the parties and whether the Appellant is entitled to compensation for the work done; and

4.0 What reliefs, if any, are the parties entitled to.

SUBMISSIONS BY THE APPELLANT

The Appellant's grounds of Appeal as well as oral submissions during the hearing may be summarized as follows:-

With regard to the first issue, the learned counsel for the Appellant submitted that, the cause of action which led to this Appeal arose on 25th April 2022, when the Appellant received an email from the Respondent informing that her claim for compensation has been rejected. Having been aggrieved by such a decision on 9th May 2022 the Appellant filed this Appeal.

The Appellant's learned counsel elaborated that, according to Section 97(2) of the Act, an appeal to this Appeals Authority can be lodged in two ways. A tenderer can lodge an appeal after being aggrieved by the decision of the procuring entity or when the procuring entity fails to issue its decision. The Appellant lodged this Appeal after being dissatisfied with the Respondent's decision received on 25th April 2022. According to Section 97(2) of the Act, an aggrieved tenderer is required to lodge an Appeal to this Appeals Authority within seven working days of becoming aware of the circumstances giving rise to the Appeal. The Appellant became aware of the circumstances of this Appeal on 25th April 2022. Counting from 25th April 2022 the seven working days ended on 9th May 2022 and the Appeal was filed on the same day. Thus, the Appellant's Appeal was filed within the stipulated time limit.

In relation to the second issue, the learned counsel for the Appellant submitted that, the Respondent's reason for rejecting the Tender due to non-availability of funds is not acceptable. The Respondent through Item 1 of the Invitation for Proposal specified clearly that it had set aside funds to

meet eligible payments under the intended project. Thus, advancing a reason of non-availability of funds after the Appellant had executed part of the intended works is illogical and contrary to the Invitation for Proposals and legal requirements. The Appellant expounded that, according to Regulation 75 of the Regulations, procuring entities are required to ensure availability of funds prior to issuance of invitation to tender. Thus, it was improper for the Respondent to invite the Tender while there was no available fund for the project.

In relation to the third issue, the learned counsel submitted that, the Appellant participated in the disputed Tender and was successful. Prior to award and signing of the contract, the Respondent required her to execute some works which were part of the intended project. The Appellant executed almost 40 percent of the works. To her surprise, the Respondent rejected the Tender. The Appellant claimed payment of compensation for the executed works; however, the Respondent rejected such a claim as there was no contractual relationship between the parties. The Appellant claimed that the Respondent's conduct implied that there was contractual relationship between them although there was no formal award or signed contract. Thus, the Respondent is duty bound to compensate the Appellant the sum of TZS 7,840,000/= being costs for the work done.

The learned counsel expounded that, based on deliberate steps, efforts and work done by the Appellant in respect of the Tender, the Respondent

ought not to have rejected the Appellant's claim for compensation. The Respondent's act of rejecting the said claim is unjustifiable and not fair.

The Appellant added that, having been persuaded not to accept other works so that she would be fully committed to the project, it was improper for the Respondent not to appreciate the Appellant's commitment in this regard. The Appellant had rejected other offers in lieu of the Respondent's project. Thus, the Respondent's conduct led the Appellant to suffer actual loss and needed to be compensated.

Finally, the Appellant prayed for the following orders:-

i. Declaration that, the Respondent was not justified to reject the Tender;

ii. Declaration that, the Appellant is entitled to compensation and an order directing the Respondent to pay the Appellant TZS 7,840,000/= being 40 percent of the project value as compensation for the loss suffered;

iii. Costs involved in this Appeal;

iv. Such other order or direction as the Appeals Authority may deem fit and just to grant.

REPLY BY THE RESPONDENT

The Respondent's reply to the grounds of Appeal as well as oral submissions during the hearing may be summarized as follows:-

With regard to the first issue, the learned State Attorney submitted that the Appellant's Appeal has been filed out of time and contrary to the requirement of Rule 9(1) of the Public Procurement Appeals Rules Government Notice No. 411 of 2014, as amended in 2017 (hereinafter referred to as "**the Appeals Rules**"). Thus, the Respondent prayed for dismissal of the Appeal with costs for being filed out of time.

In relation to the second issue, the learned State Attorney submitted that, the Respondent floated this Tender way back in December 2021. Before issuance of an award, the Respondent received directives from the Tanzania Commission for Universities that introduced new curriculum which was to be implemented with immediate effect. In order to comply with directives given, the Respondent withdrew the funds from this Tender and directed them to the implementation of the new curriculum. The Respondent expounded that, due to the prevailing situation the Respondent was compelled to reject the Tender pursuant to Section 59(1) (2) (g) of the Act. The Respondent rejected the Tender as the funds which were earmarked for the project were withdrawn.

With regard to the third issue, the learned State Attorney submitted that, at the time the Respondent rejected this Tender she has neither been awarded the Tender nor signed the contract with the Appellant. There was no contractual relationship between them. Thus, in the absence of a contractual relationship, the Appellant cannot claim to have executed any works. The proper execution of the works has to be based on the terms

and conditions of the contract. Therefore, it is improper and untenable in law for the Appellant to execute 40 percent of the works without having an award letter or a signed contract. Based on the given facts, the Respondent is not liable to compensate the Appellant.

Finally, the Respondent prayed for the following orders:-

i. The Appeal be dismissed in its entirety; and

ii. The Respondent be declared to bear no liability to the Appellant.

ANALYSIS BY THE APPEALS AUTHORITY

1.0 Whether the Appeal is properly before the Appeals Authority;

In resolving this issue, the Appeals Authority reviewed the records of Appeal and observed that it is undisputed that on 7th March 2022, the Appellant received a call from the Respondent's office which informed her that the Tender has been rejected. Following such rejection on 9th March 2022, the Appellant sent an email to the Respondent claiming compensation for the costs incurred in respect of the project worth TZS 7,840,000/=. The said email was followed with the Appellant's letter dated 17th March 2022 addressed to the Respondent which also claimed compensation for the executed works. The Respondent vide a letter dated 12th April 2022, denied the Appellant's claim for compensation as there was

no contractual relationship between them. According to the Appellant the said email was received by her on 25th April 2022 via email.

The Appeals Authority revisited Section 96 and 97 of the Act which provides guidance on the procedures to be followed by a tenderer who is dissatisfied with a procurement process. Section 96 (1) and (4) of the Act stipulates clearly that a tenderer who is dissatisfied with the tender process or procuring entity's decision thereof may lodge a complaint to the same procuring entity within seven working days. The provision reads as follows:-

> *"Sec. 96(1) Any complaint 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 related the above quoted provisions to the facts of this Appeal, the Appeals Authority observed that the Appellant was dissatisfied with the Respondent's act of rejecting the Tender. The Appellant was informed about the rejection of the Tender on 7th March 2022 and on 9th March 2022 she wrote an email to the Respondent seeking compensation for the work executed. From the sequence of events, it is the Appeals Authority's view that the Appellant was dissatisfied with the rejection of the tender. Thus, she opted to claim for payment of compensation for the works executed.

Since the Appellant was dissatisfied with the rejection of the tender, her email dated 9th March 2022 to the Respondent was a complaint as per Section 96(1) and (4) of the Act. The Respondent ought to have issued a written decision within seven (7) working days pursuant to Section 96(6) of the Act. Counting from 9th March 2022, the Respondent was required to issue a decision by 18th March 2022. However, the Respondent failed to issue the decision within the prescribed time. Therefore the Appellant ought to have pursued her right pursuant to Sections 96(7) and (97)(2) (a) of the Act, which provide as follows:-

> *"Sec. 96(7) Where the accounting officer does not issue a decision within the time specified in subsection (6), the tenderer submitting the complaint or dispute to the procuring entity shall be entitled immediately thereafter to institute proceedings, under section 97 and upon institution of such*

proceedings, the competence of the accounting officer to entertain the complaint or dispute shall cease."

"Sec. 97 (2) Where-

(a) ***The accounting officer does not make a decision within the period specified under this Act;***

the tenderer may make a complaint to the Appeals Authority within seven working days by 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)

Based on the above requirements of the law, counting from 18th March 2022 when the Respondent ought to have issued its decision, the Appellant ought to have filed her Appeal on or by 29th March 2022. To the contrary, the Appellant filed her Appeal to the Appeals Authority on 9th May 2022 after a lapse of almost 40 days. Therefore, the Appeals Authority is of the settled view that the Appeal has been filed contrary to the requirements of Sections 96 (7) and 97(2) (a) of the Act.

The Appeals Authority considered the Appellant's argument that time for filing this Appeal started to run on 25th April 2022, when she received the Respondent's decision which rejected payment of compensation. The Appeals Authority rejects the Appellant's argument in this regard as it

is clear from the record of Appeal that immediately after being informed of the rejection of the Tender and being dissatisfied the Appellant claimed compensation for the executed works to the Respondent. The Appellant ought to have waited for the Respondent's reply for only seven working days and thereafter invoke Sections 96 (7) and 97(2) (a) of the Act as explained above.

From the above analysis, the Appeals Authority concludes the first issue in the negative that the Appeal has been filed out of time and is therefore not properly before the Appeals Authority. Given the circumstances and the fact that issue No. 1 is sufficient to dispose of the Appeal, the Appeals Authority will not delve on other issues.

The Appeals Authority hereby dismiss the Appeal for being filed out of time.

Each party to bear its own costs.

Order accordingly.

The right of Judicial Review as per Section 101 of the Act explained to the parties.

This Ruling is delivered in the presence of the parties this 16th day of June 2022.

HON. JUSTICE (Rtd) SAUDA MJASIRI

.....

CHAIRPERSON

MEMBERS:

1. **ENG. STEPHEN MAKIGO**.....
2. **DR. WILLIAM KAZUNGU**.....

THE UNITED REPUBLIC OF TANZANIA
MINISTRY OF FINANCE AND PLANING
PUBLIC PROCUREMENT APPEALS AUTHORITY

In reply please quote:

Ref.No: PPAA/APPEAL/31/12/2021-22 **16th June, 2022**

The Chief Executive Officer,
Public Procurement Regulatory Authority,
PSSSF Dodoma Plaza, 9th Floor,
Jakaya Kikwete Road,
P.O.BOX 2865
DODOMA.

Re: **RULING OF PPAA ON APPEAL NO. 31 OF 2021-22 BETWEEN Ms. NORAH JONATHAN KAAYA AND MUHIMBILI UNIVERSITY OF ALLIED SCIENCE**

Refer to the heading above,

2. Please be informed that, the Ruling in respect of the above mentioned Appeal was delivered on 16th June 2022, whereby the Appeals Authority dismissed the Appeal for being filed out of time.

3. A copy of the said Ruling is herewith appended in accordance with Section 99 (2) of the Public Procurement Act, 2011 as amended read together with Rule 27(4) of the Public Procurement Appeals Rules of 2014 as amended for your reference.

Regards,

F. R. Mapunda
Ag: EXECUTIVE SECRETARY