

IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY
AT DAR ES SALAAM

APPEAL CASE NO. 12 OF 2015-16

BETWEEN

M/S CAR AND GENERAL TRADING LTD.....APPELLANT

AND

PUBLIC PROCUREMENT

REGULATORY AUTHORITY.....1ST RESPONDENT

NATIONAL BUREAU OF STATISTICS.....2ND RESPONDENT

DECISION

CORAM

- | | |
|----------------------------|--------------|
| 1. Ms. Monica P. Otaru | -Chairperson |
| 2. Eng. Francis T. Marmo | -Member |
| 3. Eng. Aloys J. Mwamanga | -Member |
| 4. Mr. Ole-Mbille Kissioki | -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. Respicius Ishengoma | -Advocate -BIN Attorneys |
| 2. Mr. Desidery Ndibalema | -Advocate -BIN Attorneys |
| 3. Mr. Venkatesh Jayaraman | -Managing Director |
| 4. Mr. Hamida Mfinanga | -Human Resource Manager |
| 5. Mr. Jonathan Masanja | -Sales Executive |

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. Mr. Oscar Mangula | - Senior Legal Officer |
| 2. Mr. Ernest Mwakitalu | - Head, Procurement Management
Unit (PMU) |
| 3. Mr. Ezekia Mwalyego | -Procurement Officer |

This Decision was scheduled for delivery today, 27th November 2015 and we proceed to deliver it.

The Appeal was lodged by M/S CAR AND GENERAL TRADING LIMITED (hereinafter referred to as "the Appellant" against the PUBLIC PROCUREMENT REGULATORY AUTHORITY commonly known by its acronym PPRA and the NATIONAL BUREAU OF STATISTICS (hereinafter referred to as the 1st and 2nd Respondents).

The Appeal is against debarment order that emanated from termination of Contract No. NBS/AE/052/2013/2014/TSMG/G/03 for Supply of 19 Vespa/Wigo Motor Cycles (hereinafter referred to as "the Contract").

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

On 17th February 2015 the Appellant and the 2nd Respondent signed the Contract at a contract price of Tshs. 33,107,500.00 (VAT exclusive) to be executed within 12 weeks. For reasons that would be explained in due course, the goods were not delivered, and on 15th August 2015 the 2nd Respondent terminated the Contract. A bit less than 2 months thereafter, the Appellant was debarred from participating in Public Procurement for a period of two years.

Dissatisfied with the Debarment Order, the Appellant filed this Appeal.

SUBMISSIONS BY THE APPELLANT

The Appellant's grounds of Appeal are as follows:

- i. That, the 1st Respondent erred in law and in fact for failure to realize that the 2nd Respondent has never fulfilled his obligation under the Contract resulting into delay.

- ii. That, the 1st Respondent erred in law and in fact for failure to realize the Appellant's endless efforts and clear intention of supplying Wigo Scooters.
- iii. That, the 2nd Respondent erred in law and in fact for debarring the Appellant in total disregard of the binding terms and conditions of the Contract.

During the hearing, the Appellant submitted that the tender was awarded to them VAT exclusive and that immediately after the award they requested the 2nd Respondent to process VAT exemption. They claimed that without the VAT exemption certificate they could not release the motorcycles to the 2nd Respondent without payment of VAT as it was contrary to the law.

The Appellant further submitted that in addition to the VAT exemption certificate, the 2nd Respondent was also required to provide the TIN Number for purposes of registration of the motorcycles but he did not do so. That, additional and unwarranted costs to the Appellant would have resulted, had they decided to register the goods in their name first and then change into the 2nd Respondent's name.

On the issue of Contract termination, the Appellant argued that, the 2nd Respondent terminated the Contract without notifying them. That, they only became aware of the termination on 21st August 2015, when they received a notice of intention to debar from 1st Respondent. Arguing that, by virtue of Clause 25.1 of the General Conditions of Contract (GCC),

termination should be a matter of last resort as the Clause provides for liquidated damages. In addition thereto, the Appellant argued that they had submitted Performance Security, which could have been used by the 2nd Respondent to deduct the liquidated damages in the event of default.

On the issue of debarment, the Appellant submitted that, in their defence to the 1st Respondent they had attached the Packing List and the Release Order showing that they had been demanding the 2nd Respondent to provide the exemption for them to deliver the goods. Thus, had the 1st Respondent gone a step further, they would have determined that the delay was caused by the 2nd Respondent for failure to provide VAT exemption certificate.

The Appellant therefore prayed for the following orders:

1. Lifting the debarment;
2. Nullification of the termination of the Contract;
3. The 2nd Respondent to be ordered to provide the VAT exemption certificate and TIN to the Appellant;
4. Subject to No. (3) above, the Appellant to be allowed to supply the Wigo Scooters to the 2nd Respondent as per the Contract;
5. In alternative to No. (3) above, the 2nd Respondent should accept in writing to reimburse the Appellant the VAT component of the Contract; and
6. Any other relief the Appeals Authority deems fit to grant.

REPLY BY THE 1ST RESPONDENT

The 1st Respondent confined themselves on the issue of debarment, and in response thereto submitted that the same was justifiable.

The 1st Respondent submitted that on 21st August 2015, the Appellant was issued with a notice of intention to debar upon which the Appellant replied vide a letter with Ref: No. CGT/PPRA/NVS/1/15 dated 3rd September 2015, admitting to have been negligent and promising to take all efforts to ensure the 19 motorcycles are delivered within 14 working days.

The 1st Respondent submitted further that, even in the following letter, (of 18th September 2015 with Ref No. CGT/PPRA/NBS/215), the Appellant did not ask for intervention from the 1st Respondent rather it was a request for its appeal to be considered and be allowed to deliver the goods to the 2nd Respondent; something which the 1st Respondent said was outside their mandate.

Additionally, the 1st Respondent submitted that they considered the facts before them, which included Contract termination by the 2nd Respondent and found nothing to suggest that the Appellant was unable to execute the Contract due to the 2nd Respondent's inaction. That the 1st Respondent's Board of Directors, on 1st October 2015 made the debarment decision through Circular Resolution No. 08 and the Appellant was notified via a letter Ref: No. PPRA/AE/052/"B"/48 dated 8th October 2015. The 1st Respondent submitted that in any case, the Contract had terminated automatically by lapse of time.

Finally the 1st Respondent prayed for dismissal of the Appeal in its entirety and the Appellant to bear their own costs.

THE 2ND RESPONDENT'S RESPONSE

The 2nd Respondent confined themselves to the issue of Contract termination, submitting that the allegation that they never fulfilled their contractual obligation is baseless and should not be considered by the Appeals Authority.

The 2nd Respondent admitted that the duty of processing VAT exemption lied with them. However, they claimed that this could have been done only after the Appellant had delivered the goods and attached the Proforma Invoice. Further, that the VAT exemption certificate was supposed to assist the Appellant at the time of claiming payment after delivery of the goods and acceptance of the same. The 2nd Respondent argued that although they received the letters by the Appellant, there was no Proforma Invoice to assist in the VAT exemption process, which is why they did not respond.

The 2nd Respondent refuted that, lack of VAT exemption certificate was the reason for the Appellant's failure to fulfill their contractual obligation. They insisted that their obligation was only to pay for the goods after delivery. Further arguing that since the Contract duration was twelve weeks (12) from 17th February 2015, by virtue of GCC Clause 26.2, the Contract had expired by mid May, 2015 and that the Appellant was officially informed on the automatic termination on 21st August 2015.

With regard to the TIN Number, the 2nd Respondent argued that nowhere in the Contract was the Appellant required to register the motorcycles on behalf of the 2nd Respondent, thus they were not responsible for any delay caused as a result of not providing the TIN Number.

As did the 1st Respondent, the 2nd Respondent also insisted that the Appeal had no merits and therefore should be dismissed.

ANALYSIS BY THE APPEALS AUTHORITY

The analysis is based on the following issues as agreed by the parties;-

1. Whether the parties fulfilled their contractual obligations in respect of the Contract;
2. Whether the Debarment Order was proper in law; and
3. What relief(s), if any, are the parties entitled to.

The Appeals Authority proceeded to analyse these issues by considering both oral and written submissions of the parties, relevant documentations¹ and the applicable law as hereunder;

1. Whether the parties fulfilled their contractual obligations in respect of the Contract;

In analyzing this issue the Appeals Authority observed that by virtue of GCC Clause 35.2, the obligation to process VAT exemption rested with the 2nd Respondent. It is on record that the Appellant had requested the 2nd Respondent to process the exemption in January when they won the

tender and in March 2015 when executing the Contract. Apparently, the 2nd Respondent did not respond to any of these letters in any way whatsoever. As they decided to keep quiet, the record indicates that the Appellant proceeded to hold goods in their possession while waiting patiently for the necessary certification from the 2nd Respondent. Unfortunately, instead of processing the VAT exemption the 2nd Respondent decided to terminate the Contract. The Appeals Authority is therefore of a firm view that the act of the 2nd Respondent to terminate the Contract was not proper, particularly so as the Appellant depended on the 2nd Respondent to discharge their obligation of processing VAT exemption.

As correctly submitted by the Appellant, GCC Clauses 25.1, 26 and 27 provide for termination after weekly deduction of liquidated damages from the contract price for each week or part of it of delay until actual delivery or until the maximum amount is reached. The 2nd Respondent had admitted that they went straight to terminating the Contract without considering the provided procedures for liquidated damages as provided under Section 77 (4) of the Public Procurement Act of 2011 (the Act) as reproduced hereunder:-

S. 77 (4) "Liquidated damages shall be charged on the contractor, supplier or service provider for undelivered goods or delayed services or work in accordance with the procedure stipulated in the regulations".

In addition to liquidated damages, the law also requires the procuring entity, in this case the 2nd Respondent to enquire on the delay. This is found under Regulation 242 (2) of the Public Procurement Regulations (GN No. 446 of 2013). The said provision read as follows:-

R. 242 (2) "Where receipt of goods is delayed, or is likely to be delayed beyond the time for delivery prescribed in the contract, the procuring entity shall seek reports and explanations from the suppliers or their agents and may institute liquidated damages as may be provided for in the contract". (Emphasis ours)

From the above provision it is evident that, the Contract should have not been terminated the way it was, as the 2nd Respondent was required first to seek for explanations from the Appellant, then, if necessary, deduct liquidated damages before proceeding to termination.

The Appeals Authority does not agree with both 1st and 2nd Respondents submissions regarding automatic termination upon the expiry of the agreed contract period since the Contract itself had provided for enquiry as well as liquidated damages in favour of the purchaser, in this case the 2nd Respondent after expiry of the delivery period. The Appeals Authority fails to see how could there be automatic termination immediately thereafter.

With regard to the TIN Number, the Appeals Authority observed that such a requirement was not included in the Contract document and that the

same could not be the basis for failure of the parties to perform their contractual obligation. Therefore the Appeals Authority cannot dwell on it.

It is crystal clear therefore, that the 2nd Respondent did not fulfill their contractual obligations, as a result the termination was unlawful.

2. Whether the Debarment Order was proper in law

In resolving this issue the Appeals Authority took cognizance of the analysis of the first issue and observed that since the basis for debarment was unlawful termination of the Contract, the subsequent Debarment Order was equally unlawful.

The Appeals Authority observed that, the 1st Respondent should have exercised the powers conferred on them under Section 9 (1) (h) of the Act to verify the legality of the termination. To the contrary, they did not do so. For purposes of clarity the said provision is reproduced hereunder:-

S. 9 (1) "The functions of the Authority shall be to-

(h) Monitor the award and implementation of public contracts with a view to ensuring that:

(ii) the circumstances in which each contract is awarded or terminated, do not involve impropriety or irregularity".

(Emphasis ours)

Therefore, the Appeals Authority concludes the second issue that the Debarment Order was not proper in law.

3. What relief (s), if any, are the parties entitled to.

With regard to the 1st prayer of uplifting the debarment, the Appeals Authority have established in the first issue that the termination of the Contract that led to debarment of the Appellant was not properly done and therefore unlawful. As such, as established in the 2nd issue above, even the Debarment Order was not proper in law.

The Appeals Authority therefore quashes the Debarment Order by the 1st Respondent and orders them to communicate this Order in the same means the debarment was effected.

Concerning the 2nd, 3rd, 4th and 5th prayers, the Appeals Authority orders the parties to fulfill their contractual obligations. It is so ordered.

With regard to the prayers by the Respondents that, the Appeal be dismissed, the same cannot be granted since the Appeal has merits. Each party to bear their own costs.

On the basis of the aforesaid findings, the Appeal is hereby allowed to the extent mentioned above.

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

Parties have the right to Judicial Review under Section 101 of the Act.

This Decision is delivered in the presence of all parties, this 27th day of November, 2015.


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MS. MONICA P. OTARU
CHAIRPERSON

MEMBERS:

1. ENG. FRANCIS T. MARMO 

2. ENG. ALOYS J. MWAMANGA 