

**IN THE PUBLIC PROCUREMENT APPEALS AUTHORITY**

**APPEAL CASE NO. 23 OF 2023-24**

**BETWEEN**

**M/S ALLTIME TECHNOLOGY.....APPELLANT**

**AND**

**KOROSHO CO-OPERATIVE JOINT**

**ENTERPRISE LIMITED.....RESPONDENT**

**RULING**

**CORAM**

- |                        |                   |
|------------------------|-------------------|
| 1. Adv. Rosan Mbwambo  | - Ag. Chairperson |
| 2. Mr. Pius Mponzi     | - Member          |
| 3. Dr. William Kazungu | - Member          |
| 4. Mr. James Sando     | - Secretary       |

**SECRETARIAT**

- |                        |                              |
|------------------------|------------------------------|
| 1. Ms. Florida Mapunda | - Deputy Executive Secretary |
| 2. Ms. Violet Limilabo | - Senior Legal Officer       |

**FOR THE APPELLANT**

- |                            |                                 |
|----------------------------|---------------------------------|
| 1. Mr. Godlove Godwin      | - Advocate - Blue Ice Attorneys |
| 2. Mr. Geoffrey Mushumbuzi | - Advocate - Blue Ice Attorneys |
| 3. Mr. Herry Kigulu        | - Managing Director             |
| 4. Mr. Zephania Eliah      | - Software Engineer             |

5. Mr. Herry Sanga - Operation Manager - JTL Enterprises

### **FOR THE RESPONDENT**

1. Mr. Albert Mwombeki - Legal Officer - Respondent's Office
2. Ms. Lilian Lyimo - Legal Officer - Respondent's Office
3. Ms. Mariam Chimbyangu - Secretary - Respondent's Office
4. Mr. Mabruuk Ismail - Ag. Chief Accountant - Respondent's Office
5. Mr. Revocatus Nyagilo - Assistant Registrar of Co-operative Societies - Head Quarter Dodoma
6. Ms. Godlove Kyangale - State Attorney - Co-operative Societies Dodoma

This Appeal has been preferred by **M/S Alltime Technology** (hereinafter referred to as "**the Appellant**") against the **Koroshu Co-operative Joint Enterprise Limited** (hereinafter referred to as "**the Respondent**"). The Appeal is in respect of Tender No. 1. INTERGRATED WEIGHING SCALE SYSTEM/UNIONS/2023 for Supply of Weighing Scales, Printers, Phones, Solar Panels and Development of integrated Weighing System (hereinafter referred to as "**the Tender**").

The background of this Appeal may be summarized from the documents submitted to the Public Procurement Appeals Authority (hereinafter referred to as "**the Appeals Authority**") as follows: -



The Tender was conducted through National Competitive Tendering Method as specified in the Public Procurement Regulations, GN. No. 446 of 2013 as amended (hereinafter referred to as "**the Regulations**").

On 31<sup>st</sup> July 2023, the Respondent advertised the Tender through the Daily News Newspaper. The deadline for submission of Tenders was set on 21<sup>st</sup> August 2023. On the deadline, the Respondent received fifteen (15) tenders including that of the Appellant.

The received tenders were subjected to evaluation. After completion of the evaluation process, twelve (12) tenderers complied with the requirements of the Tender. The Evaluation Committee recommended that all twelve tenderers should be invited for a demonstration of the integrated systems.

The Respondent through a letter dated 18<sup>th</sup> September 2023 invited the Appellant to attend the demonstration meeting scheduled on 20<sup>th</sup> September 2023. The demonstration meeting took place on 20<sup>th</sup> September 2023 as scheduled. Six tenderers attended including the Appellant. After completion of the demonstration process, the demonstration team deliberated and approved an award to M/S Rotai Company Ltd.

On 29<sup>th</sup> September 2023, the Respondent issued the Notice of Intention to award which informed the Appellant that it intends to award the Tender to M/S Rotai Company Ltd. According to the Appellant the Notice did not state the reasons for its disqualification. Dissatisfied with the said Notice, on 4<sup>th</sup> October 2023 the Appellant applied for administrative review to the



Respondent. The Appellant challenged the Respondent's non-disclosure of the reasons for its disqualification and the award proposed to M/S Rotai Company Ltd.

The Respondent through a letter dated 10<sup>th</sup> October 2023 issued its decision which dismissed the Appellant's application for administrative review. The decision was received by the Appellant on 14<sup>th</sup> October 2023. Aggrieved further, on 24<sup>th</sup> October 2023 the Appellant filed this Appeal.

Upon being notified about the existence of the Appeal, the Respondent in its Reply to the Statement of Appeal raised a Preliminary Objection (PO) on point of law that the Appeals Authority lacks jurisdiction to entertain the Appeal since the Respondent is neither a public entity nor does it receive subvention from the Government. When the hearing was in session, the following issues were framed namely:-

- 1.0 Whether the Appeals Authority has jurisdiction to entertain the Appeal;**
- 2.0 Whether the disqualification of the Appellant's tender was justified; and**
- 3.0 What reliefs, if any, are the parties entitled to?**

The Appeals Authority directed the parties to address issue number one first. The Respondent commenced its submissions which were led by Mr. Albert Mwombeki and Ms. Lilian Lyimo, legal officers from the Respondent's



office. Ms. Lilian Lyimo stated that the Respondent is composed of six union cooperative societies that have been registered under the Cooperative Societies Act, No. 6 of 2013 (hereinafter referred to as "**the Cooperative Societies Act**"). She submitted that the Respondent independently runs its operations as a private enterprise. It is not controlled by the Government.

Ms. Lyimo contended that Section 2(1) of the Public Procurement Act, No. 7 of 2011 as amended (hereinafter referred to as "**the Act**") provides clear guidance on its applicability. According to her, the Act applies to all procurements and disposals by tender undertaken by procuring entities, non-government entities for the projects financed by public funds and public private partnership project. She submitted further that Section 3 of the Act defines the term "procuring entity" to mean a public body and any other body or unit established by the government to carry out public functions.

Based on the requirement of the Act, the Respondent does not fall within the ambit of Section 2(1) of the Act. Therefore, it cannot be bound by the Act. Ms Lyimo expounded that the Respondent has its own rules that govern its operations and means of raising funds. In discharging its functions, the Respondent does not receive government subsidy. Thus, it is not a government entity.

She contended that after being dissatisfied with the Tender results the Appellant ought to have submitted its complaint pursuant to Regulation 83 of the Cooperative Societies Regulations, G.N. No. 272 of 2015 (hereinafter

A handwritten signature in blue ink, consisting of several loops and a long horizontal stroke, located at the bottom of the page.

referred to as “**the Cooperative Societies Regulations**”). The cited regulation provides guidance on procedures to be followed in resolving various disputes with cooperative societies. To the contrary, the Appellant filed this Appeal to the Appeals Authority while the same does not have jurisdiction to entertain it. In support of her proposition, she made reference to the case of *M/S Macjaro Limited vs Murososangi Co-Operative Joint Venture Enterprises Limited*, Appeal Case No. 35 of 2022-2023 where the Appeals Authority dismissed an appeal for lack of jurisdiction. The Respondent in that appeal was not a government entity, neither did it receive public funds for such a tender. The Appeals Authority is urged to apply the same principle in the cited Appeal and dismiss this Appeal too with costs.

Mr. Albert Mwombeki added that in processing this Tender the Respondent used the Standard Tender Document issued by the Public Procurement Regulatory Authority (PPRA). According to him, the PPRA’s Standard Tendering Document was only used for purposes of guidance so as to ensure that the Tender is competitively conducted. In addition, the use of the PPRA’s Standard Tendering Document did not mean that the Respondent was ready to be bound by the Act and its Regulations, he contended.

He submitted further that much as the Respondent had indicated in its Tender Document that the Act and its Regulations would be applicable, the same does not change the fact that the Respondent is not a government entity. Therefore, it is not bound by the Act. The Respondent’s operations



are governed by the Cooperative Societies Act and Cooperative Societies Regulations. The referred laws are clear on procedures to be followed in relation to disputes which arise out of cooperative societies operations. Hence, the Appellant was required to comply with the procedures provided under those laws instead of using the Act and its Regulations.

In conclusion the Respondent stated that basing on the requirements of the Act and its Regulations, the Appeals Authority lacks jurisdiction to entertain the Appeal. Consequently, the Appeal should be dismissed with costs.

The Appellant's response were made by Mr. Godlove Godwin, learned Advocate. He commenced his submissions by stating that Regulation 83 of the Cooperative Societies Regulations relied upon by the Respondent does not apply under the circumstances of this Appeal because the Respondent is not a member of the cooperative societies. The learned counsel added that even if it could be assumed that the Respondent is a cooperative society and thus governed by the Cooperative Societies Act and its Regulations, the referred laws do not provide guidance on the procedures to be followed for disputes arising out of tender processes.

The learned counsel submitted that the Respondent is a private entity which performs public functions. Item 1 of the Invitation To Tender states that the Cooperative Unions have set aside funds for purposes of the procurement of the Tender in question. In additional, the learned counsel stated that the Respondent has revealed in its submissions that its Cooperative Joint Enterprise is formed by six joint cooperative societies.

Handwritten signature and a mark resembling a checkmark or a stylized 'A'.

Consequently, the revenue collected by these societies from the public are public funds. Therefore, its utilization has to be regulated by the government.

The learned counsel submitted that Clause 2.1 of the Instructions To Tenderers (ITT) indicates clearly that the source of fund for the Tender is the Government of the United Republic of Tanzania. This implies that the Respondent had received funds from the government for the Tender. The learned counsel expounded further that the Respondent has indicated under Item 3 of the Invitation to Tender that the Tender would be conducted in accordance with the procurement Regulations. Basing on this clear position of the Respondent, the Tender falls under Section 2(1) of the Act, the learned counsel contended.

The learned counsel stated that Clause 50 of the ITT required a dissatisfied tenderer to submit an appeal to the Appeals Authority. This is when a tenderer is dissatisfied with the Respondent's decision that would be issued in respect of its submitted complaint. In addition, the Respondent has even indicated in the Tender Document the address of the Appeals Authority for submission of an appeal. The learned counsel submitted that in the Tender, tenderers were guided by the Tender Document. Hence, the Respondent cannot denounce the applicability of the stipulated procedures at this juncture when the Tender Document has stated clearly the dispute resolution procedures to be followed.

The learned counsel contended further that the Respondent did not denounce the applicability of the Act and its Regulations on 10<sup>th</sup> October





2023 when it issued its decision in respect to the Appellant's application for administrative review. In the said decision, the Respondent stated that the Tender process was conducted in compliance with the requirements of the Act and its Regulations.

The learned counsel concluded by stating that according to the Tender Document, the Act and its Regulations the Appeals Authority has jurisdiction to entertain the Appeal. He prayed that the PO be overruled and the determination of the Appeal on merits be allowed.

### **ANALYSIS BY THE APPEALS AUTHORITY ON THE PO**

#### **1.0 Whether the Appeals Authority has jurisdiction to entertain this Appeal**

In resolving this issue, the Appeals Authority reviewed the Tender Document. It observed that Item 1 of the Invitation to Tender indicates that the Respondent had set aside funds for the procurement in question. Clause 2.1 of the ITT indicates clearly that the source of fund for this Tender is the Government of the United Republic of Tanzania. Further, Item 3 of the Invitation to Tender indicates that the Tender would be conducted in accordance with the Public Procurement Regulations.

In addition, Clauses 46, 47, 48, 49 and 50 of the ITT as modified by Clauses 49 and 50 of the Tender Data Sheet (TDS) provide that disputes arising out of this Tender process shall be resolved into two stages. The first stage would be invoked by a dissatisfied tenderer by submitting its complaint to the Respondent's accounting officer. The Respondent's



accounting officer would be required to issue its decision within seven working days. If the Respondent's accounting officer issues a decision and a tenderer would still be dissatisfied or where the accounting officer fails to issue a decision within the specified time limit, a tenderer would be required to invoke the second stage by lodging its Appeal to the Appeals Authority.

The Appeals Authority reviewed Section 2(1) of the Act and noted that it provided guidance on the applicability of the Act. The provision states specifically that the Act would apply for procurement conducted by government entities or by a private entity that has received funds from the government for specific procurement or for public private partnership projects in their relevant stages. Section 2(1) of the Act reads as follows: -

***"2(1) This Act shall apply to-***

- (a) all procurement and disposal by tender undertaken by a procuring entity except where it is provided otherwise in this Act;***
- (b) non Government entities, for procurement financed from specific public finances; and***
- (c) Public Private Partnership projects, in their relevant stages".***

The Appeals Authority revisited Section 3 of the Act which defines the term "procuring entity". Section 3 of the Act reads as follows: -



**"3. Procuring entity means a public body and any other body or unit established and mandated by the government to carry out public functions".**

[Emphasis supplied]

In ascertaining if the Respondent is a procuring entity or a private entity that receives public funds to perform its functions, the Appeals Authority reviewed the record of Appeal. It observed that the Respondent is a cooperative joint enterprises constituted by six societies as per the register attached to the by-laws that governs the Respondent. The Respondent's by-laws were registered by the Assistant Registrar of the Cooperative Societies on 12<sup>th</sup> September 2022. The by-laws provide clear guidance on the formation of the Respondent's joint enterprise and how its functions are regulated. Article 24 of the by-laws states clearly the source of the Respondent's revenue. These include registration fee, shares, annual contributions, profits from the societies business, loans, revenues from various levies, grants, fines, various contributions, just to mention the few. The Appeals Authority noted further that the Respondent does not receive funds from the government.

The Appeals Authority observed from the record of Appeal that Part Eleven (11) of the Respondent's by-laws provides for dispute resolution mechanism. Article 60 of the by-laws sets out procedures to be followed where disputes arise between members of the society, other person with the society or the society with other societies. The by-laws require the dispute to be resolved amicably between the parties. However, if parties



fail to reach an amicable settlement within thirty days, the dispute should be submitted to the registrar of the cooperative societies as per the procedures specified under the Cooperative Societies Act and the Cooperative Societies Regulations. Article 60 of the by-laws of the Respondent's by-laws reads as follows: -

**"SEHEMU YA KUMI NA MOJA**

- 60 (1) Mgogoro wowote unaohusu Shughuli za Mradi kati ya wanachama au watu wanaowalalamikia, au kati ya mwanachama au watu ambao wanadai na Bodi au Afisa yeyote, au kati ya Umoja na Chama cha Ushirika kingine au mtoa huduma, utasuluhuisha kwa njia ya amani, uwazi na majadiliano kufikia maridhiano.**
- (2) Ikiwa Mgogoro chini ya sharti dogo la (1) hapo juu hautaweza kusuluhuisha kwa amani ndani ya siku 30, **utapelekwa kwa Mrajis kwa usuluhishi kwa kuzingatia taratibu zilizowekwa chini ya Sheria ya Ushirika na Kanuni zake.**
- (3) Kupeleka kwa Mrajis usuluhishi chini ya sharti dogo la (2) hapo juu kunaweza kufanywa na Bodi kwa ridhaa ya Mkutano Mkuu au **na mhusika katika mgogoro**, au na mwanachama wa umoja kama mgogoro unahusu Mjumbe wa Bodi kudaiwa deni la fedha au jambo linalohusu maadili ya uongozi.



(4) *Katika kupeleka mgogoro kwa Mrajis chini ya sharti dogo la (3) hapo juu Mlalamikaji atapaswa kupeleka nakala ya marejeo kwa mlalamikiwa ikionyesha jambo linalolalamikiwa".*

*[Emphasis Supplied]*

The Appeals Authority also revisited Regulation 83 of the Cooperative Societies Regulations. It observed that Article 60 of the Respondent's by-laws is a Kiswahili translation of Regulation 83 of the Cooperative Societies Regulation. The said regulation provides guidance on procedures to be followed to resolve disputes arising out of the cooperative societies operations. Regulation 83 of the Cooperative Societies Regulations reads as follows: -

*"83(1) Any dispute concerning the business of a cooperative society between the members of the society or **persons claiming through them** or between a member or **persons so claiming** and the Board or any officer, or between one cooperative society and another **shall be settled amicably through negotiation or reconciliation.***

*(2) Where the dispute under sub-regulation (1) is not amicably settled within thirty days pursuant to sub regulations (1), **such dispute shall be referred to the Registrar for arbitration through Form No. 13 appearing under the First Schedule to these Regulations.***



(3) Reference to arbitration under sub-regulation (2) may be made by the Board or the cooperative society by resolution in the general meeting or **by any party to the dispute**, or if the dispute concerns a sum due from a member of the Board to the Society, by any member of the society.

(4) In making reference to the Registrar under sub-regulation (3), the claimant shall serve a copy of the reference to the respondent."

*[Emphases Supplied]*

In view of the above, the Appeals Authority is of a settled view that the Respondent is a private entity which does not receive funds from the government for its operations. In addition, the Respondent is governed by its by-laws, the Cooperative Societies Act and its Regulations. The cited laws also provide for dispute resolution mechanism procedures in respect of disputes arising out of the cooperative joint enterprise's operations.

From the above exposition and the record of appeal it is the Appeals Authority's finding that the Tender is governed by its by-laws, the Cooperative Societies Act and Regulations made there under. In the circumstances, the Appellant should have followed dispute resolution procedures as provided under Article 60 of the Respondent's by-laws and Regulation 83 of the Cooperative Societies Regulations.

The Appeals Authority considered the Appellant's proposition that in view of the requirement in the Tender Document the Respondent is bound by the Act and its Regulations. Further the Tender Document also shows that



the Respondent has received funds from the government for this project. The Appeals Authority also considered the Respondent's argument that it used PPRA's Standard Tendering Document when preparing the Tender Document for the Tender for the sake of guidance on the Tender process only.

The fact that the Respondent is a private entity is not in dispute. In the absence of evidence that the Respondent received public funds for this Tender, the Appeals Authority is unable to agree with the Appellant that the Respondent is bound by the Act and its Regulations. The Appeals Authority also finds that it was not proper for the Respondent to indicate in the Tender Document that the Act and Regulations would govern the Tender. The Respondent should have been keen enough while using PPRA's Standard Tendering Document in preparing its Tender Document. The Appeals Authority also notes with dismay the Respondent's act of indicating in the Tender Document that the Tender would be governed by the Act and its Regulations and that it has received funds from the Government for the Tender. The contents of the Tender Document leaves a lot to be desired too.

Given the circumstances, the Appeals Authority is of the settled view that a private entity cannot vest to it powers to hear and determine disputes other than the powers vested to it by the Act.

From the above, the Appeals Authority finds that the Respondent is a private entity. Therefore, it cannot be bound by the Act and its



Regulations. Under the circumstances, the Appeals Authority lacks jurisdiction to entertain this Appeal.

Consequently, the first issue is answered in the negative that the Appeals Authority has no jurisdiction to entertain the Appeal.

Based on the above findings, the Appeals Authority would not delve into other remaining issues. The Appeals Authority hereby dismiss the Appeal. We make no order as to costs.

It is so ordered.

This Ruling is binding and can be enforced in accordance with Section 97(8) of the Act.

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

This Ruling is delivered in the presence of the parties this 24<sup>th</sup> day of November 2023.

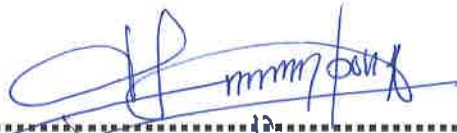
**ADV. ROSAN MBWAMBO**



.....  
**Ag. CHAIRPERSON**

**MEMBERS:**

**1. MR. PIUS MPONZI**.....



**2. DR. WILLIAM KAZUNGU**.....

