

IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY AT
DAR ES SALAAM
CONSOLIDATED APPEAL CASES NO. 42 & 43 OF 2014-
15.

BETWEEN

M/S QUANTUM POWER E.A LIMITED1ST

APPELLANT

M/S KOCH ENGINEERING CONSTRUCTION
LDC/PROMAN JV.....2ND APPELLANT

VERSUS

BOARD OF TRUSTEES OF NATIONAL SOCIAL
SECURITY FUND.....RESPONDENT

RULING.

CORAM

- | | |
|-------------------------------------|-------------|
| 1. Hon. Vincent K.D Lyimo, J. (rtd) | -Chairman |
| 2. Mrs. Rosemary A. Lulabuka | -Member |
| 3. Mr. Louis P. Accaro | -Member |
| 4. Eng. Aloys J. Mwamanga | -Member |
| 5. Mr. Ole-Mbille Kissioki | - Secretary |

SECRETARIAT

1. Ms. Florida Mapunda -Legal Officer
2. Ms. Violet S. Limilabo - Legal Officer
3. Mr. Hamisi O. Tika - Legal Officer

FOR THE 1ST APPELLANT

1. Ms. Khadija Ngasongwa –Advocate, Forbix Attorneys
2. Mr. George Joqnonn -Quantum Power E.A.

FOR THE 2ND APPELLANT

1. Mr. Hassan Ahmed -Representative, Koch/ Proman
2. Mr. Anacleto Pereira -Representative, Koch/ Proman
3. Mr. Dickson Mutogosewa -Advocate, Dickson Consulting
Advocates
4. Khadija Salum -Legal Assistant
5. Juma Bukene -Support Staff, Dickson Consulting
Advocates

FOR THE RESPONDENTS

1. Mr. Abdi Kagomba -Chief of Legal Services
2. Mr. John Msemo - Project Manager
3. Ms. Amina Abdallah -Assistant Procurement Manager
4. Mr. Jamal Mwashu -Legal Officer
5. Mr. safi K. Kondo - Legal Officer

6. Mr. Asante Mbata - Legal Officer
7. Ms. Ashura Said -Internship trainee.

FOR THE OBSERVERS.

1. Mr. Shaun Moore -Contracts Director, JV. Jelco/
Metka
2. Mr. William Mareale

This Ruling was scheduled for delivery today 1st June, 2015 and we proceed to do so.

The above Appeal was lodged by M/s Quantum Power E.A. Limited, the 1st Appellant and M/s Koch Engineering Construction LDC/PROMAN JV; the second appellant, (hereinafter referred to as "the Appellants") against the Board of Trustees of National Social Security Fund (hereinafter referred to as "the Respondent").

The said Appeal is in respect of Tender No. PA/004/2014-2015/HQ/W/09 for Financing and Supply of 300 MW Gas Fired Power Plant Generation Project, EPC and Operation and Maintenance at Mkuranga Coast Region (hereinafter referred to as "the tender").

On being notified of the Appeal, the Respondent filed a Preliminary Objection raising a point of law based on the ground that the Appeals so filed contravene Sec. 88 (5) of the Public Procurement Act No. 7 of 2011 (hereinafter referred to as "the Act") to the extent of being premature as the Authority lack (sic) original jurisdiction to determine it.

In view of the Preliminary Objection that had been raised, the Appeals Authority was obliged to resolve the same before addressing the Appeal. On the date of hearing, the only issue for consideration was-

Whether the Appeals Authority has jurisdiction to entertain the Appeal as filed.

In order to effectively determine the PO so raised, Members of the Public Procurement Appeals Authority (hereinafter called "the Appeals Authority") have deemed it fit to outline the sequence of events leading to the objection and which run as follows-

SEQUENCE OF EVENTS:

According to the documents submitted to the Appeals Authority the facts leading to the Preliminary Objection may be summarized as follows:

The Respondent, through the Daily News newspaper and the Public Procurement Journal dated 20th and 21st October 2014 respectively, invited interested investors to submit their proposals for the tender under review. The said tender was to be conducted under international competitive tendering procedures specified in the Public Procurement Regulations, GN.446 of 2013 (hereinafter referred to as "the GN.446 of 2013").

The initial deadline for the submission of proposals was set for 10th December 2014. However, the same was extended to 15th January 2015, whereby seven proposals were received. The following firms submitted their proposals:

S/N	Name of the Bidder
1.	M/s Xaris
2.	M/s Telemenía Limited
3.	M/s TransCentury Limited
4.	M/s Koch Engineering &Construction LDA (KE&C)
5.	M/s Quantum Power East Africa Limited
6.	M/s Metka Limited JV Jelco
7.	M/s Tajiri Capital Limited

During the opening of the said proposals, it was observed that only two out seven firms had submitted separate envelopes containing technical and commercial and financial proposals in compliance with the Request for Proposal (RFP). These were; M/s Telemenía Limited and M/s Koch Engineering & Construction LDA (KE&C) – the second Appellant.

Immediately after the opening ceremony, all seven proposals were subjected to evaluation which was conducted in three stages namely; Preliminary, Technical and Financial evaluation as stipulated under Section V, Clauses 2, 14, 15; and Section VII Clause 25 of the Instruction to Bidders (hereinafter referred to as the (“ITB”).

During the process of evaluation, four proposals were found to be non-responsive to the eligibility criteria provided for under Section V of the RFP. These were M/s Xaris, M/s Telemenia Limited, M/s Trans Century Limited and M/s Tajiri Capital Limited respectively. The remaining three proposals were considered for Technical and Commercial evaluation, in which case the proposals by M/s Metka Limited; JV Jelco and M/s Quantum Power East Africa Limited were found to have scored above the minimum score which was 36 out of 60. Therefore, the Evaluation Committee recommended for the opening of Financial Proposals of the two named firms.

The Tender Board at its meeting held on 19th February, 2015 deliberated on the recommendations by Evaluation Committee and on being satisfied; approved the evaluation of the financial proposals.

On 24th February 2015, the financial proposals of the two named firms were evaluated and the recommendation for award thereof was made to the Tender Board.

At its meeting held on 4th March 2015, the Tender Board deliberated upon the recommendations by the Evaluation Committee and observed that the results of financial evaluation were not supported by the evidence of scores assigned to each bidder and that lack of the same had

denied the Board the opportunity to fairly review the results before making any decision. Two bidders who had complied with the RFP had been disqualified at various stages of the evaluation. The first bidder who had complied with the RFP was disqualified at the first preliminary stage while the second appellant was disqualified at the second stage of evaluation. Two of the bidders who did not comply with the RFP were taken on board for further evaluation. Therefore, the tender board instructed the Procurement Management Unit (PMU) to seek guidance from the Public Procurement Regulatory Authority (PPRA) whether it was proper for the PMU to proceed with the financial evaluation of the two of the bidders who had not complied with the RFP in respect to the submission of two separate envelopes for technical and commercial proposal on one hand and financial proposal on the other.

The Respondent's Accounting Officer by his letters Ref. No. NSSF/HQ/P.14/254/III/65 dated 9th and 11th March 2015 respectively, requested for clarification from PPRA as directed by the Tender Board.

On 18th March 2015, PPRA responded and informed the Respondent that some information was missing in its RFP. Furthermore, PPRA informed the Respondent that the use of a different version of the RFP prior to approval of the same

by PPRA was in contravention of Regulation 108 of GN.446. Finally, PPRA ordered the Respondent to revise its RFP to include the missing information and to seek approval from PPRA before re-issuance of the same to bidders.

The Tender Board at its meeting held on 23rd March 2015, received the advice by PPRA and upon its deliberations resolved to comply with the directives by PPRA. It therefore, approved rejection of all tenders and consequently on 1st April 2015, the Respondent by his letter Ref. No. NSSF/HQ/P.14/254/III/69 sought for approval of rejection of tenders from PPRA. On 10th April 2015, PPRA by its letter Ref. No. PPRA/PA/004/"B"/84 approved the rejection of tenders as requested.

On 21st April 2015, the Respondent through his letters Ref. Nos. NSSF/HQ/P.14/254/VOL.III/74-78 respectively, informed all tenderers its decision to cancel the tender.

Upon receiving the Respondent's letters on the cancellation of the tender, the 1st Appellant on 27th April 2015 filed his Appeal while the 2nd Appellant lodged his on 4th May 2015. The two Appeals were then consolidated for determination by the Appeals Authority.

SUBMISSIONS BY THE RESPONDENT ON THE PRELIMINARY OBJECTION.

The learned counsel for the Respondent made reference to Part IX of the Act– on Disputes Settlement, sec. 88 (5) which states:

85.- 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.

In dealing with the issue of cancellation, the learned counsel submitted that the matter should be dealt with in the context of section 85 sub sec. (5) above together with sections 96 and 97 of the Act. He submitted that the Appeals Authority is a creature of statute and its powers are not absolute. The jurisdiction of the Appeals Authority is provided for under the Act and that for it to entertain an appeal two conditions must be met.

First, that there should be an administrative decision in writing by the Accounting Officer and second, the procurement contract must have entered into force. In the present case the Accounting Officer never made any administrative decision and that the procurement process in

question did not reach the contract stage. The learned counsel stated that under the current proceedings, a situation similar to the one covered under Reg. 106(1) and related regulations had not arisen, and therefore the Appeals were lodged pre-maturely. He pointed out that Regulation 106 - lays out the procedure of how the Accounting Officer may deal with an application for administrative review, while Regulation 107 deals with situations when the disputes may be referred to the Appeals Authority. He submitted that there were no applications for administrative review and hence the regulations referred to above were not applicable. And concluded that in as far as the Respondent was concerned, this Appeals Authority has no mandate to determine the appeal as it is too premature to do so.

Second, the learned counsel submitted that there was no scenario or issue or contract in force which would have prompted an application for review by the Appeals Authority. He stated that in this particular case, the Respondent sought leave and guidance from the PPRA and the same were granted. He referred to sec. 96 subsections (1) and (2) of the Act and submitted that all disputes which arise as specified under the law can be subject to administrative review and decided upon by a written decision of the Accounting Officer. It is only then that a person dissatisfied with the manner the Accounting Officer handles the

complaint that an appeal may lie to this Appeals Authority as mandated under Section 97 of the Act. The learned counsel insisted that the law is very specific on the powers of the accounting officer and from the wording and context of Sec. 88 (5) referred to above, the Appeals Authority lacks original jurisdiction to entertain complaints which have no roots in administrative decision by the accounting officer. He stated that in as far as the Respondent was concerned; this Appeals Authority has no mandate to determine the appeal as it is too premature to do so.

The learned counsel for the Respondent informed the Members of the Appeals Authority that the tender in question had been cancelled because the PPRA had observed that the Respondent had not complied with the requirements of Regulation 108 (2) of GN.446. The Respondent had not obtained prior approval from the PPRA in respect to the RFP which had been used in inviting the bids and that PPRA became aware of the matter after the Respondent had requested for advice on anomalies on packaging of the tenders and the methodology the procuring entity had used in evaluation. Consequently, the Respondent could not proceed with the tender proceedings since the RFP which the Respondent had used was neither the standard document nor modified or reviewed and approved by PPRA. By all standards, he submitted that the tender process ought

to be cancelled and re-advertised when the proper RFP as required by the law will be used.

The learned counsel stated further that by virtue of Ss. 96(2) and 97 of the Act, the Accounting Officer still had mandate to entertain and hear the Appellants' complaint before they could appeal to this Appeals Authority. The above cited provisions empower the Accounting Officer to form an investigation committee to probe the procurement complaint submitted before him. By virtue of these powers, the Accounting Officer was better placed to investigate the matter and make decisions accordingly. The Appellants did not follow that channel. Had the Appellants followed the said procedures, the Accounting Officer would have been accorded the right to review the complaint and advise PPRA accordingly. The Respondent reiterated that under the circumstances, the Appeals Authority has no original jurisdiction to hear the Appeal at hand; therefore the Appeals should be dismissed.

SUBMISSIONS BY THE 2ND APPELLANT

In reply to the Respondent's submissions learned counsel for the 2nd Appellant submitted that the Preliminary Objection raised by the Respondent is untenable and the same should not be allowed. He submitted that the Respondent was *functus officio* in handling any complaint from the Appellants

since the decision it had made to cancel or reject the tenders emanated from the directives by PPRA. In no means, could the same Respondent have made a different decision from the directives by PPRA, since PPRA is a superior authority. Further that the Respondent's replies to the Preliminary Objection in particular Paragraph 2.8 thereof lends support to the view that exhaustion of local remedies is merely complementary to the legal rights of the respective appellants. He stated that as long as the Respondent was acting under the directives of a superior authority, PPRA, there was no room for the respondent to accommodate any review as envisaged under the law. The learned counsel pointed out that under the circumstances, should the decision of the Respondent be upheld, all prospective bidders will be left without any remedy. There is an issue to be resolved and the best way is to address the same. He made reference to Regulation 17 (1) of the PPAA Rules, GN.NO.411 of 2014 on the discretion of the Appeals Authority and said that once an appeal is filed, the Authority has to determine it. He cautioned against short-circuiting the procedures.

The learned counsel stated that in terms of Regulation 106(1) (a) of GN. 446, the Accounting Officer is obliged to suspend the procurement proceedings in question pending a

determination of a complaint. Since the tenders had been cancelled, the Respondent's Accounting Officer had nothing to suspend or determine. Therefore it was not tenable to lodge an application for administrative review. He went on to show that the cancellation of tenders is a preserve right of PPRA not the Respondent's function. Therefore, the Respondent could not do any deviation from PPRA directives. He refuted any suggestion by the respondent that it could have reversed and rejected PPRA's directives for that is unlikely under the regulatory regime. To amplify his views, he stated that under administrative law, where there are no alternative remedies which a public body can offer, an aggrieved party may appeal to the superior body for redress. However, such alternative remedies do not necessarily pre-empt the legal reliefs. Elaborating on what he had already stated, the learned counsel made reference to Rule 6(h) of GN.411 of 2014, which provides for matters from which an appeal may lie to the Appeals Authority, to include any matter which the Appeals Authority may deem appealable. By invoking this provision, the Appeals Authority can hear an appeal lodged before it. Alternatively, the counsel for the 2nd Appellant submitted that, the Appeals Authority is to deal with substantive justice in determining appeals before it and not to rely on technicalities. In the event the Appeals Authority is satisfied that the Appeal was pre-maturely

lodged, it can compel the Respondent to comply with the law and at the same grant extension of time and allow the Appellants to file their complaints to the Accounting officer.

The 2nd Appellant referred this Appeals Authority to a Ruling by the High Court of Tanzania, Labour Division - *Labour Dispute No. 49 of 2008 James Kajo & 3 Others*, by Rweyemamu J. The four complainants had filed for unfair termination, claiming compensation and arrears of unpaid overtime without first going through the Commission for Mediation and Arbitration (CMA). And another reference: Public Law in East Africa - by law Africa at pg. 66 paragraph 44.7.3 on alternative Remedies and Review, wherein it is essentially stated that the existence of alternative remedy does not exclude recourse to judicial review. "*Mandamus* or *a declaration sought by judicial review* or other remedies if appropriate, are available notwithstanding the existence of an alternative remedy".

On the other hand, the learned counsel for the 1st Appellant indicated that she was in full agreement with the submissions of the 2nd appellant. She added that the decision by PPRA and its directives to the Respondent was irreversible in terms of Regulation 106(1) (a) of GN.446. The Respondent could not challenge the decision given by its superior. Therefore, the only avenue the Appellants had was

to appeal to this Appeals Authority. Both counsels for the Appellants prayed for the dismissal of the Preliminary Objection.

In his brief rejoinder, the Respondent stated that there was no correlation at all between the law and the authorities upon which the appellants had relied. That, the law was clear on the original jurisdiction of the Appeals Authority. And that finally, under Rule 6 (h) referred to by the counsel for the 2nd Appellant; there was no room for subsidiary legislation to override its principal legislation.

ANALYSIS BY THE APPEALS AUTHORITY

Having heard the oral submissions by the parties, the Appeals Authority framed the issue; whether the Appeals Authority has jurisdiction to determine the Appeals.

To start with the Appeals Authority revisited Section 88(5) of the Act relied upon by the Respondent; *op. cit.*

From the above provision, the Appeals Authority observed that for this Appeals Authority to hear and entertain complaints or appeals from complainants, one of the prescribed conditions must be observed. First, there should be an administrative decision by the accounting officer regarding the dispute; or that the procurement contract in question has already entered into force. The Appeals

Authority revisited all the documents availed to it at the hearing and observed that none of the conditions referred to under the law had in fact materialized at the time the appeals were lodged. That is, there was no complaint submitted by any of the Appellants to the accounting officer as envisaged under Section 95(1) of the Act and Regulation 104 of GN. 446. Consequently, there was no administrative decision made as mandatorily provided for under Regulation 106 (6) and (7) of GN. 446. The Appeals Authority revisited learned counsels' submissions in respect to the cancellation of the tenders.

The Members of the Authority have noted that the Respondent wrote two separate letters on 9th and 11th March 2014, respectively to the PPRA seeking clarification on the manner this tender was being processed. The responses from PPRA in its letter dated 18th March 2014 were at best the foundation for the way forward. It will be noted that at that stage, the Respondent could not revise the RFP and obtain PPRA subsequent approval while at the same time holding on to the evaluation of the tenders. And logically, the Respondent, vide its letter dated 1st April 2015, sought approval for the rejection of the tenders which approval was duly granted. It will be observed that it is the Respondent's letter Ref. Nos. NSSF/HQ/P.14/254/VOL.III/74-78 dated 21st April 2015, which is the centre of controversy since it is this

letter through which the Respondent informed all tenderers that the tender had been cancelled. Part of that letter runs as follows-

.....
In view of the above, NSSF officially informs you that Tender No. PA/00/201-2015/HQ/W/9 for Financing a 300MW Gas Fired Power Plant Generation Project, EPC and Operation and Maintenance at Mkuranga Coast Region is hereby cancelled and the same will be floated in the near future. (Emphasis mine)

.....
Undoubtedly, this aspect of the letter has contributed much to the confusion in respect to the preliminary objection. It was wrongly couched for it sent out the message that the Respondent had the powers and had decided to cancel the tender for the reasons contained in the said letter. As correctly pointed out by the learned counsels for the Appellants, the mandate to cancel any tender is that of the PPRA, while the Procuring Entity/Respondent has the power to reject tenders on the occurrence of the events specified under sec. 59 (2) (a) to (g) inclusive.

The learned counsel for the Respondent also appeared to have lost sight on the specific mandate of both the PPRA and

the Respondent as the procuring entity. During the hearing, counsel for the Respondent would like the Members of the Appeals Authority to believe that the economic and technical data of the project had changed, a matter which was the preserve of the main appeal. The learned counsels shared the view that after the cancellation, the Respondent was *functus officio*. While we agree with the counsels for the Appellants that cancellation of tenders is within the mandate of the PPRA, we do not agree that the Respondent had no room to deal with an application for review under the circumstances.

As already stated, sec. 59 (2) contain the various conditions when a procuring entity can reject tenders. And sub section 6 thereof requires the procuring entity to obtain prior approval from the PPRA before rejection of tenders. The arguments by the learned counsels for the Appellants that the Respondent could not have acted after the decision to reject tenders cannot be supported in law by virtue of sec. 96(2) of the Act which empowers the accounting officer to form an independent committee to advise him on the appropriate action to be taken. The said section reads as follows;

On receiving a complaint under this section the accounting officer may, depending on the nature

of the complaint, constitute an independent review panel from within or outside his organization which shall review the complaint and advise him on the appropriate actions to be taken.

The above provisions notwithstanding, the Appeals Authority revisited other provisions of the law relied upon by the Appellants and observed that Rules 6 of the Appeals Rules referred to by the 2nd Appellant subjects the lodging of appeals to this Appeals Authority to Sections 60(3), 95(2), 96 and 97 of the Act. This means that for any aggrieved tenderer who wants to appeal before the Appeals Authority must comply with the said requirements; such as there should be

- a notice of Intention to Award, in terms of Section 60(3) or
- an administrative decision by the Accounting Officer in terms of Section 96 and 97 respectively.

Similarly, this Appeals Authority is of the firm view that Rule 17 of the GN 411 – is not applicable to the present case. The Rule empowers this Appeals Authority to reject any appeal where it is satisfied that any condition regarding its institution was not complied with. This pre-supposes a situation where the appeal in question was heard on its

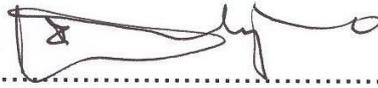
merits. Therefore, the same equally does not serve the Appellants.

Last but not least, the Appeals Authority revisited the first Appellant's cited authorities and respective submission that if satisfied that the Appeals were pre-maturely lodged, to extend time to the Appellants to lodge their complaints to the Accounting Officer. It is noted that the case so cited is of persuasive nature and not binding on this Appeals Authority. The rules of procedure that have been prescribed under the Act and its related regulations have to be complied with unless there is a lacuna within the said legislation. No such lacuna has been proved. The only power to extend time is on complaints or appeals submitted to the Appeals Authority in terms of Section 98 of the Act and not otherwise.

From the above findings, it is the Appeals Authority's conclusion that the Appeal before it was pre-maturely lodged. The preliminary objection is upheld and consequently the Appeals are struck out. Each party to bear its own costs.

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

This Ruling is delivered in the presence of the 1st and 2nd Appellants and his counsels and the Respondent and his counsels this 1st June 2015.



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JUDGE (rtd) V.K.D. LYIMO

CHAIRMAN

MEMBERS:

1. MRS. R. A. LULABUKA



2. ENG. A. J. MWAMANGA



3. MR. L. P. ACCARO

