

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

APPEAL CASE NO. 115 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. Mr. H.S. Madoffe | - Member |
| 5. Mrs. N.S. Inyangete | - Member |
| 6. 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. Ms. Francisca 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 Msembo – Projects Manager
4. Mr. H. Nyendage – Supplies Officer
5. Mr. W.S. Chamu – Mechanical Engineer, Agreneb
6. Mr. O. Modu – Project Architects, OGM Consultants

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 respect of the tender for the Supply and Installation of Air Conditioners to the Proposed NSSF Kahama Office Building (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 12th October, 2010, the Respondent through restrictive tendering **method** wrote an unreferenced letter to the following four Specialist Contractors inviting them to submit their tenders:

- M/s Mollel Electrical Contractors Ltd;

- M/s Derm Electric Contractors Ltd;
- M/s Cool Care Services Ltd; and
- M/s Ashrea Air Conditioning Co. Ltd.

The deadline for submission of the said tenders was 29th October, 2010, whereby the tenders were opened.

On 12th November, 2010, the Respondent vide letter referenced NSSF/HQ/P.14/260/VOL II/119 requested the Appellant to confirm the correction of errors to their quoted price which increased the said price from Tshs. 98,105,436.00 to Tshs. 107,023,899.60

The Appellant disagreed with the said corrections of the price and informed the Respondent that they had checked their tender and did not find any arithmetic error **on the additions** hence advised the Respondent to re-check their computations . This information was relayed to the Respondent on 13th November, 2010, vide letter referenced CCSL/TA/48/10.

Following the above response from the Appellant, the award of the tender was recommended to the Appellant

and approved by the Tender Board on 22nd December, 2010, at a contract price of Tshs. 98,105,436.00 (VAT inclusive).

On 29th December, 2010, the Respondent vide letter referenced NSSF/HQ/N.12/114.VOL.II/139, communicated the award of the tender to the Appellant at a contract sum of Tshs. 98,105,436/= VAT inclusive.

On 5th January, 2011, the Project Consultants were requested to prepare and coordinate the signing of the contract between the Main Contractor and the Appellant.

On 10th January, 2011, the Appellant acknowledged the award of the tender vide letter referenced CCSL/TA/01/11.IV/51.

The Contract Document was issued to the Appellant for signing by M/s Agreneb Consult Ltd, the Project Service Engineers. However, the Appellant refused to sign the contract awaiting clarification from the Respondent on some unclear issues within the Contract as well as the

omission of some important clauses. The said clarifications were sought vide letter referenced CCSL/NSSF.KAH/11/01, dated 9th February, 2011,

Having received no response from the Respondent, the Appellant sent a reminder on 25th February, 2011, referenced CCSL/NSSF.KAH/11/02.

According to the Appellant, the Respondent did not respond to the Appellant's letters and hence there was no further communication between the parties between March and October 2010.

On 4th April, 2011, the Project Architects, namely, M/s OGM Consultants (hereinafter to be referred to as "**the Project Consultants**") drew the attention of M/s United Builders Limited, the Sub-Contractor for lift installation, vide letter referenced DSM/NSSF/KH-SHY/11/066, on the fact that they were in the process of starting the installation of ceiling tiles but they were yet to see the nominated air conditioning subcontractor (hereinafter to be referred to as "**the HVAC subcontractor**") to fix the

pipes, if any. They requested for approval to proceed with the said works, but cautioned that, in the event they were subsequently required to remove the ceiling tiles to enable the air conditioning subcontractor to install the requisite fittings the Respondent would be obliged to pay extra charges. In addition they informed the Lift installation Sub-contractor that, despite having received a copy of the award notification to "**the HVAC subcontractor**", they had neither received the Sub-contractor's confirmation thereof nor signed a Contract with them.

On 10th June, 2011, the Project Consultants vide letter referenced OGM/NSSF/KHM/09/109, urged the Respondent to expedite resolution of the dispute on the appointment of the **HVAC sub-contractor**, as it was likely to delay the project and cause financial loss. They also alerted the Respondent that, the Main Contractor had already requested for extension of time as a result of failure of the **HVAC sub-contractor** to commence work.

On 28th November, 2011, the Respondent vide letter referenced NSSF/HQ/P.14/260/VOL IV/51, communicated their intention to cancel the award of the tender to the Appellant. It was further stated that, the said decision was a result of the Appellant's failure to sign the Contract with M/s United Builders which led to the delay in completion of the works which contributed to loss in revenue accruing from the expected rental charges of the Building. The Respondent also intimated that Appellant's failure to sign the Contract contravened the General Conditions of Contract for main works read together with the signed Form of Tender.

The Appellant was aggrieved with the Respondent's **intention** to cancel the award of the tender and therefore submitted their appeal to the Public Procurement Appeals Authority (hereinafter to be referred to as "**the Authority**") on 1st December, 2011.

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 Appellant could not sign the Contract as they are yet to receive the clarifications sought from the Respondent on the following shortcomings:

- According to the said Contract, the parties to the Contract were the Appellant and M/s United Builders, while the Appellant understood that the Respondent was the Employer. The Appellant questioned the *locus standi* of M/s United Builders in the Contract.
- The Contract made reference to another contract called "**the Main Contract**" whereby the former was supposed to supplement the latter. They had therefore requested to be given a copy of the Main Contract so as to understand the contents thereof.

- It appeared from the contents of the Contract which was to be signed by the Appellant that, the employer was required to supply and install the air conditioners pursuant to paragraph 3(1) of the said Contract.
- According to Item 2(b) of the Contract, the Contractor's bid (who is M/s United Builders as per paragraph 1 on page 1) will form part of the said contract, hence excluding the Appellant.
- Questioned the listing of some of the terms under the 'Definition of Terms' while they were not defined.
- Pointed out some important clauses which should have formed part of the General Conditions of Contract.

Finally, the Appellant requested the Authority to issue the following orders:

- (i) prohibit the Respondent from cancelling the Contract;
- (ii) require the Respondent to respond to the Appellant's request for clarification;
- (iii) require the Respondent to proceed with the procurement in dispute in a lawful manner;
- (iv) require the Respondent to pay **Tshs. 120,000/=** being Appeal filing fees.

In addition, the Appellant requested the Authority to take any action as it may deem necessary.

REPLIES BY THE RESPONDENT

The Respondent's documentary as well as oral submissions may be summarized as follows:

That, the Respondent's efforts to persuade the Appellant to sign the contract with the Main Contractor were unsuccessful.

That, when the Respondent's intention to cancel the award of the tender was communicated to the Appellant,

the latter instead of responding to the said letter by the given deadline of 8th December, 2011, as they were required, rushed to this Authority to lodge an appeal.

That, the Appellant was required to sign the contract with the Main Contractor pursuant to the General Conditions of Contract for the Main Works and as per the signed Form of Tender, but up to the time when the Appeal was lodged they were yet to do so.

During the hearing the Respondent, stated that they were keen to resolve the dispute to enable the execution of the project to be finalized since it was long overdue.

The Respondent explained that main reason for the dispute with the Appellant was centered on the fact that the Appellant was not ready to sign the contract with the main contractor but wanted to sign the same with the Respondent. However, that was not possible since the Respondent is not the main Contractor but the employer; a fact which was known to

the Appellant from the outset as it was contained in the Tender Document.

The Respondent further submitted that the conditions in the proposed contract were adapted from the subcontracting guideline issued by the National Construction Council due to the fact that there was no guideline for subcontract works issued by the PPRA as yet.

The Respondent assured the Appellant that if they agreed to sign the contract , they Respondent was willing to make available to him a copy of the contract between the Main Contractor and the Respondent and to incorporate the necessary amendments to the disputed clauses in the proposed contract.

The Respondent therefore pleaded with the Appellant to agree to sign the contract so as not to delay further the completion of the project.

REJOINDER BY THE APPELLANT

The Appellant in rejoinder stated that they did not have a problem with signing the contract with the main contractor as per the requirements in the form of bid, but disagreed with some provisions within the contract document. They also stated that they were in agreement with the conditions set out in the sub contracting guideline issued by the National Construction Council save for a few clauses .

Accordingly, having been assured that their concerns would be taken into account and that they would be availed with copy of the contract between the Respondent and the Main Contractor, the Appellant stated that they were willing to sign the contract and proceed with execution of the works. The Appellant also requested to withdraw the Appeal in accordance with Rule 12(3) of the Public Procurement Appeal Rules GN. No.205/2005.

ORDER BY THE AUTHORITY

Having heard the parties and having heard the Appellant's request to withdraw their appeal, the Authority **grants the prayer** and therefore orders that the Appeal is withdrawn with no order for costs.

This Ruling is made this 4th day of January, 2012.



JUDGE (rtd) A. BUBESHI
CHAIRPERSON

MEMBERS:

1. MR. K.M. MSITA
 2. MRS. N.S. INYANGETE
 3. MR. H.S MADOFFE
 4. MR. MARMO.....
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