

IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY
AT DAR ES SALAAM
APPEAL NO. 36 OF 2017-18

BETWEEN

M/S MASWI DRILLING
COMPANY LIMITEDAPPELLANT

AND

SENGEREMA DISTRICT COUNCILRESPONDENT

RULING

CORAM

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| 1. Ms. Monica P. Otaru | - | Ag. Chairperson |
| 2. Eng. Francis T. Marmo | - | Member |
| 3. Mr. Louis P. Accaro | - | Member |
| 4. Mr. Ole-Mbille Kissioki | - | Secretary |

SECRETARIAT

- | | | |
|---------------------------|---|----------------------|
| 1. Ms. Florida Mapunda | - | Senior Legal Officer |
| 2. Ms. Violet S. Limilabo | - | Legal Officer |

FOR THE APPELLANT

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| 1. Mr. Dushi Peter | - | Legal Officer |
| 2. Mr. Wankuru Marwa | - | Managing Director |
| 3. Mr. Payeka Kibou | - | Project Manager |

FOR THE RESPONDENT

- | | | |
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| 1. Mr. Sarapian Matiku | - | Council Solicitor |
| 2. Mr. Nicas Ligombi | - | Water Engineer |
| 3. Mr. Joel Mtango | - | Procurement Officer |

The Appeal at hand was lodged by M/s Maswi Drilling Company Limited (hereinafter referred to as "the Appellant"), against Sengerema District Council (hereinafter referred to as "the Respondent"), in respect of Quotation No. LGA/094/WSDP/W/2017-2018/Q/001 for Surveying, Drilling and Development of Productive Boreholes at Kasungamile, Igulumuki, Lubanda, Busulwangili and Kasomeko Villages in Sengerema District Council (hereinafter referred to as "the Tender").

The Tender was conducted pursuant to the Public Procurement Act of 2011, as amended, (hereinafter referred to as "the Act") and the Public Procurement Regulations, Government Notice No. 446 of 2013 (hereinafter referred to as "G.N. No. 446 of 2013").

Having gone through the pleadings lodged at the Public Procurement Appeals Authority (hereinafter referred to as "the Appeals Authority"), the facts of the Appeal may be summarized as follows:

The Appellant was the successful tenderer in the Tender. They received the acceptance letter dated 6th November 2017 on 15th November 2017. The Notice had a proposed Contract signing date of 10th November 2017, which had already passed. No other date was arranged. The Appellant waited in vain to be called by the Respondent to sign the Contract. On 26th March 2018, the Appellant decided to write a reminder to the Respondent about Contract signing. As there was no response forthcoming from the Respondent, the Appellant lodged this Appeal on 5th April 2018.

The Appellant raised two grounds of Appeal to wit; first, the Respondent contravened the law for failure to sign the contract awarded to them; and second, that the Respondent advertised a new tender similar to the one awarded to them.

In response, the Respondent raised a point of Preliminary Objection (PO) to wit; that the Appeal has been lodged prematurely.

Before proceeding to the merits of the Appeal, the Appeals Authority deemed it proper to determine the PO so raised in order to substantiate its validity.

Sections 96 and 97 of the Act provide for procedures to be followed by tenderers who are dissatisfied with procurement process. For ease of reference, Sections 96(1) and (7); and 97(1), (2) and (3) of the Act are reproduced herein below;

S.96(1) Any complaint or dispute between procuring entity and tenderers which arise in respect of procurement proceedings, disposal of public assets by tender and award of contracts shall be reviewed and decided upon a written decision of the accounting officer of the procuring entity and give reasons for his decision.

S.96(7) Where the accounting officer does not issue a decision within the time specified.....the tenderer submitting 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.

S.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) the accounting officer does not make a decision within the period specified under this Act; 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.

(3) A tenderer may submit a complaint or dispute directly to the Appeals Authority if the complaint or dispute cannot be entertained under Section 96 because of entry into force of the procurement or disposal contract and provided that the complaint or dispute is submitted within seven working days". (Emphasis added)

In simple terms, the above quoted provisions entail that there are two avenues for submitting complaints arising from public procurement processes.

The first avenue is covered under Section 96 (1) and (7) as well as Section 97(1) and (2) of the Act, which provide for two steps to be followed. The first step is for dissatisfied tenderers to submit complaints to the accounting officer within seven working days of becoming aware of circumstances giving rise to the complaint. Then the accounting officer is given seven working days within which to issue a decision. The second step is to lodge the Appeal to the Appeals Authority when the accounting officer fails to issue a decision or if the tenderer is not satisfied with the decision issued pursuant to Sections 96(7) and 97(1) and (2) of the Act.

The second avenue is covered under Section 97(3) of the Act, whereby, tenderers are to submit their complaints directly to the Appeals Authority where a procurement contract has entered into force. According to Section 60(11) of the Act, a procurement contract enters into force when the formal contract is signed by the parties.

It is not in dispute that the Appellant was awarded the Tender on 6th November 2017, and on 26th March 2018 they submitted a letter to the Respondent reminding them of contract signing. As earlier stated, having received no reply from the Respondent, the Appellant submitted this Appeal on 5th April 2018.

Relating the quoted provisions to the facts of this Appeal, the first avenue is relevant to the circumstances herein. The Appellant ought to have filed a complaint with the Respondent first. We considered the Appellant's reminder letter to the Respondent dated 26th March 2018, in line with Section 96 of the Act read together with Regulation 105 of GN No. 446 of 2013, if it qualified to be a complaint or not.

Regulation 105 of GN No. 446 of 2013 in clear terms provides what a complaint should include, which, unfortunately we failed to see in the letter in question. This letter is nothing more than a mere reminder, a fact which the Appellant conceded during the hearing. The Appellant

having noted that there was a delay in signing the contract, ought to have challenged the Respondent's act by submitting a complaint to the Respondent's Accounting Officer within seven working days of becoming aware of the circumstances giving rise to the complaint.

As the facts indicate without any scintilla of doubt that the Appellant had not submitted any complaint to the Respondent, there was nothing prompting the Respondent to consider administrative review.

The Appeals Authority therefore is of the settled view that, since there was nothing to move the Respondent for administrative review, the Appellant could neither file the Appeal for the Respondent's failure to issue a decision nor lodge a complaint directly to the Appeals Authority.

Therefore, the Appellant's failure to comply with legal procedures is a matter that touches on the jurisdiction of the Appeals Authority to entertain this Appeal. As the Appeal before us is indeed filed prematurely and therefore not proper, we have no mandate to entertain it.

From the reasons stated above, the PO is upheld and the Appeal is hereby dismissed.

No order as to costs.

The Right of Judicial Review is available to the parties as per Section 101 of the Act.

This Ruling is delivered in the presence of the parties on 11th May 2018.


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Ms. MONICA P. OTARU
Ag. CHAIRPERSON

MEMBERS:

1. ENG. FRANCIS MARMO 
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2. MR. LOUIS ACCARO 
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