

13

**IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY
AT DAR ES SALAAM
APPEAL CASE NO 13 OF 2015-16**

BETWEEN

M/S KOSEMWA PROSPECTS CO. LTD..... APPELLANT

AND

PUBLIC PROCUREMENT

REGULATORY AUTHORITY.....1ST RESPONDENT

LINDI DISTRICT COUNCIL.....2ND RESPONDENT

DECISION

CORAM

- 1. Eng. Francis T. Marmo - Chairman
- 2. Mrs. Rosemary A. Lulabuka - Member
- 3. Eng. Aloys J. Mwamanga - Member
- 4. Mr. Ole-Mbille Kissioki - Secretary

SECRETARIAT

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

FOR THE APPELLANT

1. Mr. Stephen Axwesso - Advocate
2. Mr. Philbert Maganya - Managing Director

FOR THE 1ST RESPONDENT

1. Ms. Maria G. Mng'ong'o - Legal Officer
2. Mr. Mohamed Y. Ally - Procurement Officer

FOR THE 2ND RESPONDENT

1. Ms. Happyphania E. Luena - District Legal Officer
2. Mr Daniel Kasembe - Head of PMU
3. Mr. Aswile M, Kwasaga - District Engineer
4. Mr. Langula T. Madirisha - District Health Secretary

This decision was scheduled for delivery today 4th December 2015, and we proceed to do so.

The Appeal was lodged by **M/S KOSEMWA PROSPECTS CO. LTD** (hereinafter referred to as "the Appellant" against the **PUBLIC PROCUREMENT REGULATORY AUTHORITY** commonly known by its acronym PPRA and the **LINDI DISTRICT COUNCIL** (hereinafter referred to as the 1st and 2nd Respondents respectively). The Appeal is against debarment order that emanated from termination of Contract No. LGA-052/2013/14/HQ/W/16 LOT 1 (hereinafter referred to as "the Contract").

According to the documents submitted to the Public Procurement Appeals Authority (hereinafter referred to as "**the Appeals Authority**"), the facts of this Appeal may be summarized as follows:

On 25th January 2014, the Respondent invited bidders to submit tenders for Construction of Staff House (two in one), Toilet Block and Rehabilitation of X-ray Block at Kitomanga Health Centre in Lindi. Following the successful completion of the procurement process, the Appellant won the tender and on 23rd May 2014, the

2nd Respondent signed a Contract Agreement with the Appellant. The Contract was scheduled to end on 5th November 2014, with the actual works commencing sometime in June 2014. As the works progressed, the Appellant, vide letter reference kpcl/gen.vol 03/14 dated 27th September 2014, notified the 2nd Respondent of the imminent delay of project completion due to delayed payments. An Interim Payment Certificate No.1 raised on 18th July 2014, was paid on 6th September 2014. Sometime in October 2014, the 2nd Respondent and the Appellant conducted a joint inspection of works and noted variation and additional works done by the Appellant. As a result, they mutually agreed on some variation and to extend contract completion up to 28th June 2015. The Appellant thereafter proceeded to raise the 2nd Payment Certificate inclusive of additional works on 31st October 2014 which was paid on 1st December 2014 excluding the amount for the variation. The Appellant continued to demand for full payment of additional works and demobilized from site.

Having realized that the Appellant has abandoned the site, the 2nd Respondent by its letter ref. No.LDW/H.20/10/24 dated 28th July 2015 copied to PPRA; terminated the Contract for failure to complete the works within the extended contract period.

On 12th October 2015, the Appellant received a letter from the 1st Respondent Ref. PPRA/LGA/052/52 dated 7th October 2015 debarring it to participate in public tenders for two years on reason that it failed to finish the works within the agreed contract period.

The Appellant was aggrieved by 1st Respondent's failure to follow the debarment procedures hence this Appeal which was filed on 23rd October 2015.

SUBMISSIONS BY THE APPELLANT ON THE GROUNDS OF THE APPEAL

The Appellants grounds of Appeal as deduced from the written and oral submissions of the Appellant during the hearing can be summarized as follows;

1. That, the 1st Respondent erred in law for failure to issue notification to the Appellant prior to debarring the Appellant.

The Appellant submitted that:

- On 12th October 2015 they were phoned to go to collect their letter sent through Expedited Mail Service (EMS) from the 1nd Respondent;
- after opening the same, it was a **debarment** letter and that the Postal Box number used was the old one, since they had changed the address and that 2nd Respondent was aware of this;
- there are several letters sent by the 2nd Respondent to the Appellant using the new Postal Box hence the use of old Postal Box Number was maliciously done by the Respondents with a view to deny the Appellant its right to be heard;
- the 1st Respondent has not provided any proof that a notice of intention to debar was sent through a registered mail in his Postal Box as per Section 4 of The Companies Act, CAP 212;
- the Appellant is operating in marginalized regions of Lindi and Mtwara where there is no guarantee of the 1st Respondent's journals to circulate abundantly. Appellant wondered as to how the 1st Respondent or

its agents could manage to reach him through the phone at the time of serving the debarment letter but could not do so during the service of the notice of intention to debar;

- the Appellant never received a letter of termination of the contract from the 2nd Respondent;
- according to Regulation 93(1) of the Public Procurement Regulations 2013 (hereinafter referred to as "**GN 446/2013**") debarment is initiated by a proposal, but in this case there is no proof of submission of any proposal to the 1st Respondent to process debarment proceedings in line with Regulation 94(1). According to him, a copy of the termination letter from Lindi District Council to the Appellant cannot be said to be a proposal;
- according to Section 9(1)(h)(ii) of the Public Procurement Act, 2011 (hereinafter referred to as "**the Act**"), the 1st Respondent has a duty to satisfy itself that termination of contracts should not involve irregularities however, the 1st Respondent failed to fulfill that duty;

- notification of intention to debar a tender cannot be effected until the 1st Respondent determines that the grounds for debarment have been established.

2. That, the 1st Respondent erred for punishing the Appellant for mistakes attributable to the 2nd Respondent's failure to perform its obligations under the contract

The Appellant submitted that failure to finish the project was attributed to 2nd Respondent's failure to make payments entitled to the Appellant within time, failure to effect payments for the additional works and 2nd Respondent's failure to include mobilization costs in the Bills of Quantities(BOQ).

As regards to delayed payments, on 18th July 2014, the Appellant raised its claim No. 1 but the 2nd Respondent paid the same on 06th September 2014, one and half month later. The 2nd claim was raised on 31st October 2014; however until December it was yet to be paid contrary to Clause 46 of the General Conditions of Contract (GCC) which require payments to be made within 28 days of the date of each certificate.

Regarding works variation, the Appellant contended that he was not paid, despite several reminders to the 2nd Respondent. He further submitted that the debarment was unlawful since there was great contribution of the 2nd Respondent for failure to execute fully the contract.

Therefore, the Appellant prayed before this Appeals Authority for the following orders;

- i. The debarment order and notification be nullified and or lifted;
- ii. The 2nd Respondent pay the Appellant for the additional works done;
- iii. Costs of the Appeal as follows:

Appeal filling fees... TZS 150,000.00

Transport.....TZS 270,000.00

Advocates FeesTZS 6,000,000.00
- iv. Any other reliefs as the Appeals Authority deems fit to grant.

1ST RESPONDENTS SUBMISSIONS IN REPLY TO THE APPELLANT'S GROUNDS OF APPEAL

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

- That, payments of Appellant's claim No 1 was in compliance with Clauses 45 and 46 of the GCC and there was no delay in such payment;
- that, as regards the purported additional works executed, the Appellant ought to have a written approval to execute additional works by the Project Manager;
- that, as regards anomaly in the BOQ , the Appellant was expected to have sought for clarification in terms of Clause 13 of GN 446/2013 during the tendering process. Failure of which, such issue could not be brought at this stage;
- that, the Appellant was served with a notice of intention to debar vide a letter referenced PPRA/LGA/052/52 dated 21st August 2015 by way of a registered mail whereas, it was required to submit its defence. In addition, a public notice to that effect was published in PPRA website and its journals

dated 15th and 22nd September 2015. However, the Appellant failed to submit its defence by the set deadline;

- that, the Appellant was lawfully debarred pursuant to Section 62(3) (c) of the Act as read together with Regulation 93(3)(c) of GN 446/2013. Debarment of the Appellant was initiated by the 1st Respondent in terms of Regulation 93 (1) of GN 446/2013;
- that, procedures for debarment were adhered to in terms of Regulations 95 and 96 of GN 446/2013 and that the said debarment was approved through the Board's Circular Resolution of the 1st Respondent .

The Respondent therefore prayed for the dismissal of the Appeal in its entirety.

2ND RESPONDENT'S SUBMISSIONS IN REPLY TO THE APPELLANT'S GROUNDS OF APPEAL

The 2nd Respondent's replies in respect of the Appellant's grounds of Appeal may be summarised as follows;

- That, the delay in payment of claim No. 1 was attributed by the Appellant as he submitted a claim form without detailed

claims, until it was required by the 2nd Respondent, the same was brought by the Appellant on 2nd September 2015;

- that, payment for variation of the project could not be effected since there was no approval from the Project Manager;
- that, an element of mobilisation was to be included by the Appellant in the BOQ at the “preliminary and general costs” part;
- that, the Appellant’s debarment is justifiable since he abandoned the site and without any notification, despite being paid its entitlements. Its contract was thus terminated after committing a fundamental breach of the contract.

Therefore the 2nd Respondent prays for the following orders;

- i. The Appeal be dismissed;
- ii. An order for the Appellant to pay 40% of the value of the uncompleted works in terms of clause 30 of the Special Conditions of Contract;

ANALYSIS BY THE APPEALS AUTHORITY

Parties to this Appeal and the Appeals Authority agreed on the following issues below;

1. Whether debarment proceedings were conducted in compliance with the law

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

Having identified the above issues , the Appeals Authority proceeded resolving them as follows;

1. Whether debarment proceedings were conducted in compliance with the law

Considering the parties contentions related to this issue, two sub issues were agreed as follows:

- Whether the Appellant was notified of the intention for its debarment
- Whether the Appellant was fairly debarred.

Whether the Appellant was notified of the intention for its debarment

In analysing this sub issue, the Appeals Authority considered arguments of the Appellant and the 1st Respondent regarding substance of communicated information, date and proper address of the Appellant. In so doing, the Appeals Authority also revisited Regulation 96(1) of GN 446/2013 which compels the 1st Respondent to issue a notice of intention to debar a tenderer, prior to debarment. For ease of reference, the said Regulation is reproduced as hereunder;

“Where the Authority determines that there are grounds for debarment on the basis of the produced information, documents and evidences, the Authority shall within twenty one days from the date of receiving the evidence, issue to the respective tenderer a notice of debarment”

The Appellant contends that the letter he received from the 1st Respondent by EMS on 12th October 2015, was an actual debarment letter and not a notice of an intention to debar. However, he hastened to explain that on close examination of the letter, he discovered that the 1st Respondent had used his old Postal Box number instead of the current one which the 2st

Respondent had been using in all communications to him in recent period referring to several such letters.

By reading the said letter, the Appeals Authority is satisfied that indeed the said letter was not the notice of intention for debarment.

The 1st Respondent has submitted that he had earlier served the Appellant with a notice of Intention to debar by way of a register sent through his Postal Box No. 55036. The said postal address is the one appearing in the duos' contract document. Furthermore, he demonstrated that the same Postal Box number was used in submitting his Statement of Appeal.

The Appeals Authority, having analysed the evidence by both parties on this, is of the view that; despite the fact that the Appellant's postal address stipulated in the contract document was Box 55036 and that there was no any written document adduced to prove that there was formal change of address on the part of the Appellant, impliedly, the use of the current address on the part of 2nd Respondent in several communications with the Appellant during the subsistence of the contract entails that the 2nd Respondent consented or rather was aware of the new address. The use of it also means that there was two postal

addresses used interchangeably for communication between the Appellant and the 2nd Respondent. As such, the notice of intention to debar, if any, could have been sent to any of the addresses. However, the onus is on the 1st Respondent to provide evidence that indeed the notice was posted to any of the Appellant's addresses. 1st Respondent has submitted that they sent the letter through the registered mail. They however did not produce the register receipt to convince the Appeals Authority that indeed there was a notice of debarment posted via a register to either of the Appellant's Postal Boxes.

In absence of proof of service through the said registered mail, the Appeals Authority cannot be convinced that a notice was served. Neither can it be convinced of the publication of the notice of intention to debar through the 1st Respondent's journal. The Appeals Authority revisited Regulation 99 of GN 446/2013 which was relied upon by the 1st Respondent to prove that the notice of intention was also published in the 1st Respondent's journal and website and observed that the publication in the referred journal and website are limited to decisions on debarment made by the 1st Respondent and not the notice of intention.

The Appeals Authority view is that publishing such notice in the journal was for public information but it could not best serve the purpose of informing the individual tenderer so he can exercise his right to be heard.

Basing on the aforementioned, the Appeals Authority's conclusion with regard to the first sub issue is that the Appellant was not notified of the intention for its debarment.

- **Whether the Appellant was fairly debarred**

This issue is drawn from the Appellant's contention that debarment was not in compliance with the law for there was no one who initiated debarment of the Appellant and that, the 2nd Respondent is the one who contributed to the failure to fully execution of the contract .

The Appeals Authority had therefore to satisfy itself of the legality of the said process. In so doing it had to analyse whether initiation and subsequently, the debarment complied with the law.

According to Regulation 93(1) and (2) of GN 446/2013 debarment proceedings may be initiated by the Authority as a result of audit or investigation conducted by the Authority (in this case the 1st

Respondent), any person or a Procuring entity and, where it is initiated by the Procuring entity, it should be pursuant to section 83 of the Act.

During the hearing , the 1st Respondent admitted that they initiated the debarment process on the basis of their own investigation. They however failed to provide proof of the procurement audit or investigation conducted by themselves as provided under Regulation 93(1) of GN 446/2013. It is apparent that the 1st Respondent only relied on the copy of the contract termination letter given by the 2nd Respondent.

Based on the information provided, the Appeals Authority finds no evidence of such vital information being attached to the letter of Intention to debar, if any. On the contrary, the 1st Respondent proceeded to debar the Appellant without a hearing. The Appeals Authority considers this to be a serious omission on the part of the 1st Respondent.

Therefore, the Appeals Authority's finding on the second sub issue is that the Appellant was unfairly debarred.

Basing on the aforesaid, the Appeals Authority's conclusion with regard to the first issue is that debarment proceedings were not conducted in compliance with the law, to the extent explained.

2.To what Reliefs are the parties entitled

Taking cognisance of the findings on the first issue, the Appeal is hereby allowed. All prayers by the Respondents fail forthwith.

Consequently, the debarment order is lifted and the 1st Respondent is ordered to announce it in the same way it used to announce the Appellant's debarment.

The Appeals Authority hereby orders the 1st Respondent to compensate the Appellant the sum of TZS 3,420,000.00 as per the following breakdown:

Appeal filing fees... TZS 150,000.00

Transport.....TZS 270,000.00

Advocates FeesTZS 3,000,000.00

The 2nd Respondent and the Appellant are directed to exhaust the remedies available in their contract document in case they have a contractual dispute.

It is so Ordered.

The Decision is binding upon the parties and may be executed in any court of competent jurisdiction in terms of Section 97(8) of the Act.

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

This Decision is delivered in the presence of the Appellant and the Respondents this 4th December 2015.



ENG. FRANCIS T. MARMO

CHAIRMAN

MEMBERS

1. ROSEMARY A. LULABUKA.....

2. ENG. ALOYS MWAMANGA.....