

IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY

APPEAL CASE NO. 09 OF 2016-17

BETWEEN

M/S COOL CARE SERVICE LTD APPELLANT

AND

SURFACE AND MARINE TRANSPORT
REGULATORY AUTHORITY (SUMATRA) RESPONDENT

DECISION

CORAM

- | | | |
|---------------------------------------|---|-----------|
| 1. Hon. Vincent, K. D. Lyimo, J.(rtd) | - | Chairman |
| 2. Eng. Francis T. Marmo | - | Member |
| 3. Mrs. Rosemary A. Lulabuka | - | Member |
| 4. Mr. Ole-Mbille Kissioki | - | Secretary |

SECRETARIAT

- | | | |
|---------------------------|---|---------------|
| 1. Mr. Hamisi O. Tika | - | Legal Officer |
| 2. Ms. Violet S. Limilabo | - | Legal Officer |

FOR THE APPELLANT

- | | | |
|------------------------|---|-------------------|
| 1. Mr. Andrew Mwisemba | - | Managing Director |
| 2. Mr. Kissamo Elias | - | AKK. Attorneys |

FOR THE RESPONDENT

1. Ms. Tumaini E. Silaa - Director of Legal Services
2. Dr. Stanslaus K. Ntiyakunze - Project Architect and Quantity Surveyor
3. Mr. Jumanne Swavile - Head Procurement Management Unit
4. Mr. Fortunatus M. Mutalemwa - Legal Officer Trainee

This decision was scheduled for delivery today 3rd January 2017, and we proceed to do so.

This Appeal was lodged by M/S COOL CARE SERVICES LTD (hereinafter referred to as "the Appellant") against the SURFACE AND MARINE TRANSPORT REGULATORY AUTHORITY known by its acronym SUMATRA (hereinafter referred to as "the Respondent").

The Appeal is in respect of Tender No. AE/025/2014-2015/HQ/W/1 - Lot No. 2 for Supply, Installation and Commissioning of Air Condition Works for Ongoing Construction of Sumatra House along Nkrumah Street (hereinafter referred to as "the Tender").

According to the documents submitted to the Public Procurement Appeals Authority (hereinafter called "the Appeals Authority"), as well as oral submissions by the parties during the hearing, the facts of the Appeal may be summarized as follows:-

The Respondent advertised the said tender on 26th October, 2016. The deadline for submission of tenders was initially set for 16th November 2016 but was later extended due to the amendments made in the Tender Document.

The Appellant having purchased the Tender Document, twice sought for clarifications from the Respondent on some provisions contained in the said document. The Appellant first letter calling for clarification on various clauses but basically on the relationship between main contractor and sub contractor and second letter dated 1st November 2016 called for clarification for payment of sub contractors through main contractor. On 3rd November 2016 the Appellant received from the Respondent an email dated 2nd November 2016 in which the Respondent had replied to some of the clarifications sought and promised to answer the remaining issues at the pre-bid meeting set to be held on 7th November 2016. At the pre-bid meeting, the Respondent allegedly did not respond adequately to Appellant's concerns as earlier promised especially as relates to the work relationship between main contractor and sub contractor and their respective rates.

Dissatisfied by the Respondent's replies and clarifications so made, the Appellant submitted an application to the Respondent's Accounting Officer for administrative review; vide its letter Ref. No. CCSL/TA/10/16 dated 9th November 2016.

On 15th November 2016 the Appellant received the minutes of the pre-bid meeting from the Respondent and contrary to Section 96 (6) of the Public Procurement Act No. 7 of 2011 (hereinafter referred to as "the Act") the Respondent did not respond to the Appellant's application for administrative review until 22nd November 2016.

Dissatisfied, the Appellant on 24th November 2016 filed this Appeal.

SUBMISSIONS BY THE APPELLANT

In this Appeal, the Appellant filed six (6) lengthy grounds of appeal, as follows-

- i. That Clause 1(a) of the Special Condition of Contract (SCC) and General Conditions of Contract (GCC) entails that a successful tenderer would sign contract with an unknown person called the Main Contractor, contrary to the requirement of Regulation 233 (1) of the Public Procurement Regulations No. 446 of 2013 ("GN. No. 446/2013"). As the tender had been issued by the Respondent, the subcontractors would make offers acceptable to the Respondent.
- ii. That, the Respondent purported to have used a Standard Tender Document from the Public Procurement Regulatory Authority (PPRA) which it alleges to have customized to suit its needs knowing it to be false, contrary to Sections 9 and 104(1)(a) of the Act as amended.

The Tender Document used by the Respondent not a standard document for medium and large works posted in the Authority's website in 2014. Thus, the Respondent had contravened Regulation 184 (4) of GN. No. 446/2013.

- iii. That, while Clauses 5.1 and 5.2 of the GCC require tenderers to understand all provisions contained in the main contract, the Respondent refused to provide the bidders with a copy of the main contract, contrary to Section 3 of the Act.
- iv. That, Clauses 18.3, 19.2, 21, 22, 23 and 34 of the GCC infringe subcontractor's rights contrary to Section 3 of the Act as follows:-
 - a. Clause 18. 3 and 19.2 provide that the sub contractor shall not be entitled to any rights unless those rights are claimed in the main contractor's name.
 - b. Clause 21 of the GCC provides that when the main contractor is terminated the sub contractor shall be terminated automatically, but does not provide for remedy to sub-contractor where he is entitled compensation as a result of the main contractor's termination. The Appellant explained that there may be situations where the main contractor is not willing to allow the use of his name by a sub contractor in making respective claims or where the main contractor puts some

conditions on using his name that may cause a sub contractor to incur some expenses.

- c. That, Clauses 22, 23 and 34 of the GCC require a sub-contractor to claim his rights in the name of the main contractor.

- v. That, during the pre-bid meeting the Respondent did not respond to the Appellant's concerns raised in the second letter addressed to them which concerned with payment of sub-contractor through a main contractor.

- vi. That, the minutes of the pre bid meeting was sent to the Appellant five days later beyond the three days contrary to the requirement of Regulation 189(4) of GN. No. 446/2013. At that time the Appellant had already submitted his application for administrative review to the Respondent's Accounting Officer. The Appellant submitted further that the contents of the GCC and SCC as well as the forms of contract agreement contained in the Respondent's Tender Document proves the Appellant's assertion on the first ground of this Appeal.

Finally the Appellant prayed for the following reliefs:-

- a. That the Respondent be ordered to issue a standardized General Condition of Contract and Special Condition of Contract according to law,

b. That the Respondent be ordered to pay the Appellant a sum of TZS. 5,200,000/- as per the following breakdown:

- Appeal filing fee.....TZS. 200,000.00
- Advocates fee.....TZS. 5,000,000.00;

and

c. Any other relief the Appeals Authority deems necessary.

SUBMISSION BY THE RESPONDENT

The Respondent's oral as well as written submissions in reply to the grounds of appeal are summarized as follows:-

- i. That, all queries raised by the Appellant were considered and reflected in the final Tender Document which the Respondent subsequently issued after the said clarifications. The Appellant did not collect it as agreed during the pre bid meeting.
- ii. That, the standardized document referred to by the Appellant does not apply to sub contract works, but rather to medium and large works.
- iii. That, the Tender Document issued to sub contractors was received from the PPRA and the Respondent customized it to suit their requirements.

- iv. That, during the pre bid meeting it was agreed that information relating to the main contractor would be availed to tenderers upon request, provided that such information did not infringe confidentiality of the main contractor. However, the Appellant did not submit any request for such information.
- v. That, Clauses 5.1 and 5.2 of the GCC require a subcontractor who has already been appointed to understand the provisions in respect to the main contractor but the Appellant was not yet appointed as such. Therefore, his request was premature.
- vi. That, the standard Clauses in the Tender Document were received from the Authority and by virtue of Regulation 184(4) of GN. No. 446/2013 they were restricted from altering them.
- vii. That, the Appellant's failure to collect the final version of the Tender Document led him to continue seeking for clarification even on issues already taken care of by the Respondent within the final version of the Tender Document.

Finally the Respondent prayed for the following reliefs:-

- a) That the issued Tender Document was in compliance with the law;

- b) The Appellant be ordered to pay the Respondent all costs incurred as a result of unjustifiably delaying of the tender as shall be determined by the Respondent; and
- c) Any other relief the Appeal Authority deems fit to grant.

ANALYSIS BY THE APPEALS AUTHORITY

The Appeals Authority is of the view that there are two triable issues, namely:-

1. Whether the Tender Document issued by the Respondent complied with the requirements of the law; and
2. What reliefs, if any, are the parties entitled to.

Having framed the issues above the Appeals Authority proceeded to resolve them as follows;

1. Whether the Tender Document issued by the Respondent complied with the requirements of the law;

In resolving this issue the Appeal Authority considered the Appellant's contention that the issued Tender Document contravened the law by requiring a main contractor who was not a party to a procurement process

to sign a contract with a proposed successful sub-contractor contrary to Regulation 233(1) of GN. No. 446/2013.

To ascertain the Appellant's contention the Appeals Authority revisited the corrected Tender Document issued by the Respondent subsequent to the pre-bid meeting. This is because according to the submission of the parties after the pre-bid meeting the Respondent has to incorporate all clarifications to form a standard tender document for execution of the proposed works. The Appeals Authority observed that, Clause 1.1 of the Instructions To Bidders (ITB) as modified by Clause 1 of the Bid Data Sheet (BDS) indicated that the tender was invited by the Respondent that is (SUMATRA). Furthermore Clause 1.1 of the GCC as modified by Clause 1 of the SCC indicated that the employer for the tender was SUMATRA. This fact is further supported by the form of the letter of acceptance that was attached to the Tender Document issued to the would-be subcontractor. The cited Clauses are supported by Section 60(7) of the Act read together with Regulation 233(1) of GN. No.446/2013 which inter alia state that a tenderer whose proposal has been accepted would enter into a contract with procuring entity. For purpose of clarity the said provisions are reproduced hereunder and read as follows;

Sec. 60(7) "where a tender, offer or proposal has been accepted by the Accounting Officer, the procuring entity and the person whose tender, offer, proposal has been accepted

shall enter into a formal contract for the supply of goods, provision of services or undertaking of works.”

Reg. 233(1) “where a tender is accepted by the accounting officer, the procuring entity and the person whose tender is accepted shall enter into a formal contract for supply of goods, provision of services or undertaking of works within twenty eight days after fulfilling all conditions prior to the signing of contract.”

The above quoted extracts of the law provide clearly that a contract need be signed by parties who are privy to the contract that is, between a procuring entity that invited the tender and issued a letter of acceptance to a subcontractor whose tender has been accepted.

During the hearing, the Members of the Appeals Authority asked the Respondent as to why the Tender Document required the final contract to be signed between the main contractor and subcontractor and not SUMATRA. In reply thereto, the Respondent stated that, it is the practice in the East African region, under projects similar to the one in dispute, for a sub-contractor to sign up with a main contractor notwithstanding the fact that the tender process has been conducted by the procuring entity. Dr. Stanslaus K. Ntiyakunze informed the Members of the Appeals Authority on the need for the subcontractor to sign with the main contractor. He also highlighted on the many occasions when large projects such as the one in

issue, required the collaboration between the sub-contractors and the main contractors. Very unfortunately the practice alluded to by the esteemed Architect and Quantity surveyor has not been fully captured or customized under our procurement regime. There appears to be some confusion as to whether the whole process entailed domestic or nominated sub-contractor. On the one hand, the Respondent appears to have intended to use the nominated sub-contractor as against domestic subcontractor principles. This finding is to be noted from the minutes of the Pre Bid meeting held on 7th November 2016. And a close reading of the Statement of Reply filed by the Respondent shows that following the call for clarifications, soon after the pre-bidding meeting, the Respondent incorporated the issues so raised at the said meeting in the final document issued to bidders but which the Appellant did find inappropriate to collect. During the hearing, the Appellant stated that he did not collect the document because it did not differ basically with the previous document he had purchased specifically on the obligations and rights between the main contractor and sub contractor and incidentally, that is the document the Respondent attached to his statement of reply to the Appeals Authority.

The Appeals Authority has scrutinized the attached document and has established that indeed it contains both principles for nominated and domestic sub contractor's guidelines. This is the final document which the Respondent insisted that the Appellant should have collected soon after the pre-bid meeting. It is the Appeals Authority's view that, the document should have been customized to reflect the type of subcontract that is,

nominated subcontract as indicated in the mode of invitation and the Minutes of pre-bid meeting. The Tender document so issued horribly missed the crucial aspect in as far as it contains provisions for both nominated and domestic subcontractor principles. If the Respondent intended to use domestic subcontractor principles, then the document should have clearly stated so. In the present case based on the filed document it has been shown that the proposed successful sub contractor will sign with the main contractor which is contrary with the provisions cited above.

To that extent the Tender Document issued by the Respondent after the pre-bid meeting contravenes the law by subjecting a successful sub contractor to the main contractor while the same was clearly stated in the Tender Document that the employer in the said project is SUMATRA (the Respondent).

The Appeals Authority further considered the Appellant's contention that the Tender Document used by the Respondent contravened the law by not using a standard document issued by the PPRA available in their website. In other words, Members of the Appeals Authority wanted to establish whether there was in place a standard document issued by PPRA in respect to all subcontracts as mandated by the law.

The Appeals Authority revisited Regulation 184(3) of GN. No. 446/2013 which requires a procuring entity to use a standard tender document

issued by the Authority and as asserted by the Respondent at the hearing that, it used such standard Tender Document issued by the PPRA.

The Appeals Authority observed that PPRA's website namely; www.ppra.go.tz does not contain any document for subcontractors' works. Instead, it contains a document for medium and large works that was not a relevant document for sub contracts works. The Appeals Authority vide its letter under Ref. No. PPAA/APPEALS /09/13/2016-17 dated 16th December 2016 sought from the PPRA confirmation or otherwise on the availability of the standard Tender Document for sub-contractors work. The PPRA replied that it had *a draft standard document of 2012* for subcontract works, issued to a procuring entity upon request.

The Appeals Authority further revisited the purported draft standard Tender Document from the PPRA that was issued to tenderers and observed that, it contains repealed laws. For example; Clause 5.1 refers to the repealed Public Procurement Act of 2004 and its Regulations. As the said document makes reference to repealed laws its validity could no longer be authentic especially if it was true that it was prepared by the PPRA in 2012 and ought to have incorporated the new provisions under the Public Procurement Act of 2011. A further scrutiny shows that Clauses 48.1 to 49.1 make reference to the review mechanism then in force under the repealed laws of 2004. At the centre of this controversy is whether, there is in place a customized standard tender document in respect to the execution of sub-contract works.

When asked by Members of the Appeals Authority regarding the glaring discrepancies in the document allegedly issued by the PPRA, the Respondent insisted that it had no mandate to alter documents issued by the PPRA. The Appeals Authority respectfully disagrees with the Respondent since the law allows changes to the BDS and SCC. The Respondent had a duty to make changes or customize the document for its use or use any other standard tender document acceptable to the PPRA and thereafter to seek approval from the PPRA as per Regulation 184(4) and (5) of GN. No. 446/2013. The said provision is reproduced here below;

184(4) "any changes to the standard tender documents shall be introduced only through tender data sheets, or through special conditions of contract."

(5)"where the relevant standard tender documents are not issued, the procuring entity shall use standard tender documents acceptable to the Authority."

The Appeals Authority is of the firm view that the tender document issued was not the standard Tender Document for sub contractors works. The so-called draft standard tender document referred to by the PPRA in the above quoted letter is not a legal document in the eyes of the procurement regime. This Appeals Authority had the occasion to give guidance through Appeal Case No. 129 of 2012 on the need to have in place a formal standard tender document for subcontractors in line with the Act and its

Regulations. The Appeals Authority is of the firm view that as PPRA has been entrusted by law to prepare and issue the said document as per Section 9(1)(c) of the Act, PPRA is yet to discharge that duty.

Having resolved the two contentious issues by the Appellant, it goes without saying that the tender document does not fully address the rights and obligations of the sub contractor as contained under Clauses 18.3, 19.2, 22, 23 and 34 and the Respondent did not give written clarifications to the basic issues touching contractual relationship between main contractor and sub contractor. His response was that a document was a standard tender document issued by the PPRA and which they do not have mandate to alter. Unfortunately, the said document was couched in such a way that it applies to both nominated and domestic sub contractor contrary to the requirements of Regulation 239 of GN. No. 446/2013.

The Appeals Authority concludes the first issue that, the Tender Document issued by the Respondent after the pre-bid meeting does not comply with the requirements of the law.

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

The Appeals Authority took cognizance of its findings in this Appeal that both parties have relied on an irregular Tender Document. As for the Appellant, he relied on a standard tendering document for medium and large works which is not applicable under the circumstances. As for the

Respondent, he issued what he termed a standard tender document for sub contract works but which is irregular as it relates to both nominated and domestic sub contractor. By filing an irregular tender document, the Respondent can not by any stretch of imagination benefit from such a wrongful act. Two wrongs do not make a right. Accordingly, the Appeal is partly allowed.

For the purposes of this Appeal, the Appeals Authority, taking into account of its findings herein, nullifies the tender process and orders the Respondent to do the following;

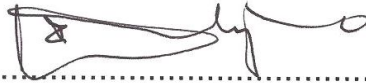
- Re-issue an approved standardized Tender Document which addresses the defects observed herein above to all tenderers who purchased the tender previously; and
- To extend time for submission of the same.

No orders as to costs. Each party to bear own costs.

This Decision is binding upon the parties and shall be enforceable in same manner as a decree or order of the court in terms of Section 97 (8) of the Act.

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


This decision is delivered in presence of the Appellant and the Respondent,
this 3rd January 2017.



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JUDGE (Rtd) V.K.D. LYIMO
CHAIRMAN

MEMBERS:

1. ENG. FRANCIS T. MARMO



2. MRS. ROSEMARY A. LULABUKA

