

IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY
AT DAR ES SALAAM
APPEAL CASE NO. 9 OF 2015-16

BETWEEN

CANNIVAL INVESTMENT LTD.....1ST APPELLANT
TRICON INVESTMENT LTD.....2ND APPELLANT
FAIR PAY LTD.....3RD APPELLANT

AND

TANZANIA PORTS AUTHORITY..... RESPONDENT

DECISION

CORAM

Mrs. Rosemary A. Lulabuka	- Chairperson
Eng. Aloys J. Mwamanga	-Member
Ms. Monica P. Otaru	- Member
Mr. Ole-Mbille Kissioki	- Secretary

SECRETARIAT

- Mrs. Toni S. Mbillinyi - Principal Legal Officer
- Ms. Violet S. Limilabo - Legal Officer
- Mr. Hamis O. Tika - Legal Officer

FOR THE 1ST APPELLANT

- Mr. Oswald Mpangala - Advocate
- Mr. Mohamed H. Omary - Operation Manager

FOR THE 2ND APPELLANT

- Mr. Castor Rweikiza - Advocate
- Mr. Pascal Rutalala - Managing Director
- Mr. Philbert Mwenda - Operation Officer

FOR THE 3RD APPELLANT

- Mr. Castor Rweikiza - Advocate

FOR THE RESPONDENT

- Mr. James Ngwagula - Procurement & Supplies Manager
- Mr. Andrew Mazwile - Senior Procurement Officer
- Mr. Daudence Mwano - Legal Officer
- Mr. Alex Seneu - Legal Officer

FOR THE OBSERVER

Mr. Hamidu J. Killa - Songambebe Shipping Company

This Decision was scheduled for delivery today 18th November 2015 and we proceed to do so.

This Appeal was lodged by M/S CANNIVAL INVESTMENT LTD (hereinafter referred to as "the Appellant") against the TANZANIA PORTS AUTHORITY commonly known by its acronym TPA (hereinafter referred to as "the Respondent") in respect to Tender No. AE/016/2013-14/DSM/NC/15 for Provision of Labourers for Operational Services at the Dar es Salaam Port [Re tendered] (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 very origin of this tender can be traced from the financial year 2013/14 whereby the same had several extensions of time, tender rejections and confusions which culminated into institution of Appeal No. 34 of 2013-14 before this Appeals Authority, the Appeal which was then allowed with a retendering order.

Following the fresh tendering proceedings, the facts of the Appeal may be summarised as follows:

The Respondent vide the Mwananchi Newspaper dated 12th May 2015, invited tenderers to submit tenders for the Tender, the deadline for which was 16th June 2015. Twenty one (21) tenders were received, the Appellants' inclusive.

The tenders were then subjected to evaluation whereby preliminary and detailed evaluations were conducted. The Evaluation Committee noted anomalies as to the interpretation of scope of works and issues relating to labourers. Subsequently, the Evaluation Committee recommended for rejection of all tenders and re-tendering so as to curb the said anomalies. The Respondent's Tender Board at its meeting held on 28th July 2015 approved the recommendation of the Evaluation Committee.

On 16th August 2015, the Respondent vide letter with reference No. DPS/3/1/18 dated 16th August 2015, informed all bidders, Appellants inclusive, that all tenders have been rejected due to unavoidable circumstances.

The 1st Appellant through a letter CIL/TPA/RWS/015/02 dated 27th August 2015, sought for Respondent's clarification on the reason for rejection of the tenders. The Respondent through a letter referenced DPS/3/1/18 dated 9th September 2015, gave reasons for rejection of tenders being change of economic and

technical data that pertained to unit of wages payment to labourers and that there was confusion as to who is the employer of the labourers.

Aggrieved by the reasons so given, the 1st Appellant filed an application for administrative review on 21st September 2015 claiming that;

1. No addendum was given to notify tenderers that there was a change of economic and technical data of the tender;
2. It is the Respondent who changed the unit of payment of wages payable to labourers several times and that payment of wages is provided in the scheduled of Price and Activity. Lot 4 was not affected by those changes;
3. There was no confusion as to the employer of labourers since it is clearly stated in Clauses 12 and 13 of Tender Data Sheet (TDS).

The Respondent on 5th October 2015 replied to the Appellant by affirming his decision based on his letter dated 16th August 2015.

Aggrieved by the Respondent's decision, on 16th October 2015, the 1st Appellant filed this Appeal.

THE 1ST APPELLANT'S GROUNDS OF APPEAL

The 1st Appellant's grounds of Appeal as per his statement of Appeal are as follows;

1. Failure by the Respondent to take into consideration the provisions of Regulations 4 (1) and (2) (a) and (d) of the Public Procurement Regulations, 2013 (GN. 446 of 2013) which provide for basic principles of public procurement, importance for integrity, accountability, fairness and transparency in the tendering process. The Respondent however terribly failed to adhere to these basic principles and, instead, disgustingly continued to reject and /or adjourn the disputed tender several times unreasonably and clothed itself into provision of Regulation 16 (6) of the Regulations aforesaid which exonerates the Respondent from liability upon rejection of the tenders for reasons known to itself.
2. Failure by the Respondent to take into consideration the intention of the provisions of Regulation 16 (1) (b) of GN 446 of 2013 which requires the Procuring Entity to award tenders by lots like the tender in dispute which had four Groups divided into several lots, but the Respondent ignored and/or did not adhere to this requirement.

3. Failure by the Respondent to take into consideration the intention of the provisions of Regulations 16 (5) of GN 446 of 2013 by overlooking the need for a notice of rejection of tenders and to give reasons of change in economic and technical data of the tender.

4. Failure by the Respondent to observe the provisions of Section 47 of the Public Procurement Act No. 7 of 2011 (the Act) which obligates the Procuring Entity to strive to achieve the highest standards of equity, taking into account, among other things, equality of opportunity to all tenders and fairness of treatment to all parties. The Respondent has been willfully rejecting and/or extending dates for the award of the rejected tender in view of giving favor to few service providers at the Port of Dar es salaam. In particular, M/S Hai Sub Supplier is the main and sole service provider at the Port for more than two years now despite the fact that its contract had expired way back in 2014. In the disguise of the reasons adduced by the Respondent which led to the rejection of the Tender and because of favoritism to M/S Hai Sub Supplier, the Respondent has been offering most of the works to them, to wit, all works under Group 1- General Cargo Handling; Group - 2; RO-RO Operations; Group-3; Lighter Quay; and Group-5; Container Freight

Services. The latter is being performed by the said M/S Hai Sub Supplier to- date.

Finally the 1st Appellant prays for the following orders;

- i. Declaration that the Respondent had acted or proceeded in an unlawful manner and reached an unlawful decision by rejecting all tenders on unsubstantiated grounds;
- ii. Compensation of costs incurred in relation to purchasing the rejected tenders, preparing tender documents and ultimately, participating in the tendering process to the tune of TZS. 141,650,000/-
- iii. Payments of legal and Appeal filing fees to the tune of TZS. 7,200,000/-
- iv. Any other costs which the Appeals Authority may deem fit to grant.

Upon Receiving the Appeal, the Respondent and tenderers were notified. M/s Tricon Investment Ltd. and Fair Pay Ltd. joined in as 2nd and 3rd Appellants respectively.

THE 2ND APPELLANT'S SUBMISSIONS

That, the 2nd Appellant participated in the Tender and that upon receipt of the letter informing all tenderers that the Tender has been rejected was in total disagreement with the Respondent's

act to cancel and reject all tenders. That, the Appellant complained through letter with Ref. No. TILL/TPA/01/015 of 31st August 2015, which was received by the Respondent on 2nd September 2015.

That the Appellant requested for extension of contract for operational services for Lot VII – Container Freight Services following rejection of the Tender. Surprisingly a contract for the services was offered to M/S Hai Sub Suppliers without following provisions of the Act.

That the Respondent's replies vide its letter referenced DPS/3/1/18 dated 11th September 2015 giving reasons for rejection and denial to extend the contract, which the Appellant finds to be untrue following repeated acts of cancellation. That the Tender was advertised without following procedures, that is it was not widely circulated. That the Appellant has suffered financially and psychologically by participating in the Tender.

Wherefore the 2nd Appellant prays for the following orders:

- i. The Respondent be compelled to comply with the law by re-advertising all tenders so that the procedures for the procurement to be fully complied with.
- ii. Costs and expenses for the Appeal such as Appeal filing fees, legal fees and compensation for unjustified cancellations of the Tender

- iii. Any other order/ costs which the Appeals Authority may deem fit to grant.

THE 3RD APPELLANT'S SUBMISSION

That, the 3rd Appellant participated in the Tender which has been cancelled several times, and that on 9th September 2015 they received a telephone call from the Respondent to collect their letter of rejection of the Tender.

That, on 8th October 2015, they got information from one of the bidders that the Tender was re-advertised in Daily Newspaper paper and the bids were opened on 6th October 2015. Upon receiving that information, the 3rd Appellant was surprised to note that the advertisement was neither posted in PPRA nor TPA Websites. From the above circumstances they suffered irreparable loss. Thus, they argued that the Respondent was unfair in his dealings and did not observe provisions governing public procurement.

Therefore, the 3rd Appellant prays for the following:

- i. A declaration that the Respondent is in serious breach of the law.
- ii. An order for the Respondent to comply with the law based on equality and fair treatment for the 3rd Appellant by re-

advertising the relevant tender so that the procedures for the same should be fully complied with by starting afresh.

- iii. Costs and expenses for the Appeal including legal and appeal filing fees together with compensation for unjustified cancellations of the tender.
- iv. Any other order/ costs which the Appeals Authority may deem fair and fit to grant.

THE RESPONDENT'S SUBMISSIONS IN REPLY TO THE APPELLANTS' GROUNDS OF APPEAL

The Respondent's replies in respect of the Appellants' grounds of Appeal may be summarised as follows;

That, prior to rejecting all the tenders, they followed all the lawful procedures including securing approval from Public Procurement Regulatory Authority (PPRA). However, the purported 3rd rejection of the tender complained of by the Appellants is denied since it was not initiated by them but rather they were complying with the order for re-tendering by the Appeals Authority in Appeal case No. 34 of 2013/14.

That, the cost aspects claimed by the Appellants are unfounded since participating in a tender does not give them an automatic right to be awarded the contract.

That, no addendum can ever be issued for a tender which has been rejected.

ANALYSIS BY THE APPEALS AUTHORITY

At the outset, it should be noted the Appeals Authority will not consider Appellants' pleadings which made reference to tender rejections and or adjournments made before 12th May 2015, when this tender was floated. The Appellants should have sought for remedies pursuant to limitations provided for in the Act. Having failed to seek remedies at that time, they are restricted from raising the same issues in this Appeal. As such the Appeals Authority will confine itself to the issues relating to rejection of the Tender made on 16th August 2015.

Secondly, the Appeals Authority observed that the 2nd and the 3rd Appellants are not properly before this Appeals Authority for the following reasons;

1. That, The 2nd Appellant used his right by complaining to the Respondent Accounting Officer but after clarification through a letter dated 11th September 2015, took no further action meaning he was in agreement with the Respondent's reply. It should be noted that if the Appellant was not satisfied with the decision of the Accounting Officer; he ought to have exercised his right by appealing to the Appeals Authority pursuant to Section 96(8) read

together with Section 99 (1) and (2) of the Act and Regulations 105 and 106 of GN 446/2013.

2. That, the 3rd Appellant upon being aggrieved by the Respondent's rejection of the tenders, did not complain to the Respondent's Accounting Officer as stipulated in Section 96(1) of the Act. Raising that issue now is an afterthought, which is legally not acceptable.

It should be noted that notification to other tenderers made by the Appeals Authority in terms of Section 99 (1) and (2) of the Act does not render imperative the provisions of Regulation 105 and 106 of GN 446/2013 which provide for the procedures for administrative review. The purpose of Section 99(2) of the Act is to avoid multiplicity of suits by the tenderers over the same tender particularly those who were not duly served with the proceedings of the tender process by the Accounting Officer. In this case the 2nd and the 3rd Appellants had been availed with the proceedings and had room to exhaust for their rights. To the contrary, they did not follow the procedures exhaustively.

Having so said, the Appeals Authority proceeded to determine the contentious issues between the 1st Appellant and the Respondent;

In so doing the parties to this appeal and the Appeals Authority agreed on two issues namely;

1. Whether the tender rejection was justified and in compliance with the law;
2. What reliefs, if any, are the parties entitled to.

Having identified the issues as above, the Appeals Authority proceeded to resolve them as follows:

1. Whether the tender rejection was justified and in compliance with the law.

This issue is drawn from the Appellant's contention that Respondent's rejection of the tenders was unjustified, unwarranted and un-procedural.

To start with, the Appeals Authority observed that rejection of tenders is guided by provisions of Section 59 (1),(2) (5) and (6) of the Act, read together with Regulation 16 of GN 446/2013. For purposes of this Appeal, Section 59 (1), (2) (5) and (6) of the Act is reproduced 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) there is lack of effective competition;

(b) tenders or proposals are not substantially responsive to the tender documents or to the request for proposals;

(c) the economic or technical data of the project have been altered;

(d) tenders or proposals involve costs substantially higher than the original budget or estimates;

(e) exceptional circumstances render normal performance of the contract impossible;

(f) tenders received contain serious irregularities resulting in interference with the normal play of market forces; or

(g) funds voted or earmarked for the procurement have not been withheld, suspended or have otherwise not been made available.

(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.

The Appeals Authority considers that the Respondent's ground for rejection falls under Section 59 (2) (c) of the Act, cited above and which is a justifiable ground for rejection.

Having established as such, the Appeals Authority observed further that the Respondent sought for and secured the approval for rejection by the Tender Board in line with Section 59(5) of the Act and subsequently sought for and secured approval of the PPRA, in terms of Section 59(6) of the Act read together with Regulation 16(3) of GN.446 of 2013.

The Appeals Authority further noted that the Respondent notified tenderers, Appellant inclusive, pursuant to Regulation 16 (5) of GN 446/2013.

The Appeals Authority having analyzed as such, finds that the Respondent complied with the procedures for rejection of the tenders and the Appellant conceded during the hearing that the said procedures were adhered to.

As regard the Appellant's contention that the reasons for rejection of the tenders were unwarranted, the Appeals Authority resorted to Regulation 16 (3) and (4) of GN.446 of 2013 that PPRA being a Regulatory Authority, albeit with a duty of ensuring adherence to procurement principles by procuring entities in the country, is the one which scrutinises/considers the grounds for rejection of tenders sought to be relied by procuring entities. This is to the

effect that scrutinising may result into approval or disapproval of the application, as per Regulation 16(4) supra.

In this case and it is on record that, PPRA received the application and after considering the same, was satisfied with the grounds given finally granted the approval.

The Appeals Authority further analysed Section 88 (5) and (6) of the Act, in effort to satisfy itself that, being an Appellate Authority, whether it has powers to fault the decision given by PPRA in its Regulatory capacity, and consequently, whether it has powers to annul the PPRA Approval of rejection so given to the Respondent. The Sections read as follows;

88(5) "The Appeals Authority shall have original jurisdiction to hear and determine complaints against procuring entities where a procurement or disposal of contract is already in force and appeals arising from administrative decisions made by the accounting officer".(emphasis added)

88(6) "The Appeals Authority shall review the Authority's decision arising from blacklisting of tenderers"

From the above cited provisions, it is clear that the Appeals Authority has jurisdiction to hear and determine appeals arising from the decisions of Accounting Officers (or omissions) of

procuring entities. PPRA is but a Regulatory Authority. The Appeals Authority, has no jurisdiction to hear and determine appeals emanating from PPRA in its regulatory capacity , save for only the latter's decision to blacklist a tenderer which, in essence, is done by PPRA in its judicial capacity. It should be noted that PPRA granting of approval to the Respondent was done in its capacity as a regulator and the ground of approval was also in conformity with the law.

That said, scrutinizing the substance of PPRA approval done in its regulatory capacity will entail that the Appeals Authority which is mandated with judicial function is interfering with PPRA executive mandate.

Having discussed the Appellant's contentions with regard to grounds for rejection, the Appeals Authority is therefore satisfied that tender rejection was justified and indeed complied with the law.

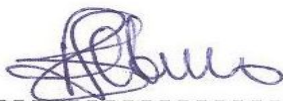
What reliefs, if any, are the parties entitled to

Taking cognizance of the findings on the 1st issue above, the Appeal is not allowed. Consequently the same is hereby dismissed; all prayers by the Appellant fail forthwith. Each party to bear its own costs.

It is so ordered.

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

This Decision is delivered in the presence of the Appellant and the Respondent this 18th November 2015.



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ROSEMARY A. LULABUKA

CHAIRPERSON

MEMBERS

ALOYS J. MWAMANGA



MONICA P. OTARU

