

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

APPEAL CASE NO. 94 OF 2011

BETWEEN

COOL CARE SERVICES LIMITED APPELLANT

AND

TANZANIA PORTS AUTHORITYRESPONDENT

RULING

CORAM:

- | | |
|--------------------------------|---------------|
| 1. Hon. A.G. Bubeshi, J. (rtd) | - Chairperson |
| 2. Hon. V.K. Mwambalasa(MP) | - Member |
| 3. Mr. M.R Naburi | - Member |
| 4. Mrs. N.S.N. Inyangete | - Member |
| 5. Mr. K.M. Msita | - Member |
| 6. Ms. B.G. Malambu | - Secretary |

SECRETARIAT:

- | | |
|------------------------|---------------------------|
| 1. Ms. E. V.A. Nyagawa | - Principal Legal Officer |
| 2. Ms. F. R. Mapunda | - Legal Officer |

FOR THE APPELLANT:

1. Eng. Andrew Mwaisemba - Managing Director

FOR THE RESPONDENT

1. Mr. Elisa A. Msuya –Advocate, Trustmark Attorneys
2. Mr. Christian Chiduga- Legal Officer
3. Mr. Sawaya Msemo – Procurement Specialist
4. Eng. Yoeza Senzighe – Senior Civil Engineer

This decision was scheduled for delivery today 24th March, 2011 and we proceed to deliver it.

The appeal at hand was lodged by **M/s COOL CARE SERVICES LIMITED** (hereinafter to be referred to as “**the Appellant**”) against **TANZANIA PORTS AUTHORITY** commonly known by its acronym **TPA** (hereinafter to be referred to as “**the Respondent**”).

The said Appeal is in respect of Tender No AE/016/2010-11/CTB/W/15 and Tender No AE/016/2010-11/CTB/W/16 for Construction of Proposed New TPA Office Blocks and Passenger Lounges for Bukoba and Mwanza Ports respectively.

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

The Respondent invited tenders *vide* the Daily News of 5th October, 2010. The said advertisement specified clearly that Building Contractors registered with the Contractors Registration Board (hereinafter to be referred to as “**CRB**”) in Class one were eligible to participate in the said tender process.

The Appellant did not purchase the Tender Document but had inspected the document bought by one of his business colleagues and discovered that, air conditioning installations were among the works to be done. He also noted that, the Schedule of Requirements for air conditioning installations were among those included in the Bill of Quantities (hereinafter to be referred to as "**BOQ**").

Having noted that, the tender advertisement and the Tender Document excluded some tenderers from participating in the tender process, on 18th October, 2010, the Appellant submitted an application for review to the Respondent *vide* letter referenced CCSL/TA/43/10. In the said application, the Appellant requested the Respondent to review the tender process, and thereafter order re-advertisement of the tender in which all contractors would be invited to participate according to their type of registration with CRB.

Having received no reply from the Respondent, on 22nd November, 2010, the Appellant submitted an application

for review to the Public Procurement Regulatory Authority (hereinafter to be referred to as "**PPRA**") *vide* letter referenced CCSL/TA/46/10.

On 30th November, 2010, the Appellant received a letter referenced PMU/3/3/01 dated 1st November, 2010, from the Respondent informing them that the tender was limited to building contractors for the sake of ascertaining liability and accountability.

Having received no reply from PPRA, on 3rd January, 2011, the Appellant lodged this Appeal to the Public Procurement Appeals Authority (hereinafter to be referred to as "**the Authority**").

SUBMISSIONS BY THE APPELLANT

The Appellant's documentary, oral submissions as well as responses from questions raised by the Members of the Authority, during the hearing may be summarized as follows:

That, the Respondent's tender process contravened Section 46(4) of the Public Procurement Act of 2004, Cap.

410 (hereinafter to be referred to as "**the Act**") as it discriminated some of the tenderers by not allowing them to participate in that procurement process.

That, the breach of duty by the Respondent had denied the Appellant an opportunity to participate in the disputed tender process contrary to Section 43(a) and (b) of the Act.

That, according to Regulation 72(1) of the Public Procurement (Goods, Works, Non consultant services and disposal of public assets by tender) Government Notice No. 97 of 2005 (hereinafter to be referred to as "**GN. No. 97/2005**") a procuring entity may issue a tender for a turnkey contract involving major specialized works project, such as the construction of an industrial plant where the supply of goods and performance of various works need to be closely integrated by one contractor. However, the tender under Appeal involves an ordinary construction project which does not qualify to be a turnkey contract as claimed by the Respondent.

That, the Respondent's argument that, the bidding restriction in favour of building contractors was aimed at controlling the contractor's liability and accountability, is not justifiable, as the control could be done through general or specific conditions of contract.

That, the Respondent's replies to the Appellant's application for review had been made out of time contrary Regulation 111(3) of GN. 97/2005.

That, the Appellant has the *locus standi* to appear before this Authority as they had an interest of participating in the tender process.

Therefore, the Appellant prayed to the Authority for the following orders;

- a) The tender process be re-started afresh in observance of the law.

b) The Respondent be ordered to compensate the Appellant a sum of Tshs. **2,130,000/-** as per the following breakdown:

- Administrative review fee paid to PPRA – Tshs. 10,000/-;
- Appeal filing fees – Tshs 120,000/-; and
- Legal consultation fee – Tshs. 2,000,000/-

REPLIES BY THE RESPONDENT

The Respondent's documentary, oral submissions as well as responses from questions raised by the Members of the Authority, during the hearing may be summarized as follows:

That, the Appellant does not have *locus standi* to appear before this Authority as they were not among the tenderers who participated or intended to participate in

the disputed tender as per requirements of Section 79(1) of the Act.

That, Sections 43(a)&(b) and 46(4) of the Act which were relied upon by the Appellant as the basis of their discrimination, do not apply to the Appeal at hand, because the Appellant did not take part in the tender process.

That, the Appellant's complaints contravened Section 79(2) of the Act, as it prohibits tenderers from applying for review against the method of procurement or choice of selection procedure opted to be used by a procuring entity.

That, the Invitation to Tender and the Tender Document indicated that bidding was to be conducted in accordance with the procedures specified under the Act.

That, the two projects undertaken by the Respondent were Turnkey Projects in terms of Regulation 72(1)(a) of GN No.97/2005 as they are time and resource intensive.

It was therefore imperative to contract the projects to a sole contractor who would handle each project in its entirety in order to minimize the Respondent's time and business resources.

That, it is a recognized principle in construction industry that when the number of interfaces are reduced to one point of contact, it becomes easier to manage and handle than it is for a multitude of contractors.

That, the restriction of bidding to building contractors was aimed at controlling the contractor's liability and accountability in order to obtain value for money.

That, the Appellant had the option to team up with any building contractor as specified in the Form of Qualification Information, a fact which was made known to the Appellant and they chose not to act.

That, the Respondent's procurement proceedings were made in full compliance with Sections 45 and 46 of the

Act and not in breach of any provisions as claimed by the Appellant.

That, the Appellant's Application for Review was attended to within the prescribed time and sufficient reasons as to why the tender was restricted to building contractors were explained therein.

That, the tender under Appeal has not yet been evaluated as the process was suspended upon receipt of the notice of this Appeal.

That, the Appellant's prayer for compensation for costs incurred is not justifiable as a genuine receipt thereof was not produced as proof.

Therefore, the Respondent prayed for the dismissal of the Appeal for being devoid of any merit and order for the payment for all costs as it deemed fit.

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 Respondent's Invitation to Tender and the Tender Document discriminated some of the contractors from participating in the tender process;**
- **Whether the Respondent's reply to the Appellant's application for review was made out of time; and**
- **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

During the hearing, the Respondent contended that, the Appellant does not have *locus standi* to neither lodge this Appeal nor appear before this Authority due to the following reasons:

- a) They did not participate in the tender under Appeal as they never purchased the Tender Document.
- b) The tender advertisement invited only building contractors who are registered by CRB in Class One and not Air Conditioning Contractors. Thus, the Appellant being one of the Air Conditioning Contractors, was not eligible to participate in the disputed tender process.

In reply the Appellant submitted that, they had *locus standi* as they were among the contractors who intended to participate in the tender process, but due to the Respondent's breach of duty, their right of participation was infringed. The Appellant's right to file an application for review is based on Section 79(1) of the Act since the tender process starts from the invitation to tender and the law does not require the applications for review to be filed only by tenderers who participated in the process.

Having considered submissions by parties on this point, the Authority reviewed them in the light of the applicable law so as to ascertain whether the Appeal is properly before it or not. In so doing, the Authority revisited Section 79(1) of the Act which was relied upon by both parties as reproduced herein below;

"S. 79(1) any supplier, contractor or consultant who **claimed to have suffered or that may suffer any loss as a result of a breach of duty imposed on a procuring entity or 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” (Emphasis supplied)

The Authority observes that, the above provision accords the right to seek review to **“any supplier, contractor or consultant”**. In so far as this Appeal is concerned, contractors have the right to seek review as the tender involves construction works. The Authority therefore deemed it necessary to revisit the definition of a ‘contractor’ provided for under Section 3 of the Act in order to ascertain whether the Appellant falls within the ambit of that definition. The said definition reads:

“Contractor” means 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 added)

The Authority has no doubt that the Appellant is a registered firm with CRB. However, for them to qualify as contractors under the above quoted definition they ought to be **"a potential party to a procurement contract."** In order to satisfy itself whether the Appellant was a potential party in the procurement process, the Authority revisited the Appellant's submissions on this particular point. During the hearing, the Appellant conceded that they never purchased the Tender Document; instead they perused the document that was bought by one of their business colleagues whereby they detected some discriminatory provisions and thereafter applied for administrative review which resulted into this Appeal. The Authority is of the considered view that, had the Appellant purchased the Tender Document they would

have signified their intention or willingness to participate in the tender process. The Authority further observes that, one cannot be '**a potential party**' by merely complaining about a document purchased by another firm/person.

Furthermore, since the Appellant did not purchase the tender Document, their complaints are solely based on information obtained from a third party, namely, a business colleague, the Authority cannot entertain complaints based on hearsay. If such behavior is entertained, it is likely to jeopardize the procurement process as the Respondent had suspended the said process as soon as they learnt of the existence of this Appeal.

The Authority further observes that Section 79(1) of the Act requires an application for review to be made by a person who is affected or may be affected by the Respondent's breach of duty. With regard to the tender under Appeal, the Appellant did not show how they could have been affected by the Respondent's breach of duty.

Moreover, the Respondent's breach of duty was not established.

For the benefit of the Appellant, the Authority reproduces Rule 5 of the Public Procurement Appeals Rules GN. No. 205/2005 which highlights the appellable matters as follows:

"Except for a decision, matter or act or omission arising from the provision of subsection (2) of section 72 and subject to sections 79, 81 and 85 of the Act, **an appeal shall lie from the following matters:**

(a)...

(b)...

(c) Inclusion of unacceptable provision in the tender documents;

(d) Unacceptable tender process;

(e) decision, act or omission of the procuring entity or reviewing Authority "

(Emphasis supplied)

The Authority is of the firm view that, the above quoted Rule provide tenderers or prospective tenderers with an opportunity for review disputing all appellable matters listed under Rule 5 of GN. No.205/2005. However, in the Appeal at hand, the Appellant could not have applied for review by invoking the said rule as they were not prospective tenderers since they neither participated in the tender process nor did they show intent to participate by purchase of the Tender Document.

Based on the above facts and evidence, the Authority is of the settled view that, the Appellant was neither an interested party nor a party to the procurement process. Thus, the Appellant had neither the right to seek review in this tender process nor appear before the Authority as they lack *locus standi*.

Accordingly, the Authority's conclusion in respect of the first issue is that, this Appeal is not properly before this Authority.

Having established that the Appellant does not have the *locus standi* to lodge Appeal or appear before it, the Authority cannot proceed with issues two, three and four as framed. Accordingly, the Appeal filed is hereby rejected and each party ordered to bear their own costs.

Other matters that caught the attention of the Authority

The Authority observes that, even though it has already been established that the Appellant does not have the *locus standi*, having gone through the Tender Documents availed to it, the following shortfalls were detected:

- (a) The Tender Document issued by the Respondent was incomplete as it lacked some of the mandatory information like drawings which could have helped tenderers in preparation of their bids. The Authority finds the Respondent's act to have contravened Section 83(1)(b) of the Act and Regulation 98(7) of GN No.97/2005 which provides as follows;

“Reg. 83(1) The solicitation documents shall include instructions to tenderers with at a minimum, the following:

- (a) The nature and required technical and quality characteristics, in conformity with Regulation 22 of the goods, works, or services to be procured, including, but not limited to, technical specifications, plans, **drawings** and designs as appropriate; the quantity of the goods, any incidental services to be performed;...” (Emphasis added)

“Reg. 98(7) Except for the specific approval not given in writing by the government architect, **tenders for building projects shall not be invited unless drawings and specifications for all buildings services subcontracts are complete and firm estimates of costs have been prepared.**” (Emphasis supplied)

- (b) The Authority noted that, the tender involved other specialized works such as electrical and mechanical installations which under normal circumstances are done by registered sub contractors by CRB. However, the Tender Document was silent with regard to sub contractors.
- (c) The Bill of Quantities for air conditioning installation attached to the Tender Document identified specific brand names in some of the items, for example, item "G" under Air Conditioning Installation on page 125 of the Tender Document reads as follows:

"Supply and installation of split type, wall mounted air conditioning unit with cooling capacity 3.5kW as **type LG**, complete with refrigeration and insulated pipes as described, including wireless remote control, voltage stabilizer AVS30 and brackets"
(Emphasis added)

The Authority finds this to be contrary to Regulation 22(2) of GN. No 97/2005 which provides as follows:

“ To the extent possible any specifications, plans, drawings, designs and requirements or description of goods or construction shall be based on the relevant objective, technical and quality characteristics of the goods or construction to be procured. **There shall be no reference to the particular trade mark, name, patent, type, specific origin or producer unless there is no other sufficient precise or intelligible way of describing characteristics of the goods, works or services to be procured and provided that words such as “or equivalent” are included.**” (Emphasis added or supplied)

- (d) The Tender Document provided that the request for clarification will be answered within 7 days from the date they are received contrary to Regulation

- 85(3) of GN. No. 97/2005 which requires the reply thereof to be made within three working days from the date of receipt.
- (e) Clauses 27, 28 and 29 of the General Conditions of Contract provide for dispute resolution by way of adjudication while Clause 29 provides that the adjudicator's payment rates shall be specified in the Bid Data Sheet and Special Conditions of Contract. However, Item 34 of the Bid Data Sheet and Items 11, 12 and 13 of the Special Conditions of Contract indicate that the issue of adjudicator is "**N/A**" meaning Not Applicable.
- (f) The tender was advertised as a National Competitive Tender while the value thereof, as disclosed by the Respondent, during the hearing is approximately Tshs. 20 billion. Upon being questioned by Members of the Authority the rationale for such a decision while the value thereof is far above the threshold of Tshs. 3 billion provided for under the Second Schedule to GN. No.

97/2005, the Respondent stated that it was based on the budgeted figure of Tshs. 2.5 billion. The Authority does not accept the Respondent's explanation since they were supposed to prepare Pre-tender Estimates which could have been used as the basis of deciding the method to be used.

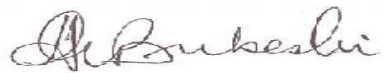
The Authority commends the Respondent for complying with the law and suspending the procurement proceedings pending determination of this Appeal. This reflects, amongst others, good faith and commitment to ensure justice is served, irrespective of the outcome of the Appeal.

Last but not least, the Authority does not comprehend the Appellant's motive for lodging this Appeal knowing well that they were not a party to this tender process. Such conduct is uncalled for and should not recur in future.

On the basis of the aforesaid findings, the Authority rejects the Appeal as the Appellant lacks *locus standi* and orders each party to bear their own costs.

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

Ruling is delivered in the presence of the Appellant and the Respondent this 24th March, 2011.



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JUDGE (rtd) A. BUBESHI
CHAIRPERSON

MEMBERS:

1. HON. V.K. MWAMBALASWA (MP).....


2. MR. M. R. NABURI


3. MR. K. M. MSITA


4. MRS. N.S.N. INYANGETE
