

**PUBLIC PROCUREMENT APPEALS AUTHORITY
AT DAR ES SALAAM**

APPEAL CASE NO. 114 OF 2011

BETWEEN

M/S COOL CARE SERVICES LTD.....APPELLANT

AND

**NATIONAL SOCIAL
SECURITY FUND.....RESPONDENT**

RULING

CORAM:

- | | |
|--------------------------------|---------------|
| 1. Hon. A.G. Bubeshi, J. (rtd) | - Chairperson |
| 2. Mr. K.M Msita | - Member |
| 3. Mr. F.T. Marmo | - Member |
| 4. Mrs. N.S. Inyangete | - Member |
| 5. Ms. B.G. Malambugi | - Secretary |

SECRETARIAT:

- | | |
|---------------------|-----------------|
| 1. Ms. F.R. Mapunda | - Legal Officer |
|---------------------|-----------------|

2. Mr. H.O. Tika - Legal Officer
3. Ms. V. Simeon - Legal Officer

FOR THE APPELLANT:

1. Eng. A Mwaisemba – Managing Director
2. Mrs. F. Ngowi – Technical Assistant

FOR THE RESPONDENT:

1. Ms. R.C. Makombe – Senior Legal Officer
2. Eng. Karim Mattaka – Principal Officer(Projects)
3. Eng. J.K Msemu – Projects Manager
4. Mr. H. Nyendage – Supplies Officer

This ruling was scheduled for delivery today 11th January, 2012, and we proceed to deliver it.

The Appeal at hand was lodged by **M/S COOL CARE SERVICES LTD** (hereinafter to be referred to as "**the Appellant**") against **NATIONAL SOCIAL SECURITY FUND** commonly known by its acronym NSSF (hereinafter to be referred to as "**the Respondent**").

The said Appeal is in the respect of tender No. PA/004/2009-10/W/10 for the Proposed Construction of NSSF Commercial Complex on Plots Nos. 130 and 131 at Kaloleni in Arusha Municipality (Air Conditioning and Ventilation Installations) (hereinafter to be referred to as "**the Tender**").

According to the documents submitted to the Authority as well as oral submissions by parties during the hearing, the facts of the Appeal may be summarized as follows:

On 7th September, 2011, the Respondent *vide* an unreferenced letter, extended an invitation to tender to the following five Specialist Contractors through restricted tendering:

- M/s Unicool East Africa Co. Ltd;
- M/s M.A.K. Engineering Co. Ltd;
- M/s Alshaaf Bargain Centre Ltd;
- M/s Ashrea Air Conditioning Co. Ltd; and
- M/s Berkeley Electrical Ltd.

The deadline for submission of the tenders was 16th September, 2011.

On 9th September, 2011, the Appellant having learnt of the invitation to tender from undisclosed sources, submitted their application vide a letter referenced CCSL/TA/42/11 to the Respondent including the sum of Tshs. 100,000/= for purchase of the Tender Document.

The Respondent's Officials refused to accept the Appellant's application letter as well as the fee for the purchase of the Tender Document on the ground that they were not invited to tender.

Being aggrieved by the Respondent's refusal to accept the Appellant's application to tender, the Appellant

applied for administrative review to the Respondent on 13th September, 2011, *vide* a letter referenced CCSL/TA/42/11. However, no response was received from the Respondent on the complaint.

Having received no response from the Respondent, on 17th October, 2011, the Appellant referred the matter to the Public Procurement Regulatory Authority (hereinafter to be referred to as "**PPRA**") requesting them to order the Respondent to re-start the tender process in observance of the law.

On 21st October, 2011, the Appellant received the Respondent's reply to their request for administrative review through a letter referenced NSSF/C/T.1/39/26 dated 13th October, 2011, which informed the Appellant, *inter alia*, that the procurement method used was restricted tendering and the Appellant had not been invited to tender.

According to the Appellant, up to the time when they lodged this Appeal, to wit, 21st November, 2011, PPRA

was yet to issue a decision, hence this Appeal to the Public Procurement Appeals Authority (hereinafter to be referred to as **“the Authority”**).

SUBMISSIONS BY THE APPELLANT

The Appellant’s arguments as deduced from documents availed to this Authority, as well as oral submissions and responses to questions raised by the Members of the Authority during the hearing may be summarized as follows:

That, their reasons for this Appeal are mainly centred on the process employed in obtaining the shortlist by the Respondent in the said restrictive tendering method and not on the selected procurement method.

That, the Respondent’s tender process lacked transparency as the modality of how the five shortlisted contractors were obtained was not disclosed.

That, the Respondent did not conduct pre-qualification which would have enabled them to get the qualified contractors for the said work.

That, Section 88 of the Public Procurement Act No. 21 of 2004, Cap 410 (hereinafter to be referred to as "**the Act**") empowers the Minister to make Regulations for better carrying out the provisions of the Act. However, Regulation 67 of the Public Procurement (Goods, Works, Non consultancy Services and Disposal of Public Assets by Tender) Regulations, Government Notice No. 97 of 2005 (hereinafter to be referred to as "**GN No. 97/2005**") which has been relied upon by the Respondent contravened the provisions of the law particularly Section 59(1) & (2)(a) of the Act. Hence, the Respondent was required to apply the said Regulation 67 together with the main Act.

That, the Respondent's statement that the Appellant was not among the invited contractors even though they have been working together in some other projects implied that:

- There was a deliberate move by the Respondent to prevent some contractors from participating in the tender in favour of a certain contractor for personal gain, contrary to Section 43(a) of the Act.
- The winner of the tender was pre-determined before the invitations were issued to the five Specialist Contractors. The invitation was therefore intended to camouflage the ill-intention for purposes of creating a record of the procurement process to indicate that the law was observed.

That, based on calculations which were done by the Appellant the estimated value of the project was more than Tshs. 800 million. Hence, the Respondent's estimated budget of less than Tshs. 400 Million was untrue as it did not reflect the real cost of the project.

That, in view of the a foregoing, it is evident that, the tender process was unacceptable and it contravened Section 59(2) of the Act.

Accordingly, the Appellant prayed for the following:

- (i) The Respondent be ordered to re-start the tender process in observance of the law;
- (ii) The Authority prohibit the Respondent from conducting unlawful procurement process;
- (iii) The Respondent be ordered to pay Tshs. 120,000/= being costs of the Appeal.
- (iv) The Authority take any other action as deemed necessary.

REPLIES BY THE RESPONDENT

The Respondent's arguments as deduced from documents availed to this Authority, as well as oral submissions and responses to questions raised by the

Members of the Authority during the hearing may be summarized as follows:

That, the procurement process was conducted in observance of the law, in that, selection of the procurement method was done on the basis of Section 59(1) of the Act which provides as follows:

“Except as provided in section 60, a procuring entity engaging in the procurement of goods, works or services or disposal by tender, shall apply competitive tendering using methods prescribed in the Regulations depending on the type and value of the procurement and in any case, the successful tender shall be the tender offering the lowest evaluated cost.” (Emphasis added)

That, they opted to use the restrictive tendering method because the value of the project was less than Tshs. 400 million as per Regulation 67(1) (c) of GN No. 97/2005.

That, the Second Schedule to GN. No. 97 of 2005 specifies the threshold for restrictive tendering for works to be Tshs. 400 million. In this case therefore, the estimated cost for the works involved in the tender under Appeal is less than Tshs. 400 million, hence, it is within the specified threshold. The Appellant being a seasoned contractor in the construction industry is well aware that the provisional sums are included in the BOQ for works which for one reason or another, the design and scope are yet to be completed. For the tender under Appeal the design was an open plan to be partitioned during testing and that would affect the requirement of Air Conditions on the floors. That is why the provision of Tshs 800 million was reduced to an estimation of less than Tshs. 400 million.

That, they had not conducted the pre-qualification but the shortlisted contractors were obtained from the list of contractors who had been working with them in other projects as per Regulation 67(3) of GN No.97/2005.

That, the Appellant being among the contractors who had been working with the Respondent was not included in the shortlist due to the fact that there was a pending dispute between them regarding the signing of the contract in respect of another tender for installation of Air Conditioning Works for the Proposed NSSF Kahama Office Building (hereinafter to be referred to as "Kahama building project"). The tender in dispute is for works of a similar nature with the one under Appeal; hence, the Respondent could not include the Appellant in the list before the said dispute was resolved.

That, the Respondent invited five eligible Specialist Contractors to participate in the tender and the Appellant was not among them and therefore could not tender. They were thus surprised that, a firm that was not invited to tender could approach them for purposes of purchasing the Tender Document.

The Respondent therefore prayed for the following:

- That the Appeal be dismissed for lack of merit

- The Appellant be ordered to compensate the Respondent for the two days salaries for staff who prepared the defense and attended the hearing.
- That the Authority give a stern warning to the Appellant specifically on the allegations based on rumours.

ANALYSIS BY THE AUTHORITY

Having gone through the documents submitted and having heard the oral arguments from parties, the Authority is of the view that the Appeal is centred on the following issues:

- **Whether the Appeal is properly before the Authority**
- **Whether the procedure used by the Respondent in short listing contractors under the restricted tendering method complied with the law.**

- **To what reliefs, if any, are the parties entitled to.**

Having identified the issues in dispute, the Authority proceeded to resolve them as follows:

1.0 Whether the Appeal is properly before the Authority

Having reviewed the written and oral submissions by parties as well as other documents availed to it, the Authority deemed it necessary to establish whether the appeal lodged was properly before it, in view of the fact that the same was filed by a company which had not participated in the tender process.

In order to do so, the Authority revisited Section 79(1) of the Act which provides as follows;

“79(1) Subject to sub-section (2) of this section, **any supplier, contractor or consultant who claims to have suffered or**

that they may suffer any loss or injury as a result of a breach of a duty imposed on a procuring entity or an approving authority by this Act may seek a review in accordance with sections 81 and 82 of this Act, provided that, the application for review is received by the procuring entity or approving authority within twenty-eight days of the supplier, contractor or consultant becoming aware of the circumstances giving rise to the complaint or when the supplier, contractor or consultant should have become aware of those circumstances.

Furthermore, the Authority revisited Rule 4 of the Public Procurement Appeals Rules, Government Notice No. 205/2005 (hereinafter to be referred to as '**GN No. 205/2005**') which states categorically who may appeal. For purposes of clarity the said Rule 4 is reproduced herein below. It reads;

“Any person being a supplier, contractor, consultant, buyer, service provider, disposer of public assets by tender or procuring entity and who is dissatisfied with the decision, act or omission of the Minister responsible for Local Government Authorities or the Public Procurement Regulatory Authority may lodge an appeal to the Public Procurement Appeals Authority” (Emphasis added).

Based on the nature of the tender under Appeal, the Authority deemed it proper to define the word “contractor”. Section 3 of the Act defines the word “contractor” to mean;

“a firm, company, corporation, organization, partnership or individual person engaged in civil, electrical or mechanical engineering or in construction or building work of any kind including repairs and renovation, and who is, according to the context, **a potential party or**

the party to a procurement contract with the procuring entity” (Emphasis supplied)

Based on the above quoted provisions the Authority is of the view that, an Appeal can be filed by a supplier, contractor, consultant, service provider, or asset buyer who claims to have suffered or may suffer any loss as a result of breach of duty by the procuring entity. The Appeal can also be filed by a party or a potential party to a procurement contract with a procuring entity.

According to the facts of this Appeal, the Appellant was not among the prospective contractors who were invited by the Respondent to compete in the disputed tender process. This fact was also conceded by the Appellant.

Having observed that the Appellant was not a tenderer in the tender under Appeal, the Authority is of the firm view that the Appellant was neither a party nor a potential party in the disputed tender process to entitle them to claim for loss as a result of breach of duty by the Respondent.

The Authority wishes to enlighten the Appellant that, the right to appeal or *locus standi* to appear before this Authority is acquired when a supplier, contractor, consultant, service provider, or asset buyer has participated in a particular tender process and is dissatisfied with the said process. The Appellant herein did not participate in the tender under Appeal; hence, could not have a right of appeal before this Authority since he lacks *locus standi*.

On the basis of the above findings, the Authority is of the firm view that, the Appellant has lodged this Appeal without the requisite *locus standi*. Accordingly, the Appeal filed is hereby rejected and the Authority sees no basis to proceed with the merit as framed in issues two and three. The Appeal stands rejected and each party is to bear their own costs

In view of the above analysis, the Authority rejects the Appeal and orders each party to bear its own costs.

Right of Judicial Review as per Section 85 of the PPA/2004 explained to parties.

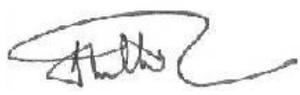
This ruling is delivered in the presence of the Appellant and the Respondent this 11th January, 2012.



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JUDGE (rtd) A. BUBESHI

CHAIRPERSON

MEMBERS:

1. MR. K. M. MSITA 

2. MR. F. MARMO 

3. MRS. N.S. INYANGETE 