

**IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY AT
DAR ES SALAAM.**

APPEAL CASE NO. 35 OF 2013-14

BETWEEN

**M/S KIHELYA AUTO TRACTOR
PARTS COMPANY LIMITED.....APPELLANT**

AND

TANZANIA PORTS AUTHORITYRESPONDENT

DECISION

CORAM

- | | |
|----------------------------|----------------|
| 1. Ms. Esther J. Manyesha | -Chairperson |
| 2. Mr. Kesogukewe M. Msita | -Member |
| 3. Eng. Francis T. Marmo | -Member |
| 4. Mr. Ole-Mbille Kissioki | -Ag. Secretary |

SECRETARIAT

1. Mrs. Toni S. Mbilinyi - Principal Legal Officer
2. Ms. Violet S. Limilabo - Legal Officer
3. Mr. Hamisi O. Tika - Legal officer

FOR THE APPELLANT

1. Mr. Francis Noni - Director, Kihelya Auto Tractor Parts Ltd.
2. Mr. Dismas Raphael - Legal Officer

FOR THE RESPONDENT

1. Mr. Robert Ngwatu - Principal Procurement Officer
2. Mr. Jesse Shali - Procurement Officer
3. Mr. Alex Seneu - Legal Officer
4. Mr. Daudence Mwano - Legal Officer

This decision was scheduled for delivery today 30th May, 2014 and we proceed to deliver it.

The appeal at hand was lodged by **M/S KIHELYA AUTO TRACTOR PARTS COMPANY LIMITED** (hereinafter referred to as "**the Appellant**") against the **TANZANIA PORTS AUTHORITY** commonly known by its acronym **TPA** (hereinafter referred to as "**the Respondent**")

The appeal is in respect of Tender No. AE /016/2013 -14 /CTB/G/56 for the Supply, Installation and Commissioning of one Gantry x-ray and one mobile x - ray Inspection scanners (hereinafter referred to as "**the tender**").

The facts of the appeal in brief are as follows;

The Respondent, vide the Daily News and Mwananchi Newspapers dated 7th January, 2014, floated the tender referred above. The tender was to be conducted through International Competitive Bidding Procedures specified in the Public Procurement (Goods, Works, Non Consultant Service and Disposal of Public Assets by tender) Regulations, GN.No. 97 of 2005. However the Public Procurement Appeals Authority (hereinafter referred to as "**the Authority**") observes that they were required to

conduct the tender process by using the Public Procurement (Goods, Works, Non Consultant Service and Disposal of Public Assets by tender) Regulations, GN.No.446 of 2013 (hereinafter referred to as "**the GN.No.446**").

In response thereto, the Appellant was among the four tenderers who submitted their tenders. Other tenderers were M/s Restrata Ltd, M/s Pillers Inter trade Company and M/s Quality Trade and Distribution Ltd.

The tenders were then opened but before the evaluation process the Respondent cancelled the tender.

On 25th March, 2014 the Appellant received a notice of tender cancellation on a reason that the Respondent had received a donation of same equipment which is subject of the cancelled tender from the Economic and Commercial Representatives of the Peoples Republic of China.

The Appellant was aggrieved by such cancellation and through a letter, sought an administrative review from the Respondent's Accounting Officer. The letter was however not responded to. Thus, the Appellant appealed to this Authority.

APPELLANT'S SUBMISSIONS

According to the documents submitted to the Authority and oral submissions of the parties during the hearing, the Appellant's submissions are summarized as follows;

That, the Appellant was among the four tenderers who submitted tenders as a result of an invitation by the Respondent through International Competitive Bidding Procedures.

That, the tenders were opened on the 27th February, 2014 and since then they expected that the evaluation process of the same would follow.

That, on 25th March, 2014, they received from the Respondent a letter with ref No. PMU/2013 -14/G.56

notifying them of the tender cancellation. The reason advanced for the cancellation was the expected receipt of a donation from the Economic and Commercial Representatives of the Peoples Republic of China to supply and commission all the equipment; the subject of the tender.

That, the Appellant was aggrieved by such cancellation and vide a letter referenced KATPCL/TPA/010/004/2014 dated 26th March, 2014, sought an administrative review from the Respondent's Accounting Officer challenging that cancellation. Such cancellation was illegal, unacceptable and unfair treatment in the conduct of public tenders. The letter was however not responded to by the Respondent.

Due to lack of response from the Accounting Officer the Appellant appealed to this Authority on the 14th April, 2014.

The grounds of the Appeal are as follows;

1. That, the cancellation of the tender was illegal and the same be declared as incompetent since

it contravened the mandatory procedures as laid down under Section 59 (2), (5) and (6) of the Public Procurement Act, 2011 (hereinafter referred to as "**the Act**") and Regulation 16 (2) of GN. NO.446 of 2013.

2. That, cancellation of the tender without seeking or obtaining the approval of the Tender Board and Public Procurement Regulatory Authority (hereinafter referred to as "**the PPRA**") is illegal and unprocedural. That shows bad intention on the part of the Respondent.

3. That, it is trite law and good practice that the tenders be open and transparent and that unless cancelled before opening, the opened tenders should be evaluated and recommended for award; nothing outside the evaluation process shall be entertained.

4. That, even if the Respondent could have sought PPRA's approval, still the grounds for cancellation of the tender are not justified and

are against Section. 59(2) of the Act read together with Regulation 16 (2) of GN.No. 446. The Respondent has to explain as to when did the issue of donors arose and the rationale to prefer them while that donor is a business community; likewise the bidders who are also businessmen.

5. That, the cancellation was done in bad faith and specifically to the Appellant whose tender was very responsive, reasonable and competitive.

6. That, if sustained, cancellation of the tender without following the law can cause liquidated damages, loss of business and discouragement to bidders' development especially local bidders who are guaranteed preference by the Act to participate in public tendering.

Therefore the Appellant's Prayers before this Authority were as follows:

- i. Declaration that procedure for cancellation of the tender was not followed and hence is null and void.
- ii. Declaration that the grounds for cancellation were unfounded under the law and hence is null and void; as the reason adduced by the Respondent is neither envisaged in section 59(2) (e), nor anywhere in the procurement law.
- iii. Declaration that the cancellation of the tender was null and void and the procurement process be continued before the expiry of the bid validity period and award the same to the successful bidder.
- iv. Declaration that the donation by the Economic and Commercial Representatives of Peoples Republic of China should not interfere with the procurement process but be used to pay the successful bidder, instead of deviating the business to those who did not participate in the tender.

- v. Declaration that the integrity, fairness, equal treatment of all bidders and transparency were ignored and were not observed in accordance with the public procurement laws as a result of cancellation of the tender and transferring the business to Economic and Commercial Representatives of the Peoples Republic of China against bidders who tendered.

- vi. Compensation of the total cost of Tanzania Shillings three billion (3,000,000,000.); being liquidated damages and the anticipated profits to the investment made by the Appellant to bid for the tender as a joint venture which included appeal application fees, transport charges, hotel charges, stationery costs, costs for legal representative and cost for preparation of the tender for submission to the Respondent; and

vii. Any other relief that this Authority deems fit.

RESPONDENT'S SUBMISSIONS

The Respondent's written and oral submissions in reply to the Appellant's submissions are summarized as follows;

That, TPA is a public entity and as such, it received communication from the government about the acquisition of the Gantry x - ray and one mobile x - ray scanner through a donation from the Economic and Commercial Representatives of the People's Republic of China. Thus, it was not economically viable to continue with the procuring process instead of cancelling or annulling the whole process in accordance with Section 59(2) (e) of the Act and Regulation 16 (1) and (2) of GN. No. 446.

That, Respondent's actions were calculated in adherence to the Public Procurement Act, 2011, by making best possible use of the public funds with honesty and fairness thereby ensuring economic efficiency. Further to that, , it

was inconceivable for the Respondent to refuse the donation from People's Republic of China and opt to continue with the procurement process at the expense of public funds which could have been allocated for other use as the government deems fit. That could have amounted to the highest degree of unethical and unaccountable conduct by a public entity.

That, the Appellant's tender could not qualify as very responsive, reasonable and competitive as they contend, since no evaluation of the tenders was done.

That, the decision to cancel the tender was legal and justified. The decision was done and communicated in good faith to grant opportunity to bidders to collect their bid securities and also to inform them of the fate of their bids.

That, the Respondent could not have responded to the application for administrative review by the Appellant as they were based on speculation that the tenders were in evaluation stage. Further to that, the Appellant's

assertions of unfair treatment in the conduct of public tender was of his own creation.

That, the donation from the Economic and Commercial Representatives from the People's Republic of China was not in monetary value but rather actual commissioning of the equipment that were earmarked to be procured and therefore the Respondent could not secure funds to pay the successful bidder from the donor.

That, the liquidated damages in a sum of Tshs. 3,000,000,000/= were exaggerated and not awardable since liquidated damages are only payable where there is a contract between parties and the other party had suffered as a result of such breach, something that was not the case in this appeal.

The Respondent therefore prayed that the appeal be dismissed for want of merit.

ANALYSIS BY THE AUTHORITY

At the outset, the Authority has noted the improper contextual use of the terms 'tender cancellation' as if the same is synonymous with 'tender rejection'. Going through the parties written and oral submissions it is evident that both have referred "tender cancellation" in terms of section 59 (2) (e) of the Act which in essence refers to tender rejection. Undoubtedly, both parties' submissions are centred on tender rejection. Tender cancellation is regulated by section 19 of the Act and the same has its distinct application. For record purposes and proper use of the term in the procurement context, the Authority proceeds to use the proper terminology, namely "tender rejection". Thereafter the Authority proceeded to frame the following issues;

1. Whether the tender rejection was lawful

2. To what reliefs, if any, are parties entitled to

1. Whether the tender rejection was lawful

In ascertaining this issue the Authority analysed the grounds and procedure pertaining to the rejection of tenders, vis a vis the procurement laws. It therefore subdivided the issue into two sub issues namely:

a. Whether the ground for tender rejection was legally justified

b. Whether the procedure for tender rejection was adhered to.

(a) Whether the ground for the tender rejection was legally justified.

In analysing this sub issue, the Authority revisited the provisions cited by the Respondent that gave them power to reject the tender, that is section 59(1) (2) (e) of the Act, as quoted hereunder;

59. " (1) Tender documents and request for proposals may provide that

procuring entities reject all tenders or all proposals.

(2) The rejection of all tenders or all proposals under this section shall be justified where-

(a)....

(e) Exceptional circumstances render normal Performance of the contract impossible”

The authority went further to ascertain whether the Respondent’s Tender Document has provided that the tenders can be rejected. Clause 38 (1) reads as hereunder;

“ Notwithstanding ITB Clause 36, the Procuring entity reserves the right to accept or reject any Bid, and to annul the Bidding process and reject all Bids at any time prior to contract award, without thereby

incurring any liability to the affected Bidder or Bidders”

Going through the referred provisions of the law and the ITB Clause, it is apparent that the law permits tender rejection at any stage, provided that, it is before award of the contract. Therefore it cannot be held that the Respondent was at fault when they invoked the provisions of the law to that effect. The reason for rejection however, has to be backed by law.

According to the reason adduced by the Respondent, the tender in dispute was rejected on the occasion of expected acquisition of three scanners from the Economic and Commercial Representatives of the People’s Republic of China by way of a donation.

Mindful of the pertinent questions surrounding the donation, specifically as to whether the equipment to be donated resembles the technical specifications as contained in the Tender Document or if the donation would on the same vain serve the purpose intended in

the tender, questions which the Authority has no powers to investigate, it suffices to agree that indeed the reason adduced by the Respondent, on the face of it, fits the exceptional circumstances envisaged by section 59 (2) (e) referred above. It is viewed that the Respondent's circumstance indeed warranted the need to invoke the principle of value for money; one of the fundamental principles of procurement, enshrined in section 47 (c) of the Act. With due respect to the Appellant who submitted that the Respondent's reason is not envisaged under section 59, the Authority agrees that the reason fits the circumstances of the said section since, the mischief which section 59 (2) (e) was intended to cure includes situations as those befallen onto the Respondent.

The Authority finding with regard to sub issue (a) is that the ground for tender rejection was legally justified.

(b) Whether the procedure for tender rejection was adhered to

On the procedural aspect pertaining to the rejection of tenders, guidance is provided in Section 59(5) and (6)

and under Regulation 16 of GN.No. 446 of 2013, whereby Tender Board's and PPRA's respective approvals should be sought, prior to rejecting tenders. For ease of reference the sub sections (1), (5) and (6) of Section 59 of the Act are reproduced as hereunder;

59. “ (1) Tender documents and request for proposals may provide that procuring entities reject all tenders or all proposals.

(2) ...

(5) The appropriate tender board's prior approval shall be sought before rejecting all tenders or all proposals, soliciting new tenders or proposals or entering into negotiations with the lowest evaluated tenderer.

(6) Subject to the provisions of subsection (5) the

accounting officer shall seek approval from the Authority prior to rejecting tenders or proposals.

From the submissions of parties, the Appellant emphatically reiterated that the Respondent neither obtained approval from its Tender Board nor PPRA before effecting the rejection. During the hearing the Respondent admitted that PPRA's approval was not sought prior to tender rejection. As for the Tender Board approval, they submitted that they sent an internal memo notifying the said Board of the rejection of tenders due to the reason explained earlier.

The Authority finds it in clear terms that the Respondent had not complied with the mandatory procedures required by the law. As such, the Accounting Officer usurped both the powers of the Tender Board and those of PPRA.

The Authority further considered the Respondent's submission that they decided to cancel tenders after receiving a communication from the government that the

Economic and Commercial Representatives of the People's Republic of China were going to donate three scanners; the subject of the advertised tender. It should be clearly understood by the Respondent and other procuring entities that the communications from the government do not direct them to act contrary to the law. In implementing the communiqué, the Respondent was still duty bound to comply with the law; something that they did not do.

The Authority finding on sub issue (b) is that the procedure for tender rejection was not adhered to by the Respondent.

The conclusion with the regard to the first issue is that; although the Respondent's ground for tender rejection was justified, they grossly erred by not adhering to important procedures they were bound to follow, prior to rejecting the said tender. It follows therefore, to the extent explained above, that the rejection of the tender was unlawful.

The Authority also wishes to comment on the Respondent's decision not to respond to the Appellant's application for administrative review. The reason adduced by the Respondent for the omission, as explained above, is not acceptable and is unexpected from a public body which is duty bound to adhere to highest governance standards.

2. To what reliefs, if any, are parties entitled to

Having held that the rejection of the tenders was unlawful, this appeal is allowed to the extent explained. In consideration of the reliefs prayed for by both the Appellant and Respondent; the following relief orders suffice;

The Authority declares that the tender rejection was unlawful since it neither had Respondent's Tender Board approval, nor PPRA's approval.

Consequently, the Authority hereby nullifies the tender rejection communicated to four bidders and in turn orders the Respondent to comply with the law; that is; to

seek approval of its Tender Board and PPRA, prior to rejecting the tenders.

As regards the Appellant's prayer for damages amounting Three billion (Tshs. 3,000,000,000/=), the Authority cannot grant the same because the aim of damages is to compensate for the loss in the spirit of restituting the victim to the situation he was, immediately before the breach.

In this case there is no actual loss that the Appellant suffered. However, agreeing that the appeal has merit, by virtue of section 97 (5) (f) of the Act, the Authority orders the Respondent to pay the expenses incurred by the Appellant for the unlawful acts done, to the tune of Tshs. 2,384,000/= the breakdown of which is as follows:

Appeal filling fees	Tshs. 120,000/=
Transport	Tshs. 1,254,000/=
Boarding and lodging	Tshs. 480,000/-
Legal fees	Tshs. 500,000/=
Stationery	Tshs. 30,000/=

The decision is binding upon the parties and the Appellant has the right to execute the same in terms of Section 97(8) of PPA, 2011.

Right of Judicial Review as per Section 101 of the PPA, 2011 explained to parties.

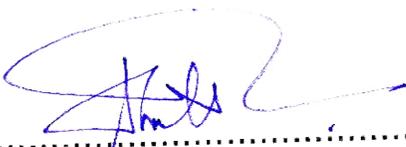
This Decision is delivered in the presence of the Appellant and the Respondent this 30th May, 2014.


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MS ESTHER J. MANYESHA

CHAIRPERSON

MEMBERS:

1. MR. K. M. MSITA 
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2. MR. F. MARMO 
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