

IN THE PUBLIC PROCUREMENT APPEALS AUTHORITY

APPEAL CASE NO. 15 OF 2024 - 2025

BETWEEN

M/S KIC SECURITY SERVICES

COMPANY LIMITED.....APPELLANT

AND

NMB BANK PLC.....RESPONDENT

RULING

CORAM

- | | |
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| 1. Adv. Rosan Mbwambo | - Ag. Chairperson |
| 2. Eng. Stephen Makigo | - Member |
| 3. Mr. Rhoben Nkori | - Member |
| 4. Mr. James Sando | - Secretary |

SECRETARIAT

- | | |
|-------------------------|------------------------------|
| 1. Ms. Florida Mapunda | - Deputy Executive Secretary |
| 2. Ms. Agnes Sayi | - Principal Legal Officer |
| 3. Ms. Violet Limilabo | - Senior Legal Officer |
| 4. Mr. Venance Mkonongo | - Legal Officer |

FOR THE APPELLANT

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| 1. Mr. Paul Malima | - Managing Director |
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FOR THE RESPONDENT

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| 1. Mr. Mvano Mlekano | - Legal Counsel - Civil Litigation |
| 2. Mr. Linus Silayo | - Senior Procurement Specialist |



M/S KIC Security Services Company Limited (hereinafter referred to as **"the Appellant"**) has preferred this appeal against M/S **NMB Bank PLC** (hereinafter referred to as **"the Respondent"**). The Appeal is in respect of Tender for Request for Proposal for *"Provision of Guarding and Response Services for NMB Premises Across the Country"* (hereinafter referred to as **"the Tender"**).

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

On 02nd May 2024, the Respondent issued a Request for Proposal (**RFP**), inviting eligible tenderers to participate in the Tender. According to the Respondent, the deadline for submission of tenders was on 22nd May 2024. The received tenders by the deadline were subjected to evaluation. The evaluation process was conducted from 27th May 2024 to 07th June 2024.

The record of Appeal indicates that the Appellant was the existing service provider whose contract was to expire on 30th June 2024. Before expiry of the Appellant's contract, the Respondent through a letter dated 28th June 2024, extended the said contract for three more months, from 1st July 2024 to 30th September 2024. The record of Appeal shows further that the Respondent through a letter dated 28th August 2024, notified the Appellant that there would be no renewal of the extended contract. According to the Appellant, before the Tender results were issued, on 1st October 2024 the Respondent required the Appellant to hand over the sites to SUMA JKT.



The Appellant got aggrieved. Through a letter dated 2nd October 2024 the Appellant submitted its complaint to the Respondent. The Appellant challenged the Respondent's act of awarding the Tender to SUMA JKT while the firm did not even bid for the Tender. The record of Appeal shows that there was no response from the Respondent on the Appellant's complaint. Hence, through a letter dated 9th October 2024, the Appellant filed a second complaint to the Respondent. Having not received any responses from the Respondent, on 15th October 2024, the Appellant lodged this Appeal.

In this Appeal, the Appellant states that the Respondent floated the first tender on 15th July 2023. However, before issuing the tender results of the said tender, the Respondent floated another tender on 2nd May 2024 and proceeded to award the same to SUMA JKT. The Appellant challenges the Respondent's act of awarding the Tender to SUMA JKT without issuing the Tender results. The Appellant therefore, contends that the award made to SUMA JKT is marred with irregularities.

In response to the grounds of Appeal, the Respondent stated that the Appellant was fairly disqualified during technical evaluation stage for failing to comply with the requirements of the Tender document. It is stated further that the Respondent's decision to award the Tender to SUMA JKT was fair and proper as it complied with all the laid down procedures. The Respondent expounded further that it did not float two tenders as alleged by the Appellant. The invitation issued in July 2023 was for pre-qualification of vendors. pre-qualified tenderers, including the Appellant were on 2nd May 2024, issued with the RFP for the Tender, the award of



which is the subject of this Appeal. The Respondent stated further that it had not issued the Tender results since according to the Bank's procedures, the results are issued after the contract is signed and the probation period has expired.

On its Statement of Reply the Respondent also raised a Preliminary Objection (PO) on the point law that: -

"The Appeals Authority has no jurisdiction to determine this matter".

When the matter was called on for hearing the following issues were framed which covered both the PO and the merits of the Appeal, namely: -

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

Having framed the issues, the Appeals Authority directed the parties to address the first issue on the jurisdiction before addressing the issues on the substantive Appeal.

SUBMISSIONS BY THE RESPONDENT ON THE PO

The Respondent's submissions were made by Mr. Mvano Mlekano, learned legal counsel. He commenced his submissions by stating that the PO on the jurisdiction of the Appeals Authority has two limbs. In the first limb the Respondent's concern is that being a private entity the provisions of the Public Procurement Act, No. 7 of 2011 as amended (hereinafter referred to



as "**the Act**") do not apply to tenders floated by it. Much as the Act has been repealed and replaced by the Public Procurement Act, No.10 of 2023 with effect from 16th June 2024, it is still applicable for tenders floated before the new law came into force by virtue of Section 131(2) of the new Act. The second limb is that the Appeal has been filed out of time prescribed by the law.

Submitting on the first limb the learned counsel referred to Section 2(1) (a), (b) and (c) of the Act. According to the learned counsel, the Act applies to all procurement and disposal by tender undertaken by a procuring entity, non-Government entities for procurement financed from specific public finances and to public-private partnership projects in their relevant stages. The Respondent is neither a procuring entity nor a non-government entity that had received finances from the Government for the Tender, the learned counsel contended. It was also submitted that the Tender does not relate to public - private partnership project, either.

The learned counsel also referred the Appeals Authority to Section 3 of the Act, the definition section. In this section the word "procuring entity" is defined to mean a public body and any other body or unit established and mandated by the Government to carry out public functions. He stated further that Section 3 of the Act has also defined the word "public body" to mean any Ministry, department or agency of the Government or anybody corporate or statutory body or authority established by the Government or any company registered under the Companies Act in which the Government or an agency of the Government is in the position to influence the policy of the company.

The learned counsel submitted that the Respondent is among private companies which are publicly listed in the Dar es Salaam Stock Exchange and Capital Markets and Securities Authority. He expounded that the Respondent's shareholding structure is held by the shareholders as follows: Arise B.V 34.9%, other minority investors 33.3% and the Government 31.8%.

It was submitted that in view of the above shareholding structure the Respondent is also not a public corporation. To buttress his proposition the learned counsel made reference to section 3 of the Public Corporations Act, Cap 257 R. E. 2019. This definition section provides that "*public corporation means any corporation established under this Act or any other law and in which the Government or its agent owns a majority of the shares or is the sole shareholder*".

According to the Respondent's share structure as presented in the stock markets, the Government is a minority shareholder. Therefore, it does not have a controlling power on the Respondent's functions.

He added that the Respondent does not receive Government subsidies. It plans its own affairs without the intervention of the Government. The learned counsel expounded that the Chief Executive Officer and Board Members are all appointed by the shareholders according to the bank's procedures. The Government just like any other shareholder, receives dividends.

The learned counsel submitted that since the Respondent has its own procurement procedures, any disputes which arise out of the procurement



proceedings are resolved in accordance with the procedures established by the Respondent not under the Act. The Act vests powers to the Appeals Authority to determine procurement disputes arising out of the tender proceedings conducted in accordance with the Act. The Appeals Authority therefore, lacks jurisdiction to entertain this Appeal.

In further support of his proposition, the learned counsel cited PPAA Appeal No. 23 of 2023 -24 between ***M/S Alltime Technology and Korosho Co-operative Joint Enterprise Limited*** and PPAA Appeal Case No. 31 of 2020-21 between ***M/S Star Media (T) Limited and Tanzania Football Federation***. According to the learned counsel, in both Appeals the Appeals Authority ruled that it is not seized with jurisdiction to entertain appeals brought against private entities. The learned counsel urged the Appeals Authority to apply the same principle in this Appeal and dismiss it with costs.

In the second limb of the PO, the learned counsel submitted that the Appellant has stated in paragraph 3(c) of the Statement of Appeal that it became aware of the circumstances giving rise to this Appeal on 1st October 2024, when it was required to hand over the guarding sites to SUMA JKT. It was submitted that according to Rule 8 of the Public Procurement Appeals Rules, GN No. 411 of 2014 as amended (hereinafter referred to as "**the Appeals Rules**") an Appeal to this Appeals Authority must be filed within seven days from the date the Appellant became aware of the circumstances giving rise to the Appeal.



The learned counsel submitted that counting from 1st October 2024, the seven days within which the Appellant was required to file its Appeal lapsed on 9th October 2024. The Appellant has filed this Appeal on 15th October 2024, six (6) days late. Thus, the Appeal was filed in contravention of Rule 8 of the Appeals Rules. Hence, should be dismissed for being time barred, the learned counsel contended.

REPLY BY THE APPELLANT ON THE PO

The Appellant's submissions in reply, were made by its managing director, Mr. Paul Malima. He commenced by addressing the second limb of the PO. He stated that it became aware of the circumstances giving rise to this Appeal on 1st October 2024, after being required by the Respondent to hand over the sites to SUMA JKT. Mr. Malima submitted that the Appellant was aggrieved by the Respondent's decision of awarding the Tender to SUMA JKT. Hence, it submitted a complaint to the Respondent on 4th October 2024. He stated that the complaint letter was submitted to the Respondent through its official email.

Mr. Malima submitted that having not received response from the Respondent, on 6th October 2024, the Appellant lodged a second complaint to the Respondent. However, there was no response as well. Thus, on 15th October 2024, the Appellant filed this Appeal. Therefore, Mr. Malima contended that this Appeal was filed within time and in accordance with the requirements of the law.

In the first limb of the PO Mr. Malima submitted that the Government owns 31.8% of shares in the Respondent's company. He stated that through the



shares that the Government owns in the Respondent's company the Respondent qualifies to be a government entity. Mr. Malima stated that since the Respondent is a government entity, it cannot be left out to freely use its own policies as it wishes in conducting tender proceedings. The Respondent's transactions are regulated by laws, including the Act.

Mr. Malima stated that since the Respondent is a government entity, it was required to comply with the Act and Regulations made under it when conducting the Tender. Therefore, Mr. Malima concluded his submissions on this point by stating that the Appeals Authority has mandate to hear and determine this Appeal.

REJOINDER BY THE RESPONDENT

In his brief rejoinder on the second limb of the PO, the learned counsel for the Respondent submitted that it is not true that the Appellant submitted complaints to the Respondent on 4th and 6th October 2024 as alleged. The learned counsel stated that on 1st October 2024 the Appellant submitted an email to the Respondent inquiring about the handing over of the sites to the new service provider. The learned counsel stated that the Appellant's assertions that it submitted complaints to the Respondent and the same were not replied to are unfounded. He submitted that if the Appellant had submitted complaints to the Respondent on the alleged dates, it would have attached emails as a proof of services. To the contrary, the Appellant attached emails which showed other correspondences. There is no proof of service of the Appellant's complaints that has been produced to the Appeals Authority. The learned counsel urged the Appeals Authority to



disregard the Appellant's contention. He also reiterated his earlier submissions and prayed that the Appeal should be dismissed with costs.

ANALYSIS BY THE APPEALS AUTHORITY ON THE PO

1.0 Whether the Appeals Authority has jurisdiction to entertain the Appeal

The Appeals Authority reviewed Sections 2 (1) (a), (b) and (c) and 3 of the Act which provide 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-governmental entities for procurement financed from specific public finances; and*
- c) Public Private Partnership projects in their relevant stages.*

3. In this Act unless the context otherwise requires -

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

"public body or public authority" means-

- (a) any Ministry, department or agency of the Government;*
- (b) anybody corporate or statutory body or authority established by the Government any company registered under the Companies Act*



(c) being a company in which the Government or an agency of the Government, is in the position to influence the policy of the company; or
(d) any local government authority".

(Emphasis provided)

According to the above quoted provisions the Act applies to procurement undertaken by procuring entities; procurement conducted by non governmental entities in procurement financed by public funds; and procurement in public private partnership projects. According to Section 3, a procuring entity is a public body or unit mandated by the Government to carry out its functions. Public body has also been defined to mean an entity that has been statutorily established by the law to discharge a particular function or a company in which the government or its agency has the position to influence its policy.

The Appeals Authority also reviewed Section 3 of the Public Corporations Act, Cap 257. It defines the word "*public Corporation*". Section 3 of the Public Corporations Act reads as follows: -

***"Public corporation"** means any corporation established under this Act or any other law and in which the Government or its agent owns a majority of the shares or is the sole shareholder".*

(Emphasis provided)

In ascertaining whether the Respondent is a public body or procuring entity in terms of the Act and or whether it is a public corporation in terms of the

Public Corporations Act, the Appeals Authority reviewed the Respondent's website. It observed that the Respondent was initially established under the National Microfinance Bank Limited Incorporation Act of 1997 following the break-up of the old National Bank of Commerce by an Act of Parliament. There were three new entities that were created by the law, namely: (a) NBC Holdings Limited (b) National Bank of Commerce (1997) Limited and (c) National Microfinance Bank Limited.

The available record indicates that in 2005, the Government privatized the Respondent's bank by selling 49% of its shares to a consortium led by the Coöperative Centrale Raiffeisen-Boerenleenbank B.A. ('Rabobank Group'). Furthermore, in 2008 the Government sold 21% of its shares. It is also indicated that the Respondent's current share structure is being owned by shareholders as follows: - Arise B.V 34.9%, other minority investors 33.3% and the Government 31.8%.

The Appeals Authority further reviewed the record of Appeal and observed that the RFP document that was issued for this Tender did not indicate the laws or rules which would govern the Tender. Source of the fund for the intended contract was not disclosed suggesting that the project would be funded by the Respondent. In addition, the RFP document was structured differently from the standard tendering documents which are issued by the Public Procurement Regulatory Authority (PPRA) for public tenders.

From the contents of Section 2 of the Act it is apparent that for the Act to apply, an entity which floats a Tender must be a procuring entity or



public body or a non-government entity which received public funds for the Tender. It is also apparent from the record of Appeal that the government is among the minority shareholders. In terms of the definition of the word "public body" under Section 3 of the Act, for an entity to be considered as a public body the same must be established by the law, or the government should have the mandate to influence the policy of the company. In addition, according to Section 3 of the Public Corporations Act, for an entity to be considered as a public corporation, the Government or its agent must own majority of the shares or must be a sole shareholder.

Since the available public records on Respondent's website are clear that the Government is the minority shareholder according to the share structure, it goes without much saying that the Government has not mandated influence in the Respondent's policy. In view of this position, the Appeals Authority is of the settled view that the Respondent is not bound by the Act.

The Appeals Authority considered the Appellant's contention that since the Government owns 31.8% shares of the Respondent, the Respondent is bound by the Act. The Appeals Authority observes that in view of the requirements of the law and available record as analyzed above, it is crystal clear that the Respondent is not bound by the Act.

Given the above exposition the Appeals Authority finds that it has no jurisdiction to entertain this Appeal. In the circumstances, the Appeals Authority hereby sustains the PO. Having found that it has no jurisdiction



to entertain this Appeal, the Appeals Authority would not delve into the other limb and the merits of the Appeal.

Therefore, the Appeals Authority hereby dismiss the Appeal. Each party is to bear its own 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 28th day of November 2024.

ADV. ROSAN MBWAMBO



Ag: CHAIRPERSON

MEMBERS: -

1. ENG. STEPHEN MAKIGO.....

2. MR. RHOBEN NKORI.....