MAKERERE LAW JOURNAL JUNE 2021

Volume 20 Issue 3

CRITIQUE OF THE LEGAL FRAMEWORK GOVERNING THE RESOLUTION OF PUBLIC PROCUREMENT DISPITES IN TANZANIA

Daudi Francis Momburi

RECOMMENDED CITATION:

Daudi Francis Momburi (2021) "Critique of the Legal Framework Governing the Resolution of Public Procurement Disputes in Tanzania" Volume 20, Issue 3, Makerere Law Journal pp 194-218

CRITIQUE OF THE LEGAL FRAMEWORK GOVERNING THE RESOLUTION OF PUBLIC PROCUREMENT DISPUTES IN TANZANIA

Daudi Francis Momburi*

Abstract

The procurement process is facing various challenges, some legally based and others arising from the application of the law. The disputes that arise from the procurement process are contentious and need review so that justice may be served where there is a wrong. The justice should be timely and must provide remedies within reasonable time since these are largely commercial transactions. The system faces a challenge where some instituted bodies and persons to handle procurement disputes also parties to the procurement process hence leading to doubts as to impartiality. There should therefore be a review of the laws to provide for bodies with quasi judicial powers to handle these disputes. These bodies should be completely disconnected from the procurement processes.

1.0 INTRODUCTION

The formal process of resolving public procurement disputes in Tanzania is spearheaded by a combination of authorized officials and established bodies. These are the Accounting Officer (AO) vested with quasi-judicial powers, the Public Procurement Appeals Authority (PPAA), a quasi- judicial body, the High Court and Court of Appeal. This process employs various provisions of principal and subsidiary laws, which constitute the legal framework for the resolution of public procurement disputes. These laws include, but are not limited to, the following:

i) Law Reform (Fatal Accidents and Miscellaneous Provisions) Act Cap 310 R.E 2002;

* LL.B (Hons), LL. M, PhD (Advocate), Lecturer, University of Dodoma

ii) Law Reform (Fatal Accidents and Miscellaneous Provisions) (Judicial Review Procedure and Fees) Rules 2014;

iii) Public Procurement Act, 2011;

iv) Public Procurement (Amendment) Act 2016;

v) Public Procurement Regulations 2013;

vi) Public Procurement (Amendment) Regulations 2016;

vii) Public Private Partnership Act 2010;

viii) Public Private Partnership Regulations 2011; and

ix) Public Procurement Appeals Rules 2014.

Despite having this institutional set-up under the relevant laws, it is alleged that procurement disputes are not resolved in a timely and impartial manner, and it has been found that the number of appeals lodged before appellate bodies is increasing. For instance, between 2015 and 2020, 196 appeals were resolved by PPAA.[1] Equally, in the same period administrative review filed before the AO were 275.[2] This translate that out of 275 applications for review of AO, 196 were appealed against, which is equal to 72.3%. This percentage is on higher side, hence there is no other plausible conclusion than that the legal framework for resolution of public procurement leaves a lot to be desired. In this context the examination of the same is justified.

2.1 PROCESS OF RESOLUTION OF PUBLIC PROCUREMENT DISPUTES

Generally there are two types of dispute resolution methods, which are: adjudicative and non adjudicative.[3] Adjudicative includes litigation and

---

1 Decided appeals available at *www.ppaa.go.tz/sw/maamuzi* (accessed 20 April, 2021).

2 Public Procurement Regulatory Authority "Annual Performance Evaluation Report 2018/2019" 12 available at https://www.ppra.go.tz/index.php/about-joomla/annual-reports/annual-performance-evaluation-reports (accessed 19 May 2021).

3 Procurement Management Pressbook "Settlement of Disputes" available *at www.procurment management pressbok.com (*accessed 19 May 2021).

arbitration. Whereas in litigation a party sues or prosecutes another in a state court, arbitration refers to the resolution of case through a selected private arbitrator.[4]

On the other hand, non adjudicative methods involve the resolution of disputes through resort to processes of mediation, negotiation, conciliation, and in some cases the use of independent experts. Accordingly, in the above context, this part discusses the overall process of resolution of public procurement disputes as from the parties involved and roles played by various bodies mandated to resolve procurement disputes.

2.1.1 Parties to public procurement disputes

Public procurement disputes normally arise from the procurement and disposal of public assets through tenders and the blacklisting of those offering tenders[5], which are carried out by public bodies referred to as procuring entities (PE) and the Public Procurement Regulatory Authority (PPRA).[6] PEs are defined by Section 4 as a public body and any other body or unit established and mandated by the government to carry out public functions, which include the conduct of public procurement.[7]

These bodies comprise ministries, independent departments, executive agencies, corporate or statutory bodies or authorities established by the government, and companies registered under the Companies Act (the policies of which the government or government agency is in a position to influence) and local government authorities. Although authorities and bodies not mandated by the government to carry out the function of public procurement are not PE as defined by the public procurement law, they may qualify to

4 Ibid.

5 L. Beker "Procurement Dispute at the State and Local Level: A Hodgepodge of Remedies" (1996) 25(2) *Public Contract Law Journal* 265.

6 E.C. Maliganya "The Next Age of the Public Procurement Reforms in Tanzania: Looking for the Best Value for Money" (2015) *Georgetown Washington University Law School* 5.

7 Cap 410.

become PEs when the public procurement they are conducting is financed by specific public funds and is for public-private partnership projects at their relevant stages.[8]

The PPRA was established by Section 7 of the Public Procurement Act (PPA) to oversee the procurement system in Tanzania and to monitor PEs' compliance with the PPA.[9] Section 62(1) of the PPA gives the PPRA power to blacklist certain tenders, which decision cannot be challenged.[10] In this way, PEs and the PPRA occupy the central role in handling public procurement disputes, and any disputes they may have with suppliers, contractors, consultants, buyers and service providers, or with a disposer of public assets by tender, depending on the type of public procurement implemented by a PE.[11]However, the PPRA may be a party to a public procurement dispute when its decision is challenged in the High Court. Therefore, it is important to note that parties to public procurement cover a wide spectrum of stakeholders.

The blacklisting of tenders provided for in Section 62 is a disciplinary process emanating from the primary transaction of the public procurement or disposal of government assets through a tender (whereby a tenderer is accused of offending the PPA). A PE initiates the debarment process by submitting a proposal to debar the tenderer who is a party to the primary transaction, whereas an appeal lodged with the PPAA normally concerns a transaction between the parties to the primary transaction.[12]

Conventional dispute resolution processes would not have involved a regulator (PPRA) or an appellate body, the Public Procurement Appeal Authority (PPAA), as parties to the dispute resolution framework at the beginning of the process

8 Section 2 (b) and (c) of the PPA, Cap 410.
9 Section 8 and 9 of the PPA, Cap 410.
10 Section 62(6) of the PPA, Cap 410.
11 Breakthrough attorneys "Regulating and Compliance Law Update: Dispute Settlement Procedure in Public Procurement in Tanzania" available at www.breakthroughattorneys.co.tz [accessed 12 may 2021]
12 Regulation 94(1) of the Public Procurement Regulations, 2013 as amended in 2016.

or at a later stage.[13] Thus the original parties to the primary transaction continue to be parties to the subsequent processes involving the same primary transaction, because it would be inconceivable to have different parties at different stages of the same transaction. Therefore, the effectiveness of the institutional set-up and efficiency of the legal framework for public procurement dispute resolution leaves a lot to be desired.

2.1.2 Adjudicative role of an Accounting Officer

The accounting officer (AO) of a PE is the primary destination for the resolution of a public procurement dispute, except one emanating from the debarment decision made by the PPRA. This process is commonly referred to as an administrative review by the AO.[14] Thus the AO is empowered to handle complaints by suppliers, contractors, consultants, buyers and service providers, or by a disposer of public assets by tender, which arise from public procurement proceedings, the disposal of government assets by tender, or when a public procurement contract is awarded.[15]To adjudicate the complaints raised by the aggrieved parties, the AO does not require a special form or procedure.[16]

Aggrieved parties are simply required to submit their complaints to the AO in a letter copied to other bidders who had participated in the public procurement process or disposal of public assets by tender.[17] A complaint concerning a procurement dispute must be submitted to the AO within 7 days from the date that the complainant became aware of the circumstances that had given rise to

13 A. T. Ajayi & L.O. Buhari "Methods of Conflict Resolution in African Traditional Society"(2014)8 *African Research Review* 149.
14 Breakthroughattorneys (note 11 above) 1.
15 Section 36 (1) (I) of the PPA, Cap 410.
16 Regulation 105(1) of the Public Procurement Regulations, 2013 as amended in 2016.
17 Ibid, Regulation 105.

the complaint or when that complainant should have become aware of those circumstances.[18]

After receiving the complaint, the AO is duty bound to review it and provide a decision in writing within seven (7) days and give reasons for his decision. If the complaint or dispute is upheld in whole or in part, then corrective actions must be taken.[19] Accordingly, the AO must issue a decision within seven (7) days, which if not forthcoming the complainant is entitled to lodge his complaint with the PPAA. Furthermore, the AO is duty bound to submit a copy of the complaint received and a report on his decision concerning it to the PPRA[20] so that it is informed that the PPA has been complied with and that the due process of resolving public procurement disputes has been followed.

In addition, the AO may constitute an independent review panel from within or outside the PE to advise him or her on the correct decision to be made. Professional or technical advice from an appropriate body or person in Tanzania or elsewhere may be sought if the PE does not have the required technical expertise.[21] It is important to understand that the AO is responsible for the procurement decision made by his PE.[22]

Therefore, the AO is duty bound to make the correct decision to prevent the government from incurring pecuniary liabilities, which may arise from a faulty decision being made thereby reducing the number of unnecessary public procurement disputes. When a procurement contract has been entered into, the AO is prevented from entertaining or continuing to entertain a complaint submitted by the bidder.[23] It has been established by Tanzania's procurement

18 Section 96(4) of the PPA, Cap 410.
19 Section 96(6)
20 Section 36(1) (j)
21 Section 36(2)
22 Section 36(5)
23 Section 95(5)

law that the signing of the procurement contract marks the end of the procurement process thereby ending the AO's jurisdiction.[24]

However, the administrative review by the AO does not cover all aspects of disputes that may arise during procurement proceedings, the disposal of public assets by tender, and the award of a public procurement contract. The PPA restricts the AO's administration review to selecting the procurement method. Further, it restricts, in the case of services, the procedure to procurement proceedings on the basis of nationality in matters involving post-qualification to be challenged; this is in accordance with Section 53 of the PPA, or the prescribed Regulations. Furthermore, it restricts to challenge a refusal by the PE to respond to an expression of interest.[25] Nevertheless, if a bidder is aggrieved by the PE's decision in relation to the aforementioned areas, he or she shall have the right to lodge a complaint with the PPRA.[26] In the final analysis, the decision of the AO may be challenged by the PPAA.

2.1.3 The adjudicative role of the PPAA

The PPAA is a statutory quasi-judicial body established by Section 88 (1) of the PPA,[27] which is empowered to hear and determine complaints against PEs, where the contract for the procurement or disposal of government assets by tender is already in force, and to hear and determine appeals arising from administrative decisions made by an AO.[28] Under Section 88(6), the PPAA is also empowered to hear and determine appeals emanating from the procurement decision made by the PPRA[29] and overrule them. The functions the PPAA are: i) to receive complaints and appeals concerning the procurement process or decisions made by the government or its institutions in relation to public procurement; ii) to review decisions made by AOs concerning

24 Regulation 233(3) of PPR, 2013 as amended in 2016.
25 Section 95(2) of the PPA, Cap 410.
26 Section 95(3)
27 Cap 410.
28 Section 88(5)
29 Public Procurement Act, Cap 410.

procurement processes; iii) to review decisions made by the PPRA on the blacklisting of tenderers; and iv) to take corrective action if a breach in the procurement procedure was found.

The PPAA is composed of a Chairman appointed by the President from amongst retired Judges of the High Court of Tanzania and six other members to be nominated by the Minister responsible for finance.[30] The Attorney General is required to appoint a senior lawyer, presumably from his office, and two of the six members must come from the private sector that have relevant knowledge and expertise in public procurement, business administration, the construction industry, finance or law.[31]

The Executive Secretary, who is the chief executive officer of the PPAA, is also the secretary of the appeal authority. The PPAA may hear and determine appeals and procurement disputes that emanate from when: i) an AO does not make a decision within 7 days as specified by the law; ii) the tenderer is dissatisfied with the AO's decision; iii) the tender is accepted or rejected in contravention of the PPA; iv)an award or proposed award of a contract was made in contravention of the PPA; v) an unacceptable provision was included in the tendering document; vi) a PE carried out an unacceptable tendering process; vii) a PE made a decision that offends the PPA; and viii) when a bidder is dissatisfied with the debarment decision made by the PPRA.

Normally, before an appeal is lodged with the PPAA, a notice of intention to appeal and a statement of appeal are submitted, provided for in Forms No.1 and 2 respectively as set out in the PPAA.[32] The statement of appeal contains the particulars of the appellant and the facts giving rise to the complaint or dispute, the relief sought, and anything else the appellant may consider necessary for the just determination of the appeal. The PPAA is not bound by

30 Section 88(2) of the PPA, Cap 410.
31 Section 88(2) (b) (ii) of the PPA, Cap 410.
32 First Schedule to the Public Procurement Appeals Rules 2014.

strict rules of procedure, but can employ simple alternative methods for resolving disputes.

Unless the appeal is dismissed, the PPAA may: i) declare that the legal rules or principles governing the subject matter are unlawful; ii) prohibit the PE from acting or deciding unlawfully or from following an unlawful procedure ;iii) require the PE that has acted in an unlawful manner, or reached an unlawful decision, to act in a lawful manner or to reach a lawful decision; iv) annul in whole or in part an unlawful act or decision of the PE; v)revise an unlawful decision by the PE or substitute its own decision, or require the payment of reasonable compensation to the tenderer submitting the complaint as a result of an unlawful act, and the decision or procedure followed by the PE.[33] If parties to the dispute are aggrieved by the decision of the PPAA, they may seek a judicial review at the High Court.

2.1.4 Role played by the High Court

Pursuant to the PPA, a tenderer or PE aggrieved by decision of the PPAA may apply to the High Court for a judicial review within fourteen (14) days.[34] This is complemented by the Law Reform (Fatal Accidents and Miscellaneous Provision) Act and Judicature and Application of Laws Act, Cap 538 R.E 2020, which empowers the High Court to hear and determine the judicial review.[35] The judicial review process is initiated by filing an application for leave to apply for administrative orders, namely, mandatory, prohibition or *certiorari.* The leave to apply for prerogative orders is provided for under Rule 5 (1) of the Law Reform (Fatal Accidents and Miscellaneous Provision) (Judicial Review Procedure and Fees) Rules, 2014, which is required to be heard and determined within 14 days as per Rule 5 (4).

33 Section 97(5) of the PPA, Cap 410.
34 Section 101.
35 Sections 17 and 2 respectively.

In addition, the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act, Cap 310 of the Revised Edition, 2002 and of the Law Reform (Fatal Accidents and Miscellaneous Provisions) (Judicial Review Procedure and Fees) Rules, 2014(GN No. 324) of 2014 require that the application for leave to file a judicial review must be filed within six months after the proceedings.[36] This application is made under Chamber Summons, supported by an Affidavit and Statement.[37] Upon being granted leave to apply for prerogative orders, the next step is to actually apply for them, which must be done within 14 days after leave has been granted, as provided for under Rule 8 (1) of the Law Reform (Fatal Accidents and Miscellaneous Provision) (Judicial Review Procedure and Fees) Rules, 2014. This application will be made under Chamber Summons and supported by an Affidavit.[38]

2.1.5 The role played by the Court of Appeal

If the High Court has erred in its application or interpretation of the law, an appeal may be made to the Court of Appeal. The aggrieved bidder cannot lodge his appeal, but must file a notice of appeal while simultaneously filing an application seeking leave to appeal within 14 days of the High Court's decision, and file a memorandum and the record of the appeal within 60 days of leave to appeal being granted. The decision of the Court of Appeal is final and conclusive.[39]

3.0 LEGAL CHALLENGES OF THE DISPUTE RESOLUTION PROCESS

As stated above, the framework for the resolution of public procurement disputes appears to be convoluted, thereby triggering an examination into whether or not it is free from legal and practical challenges. Emphasis is placed on examining areas of procurement law and general practice that are

36 Section 19 (3) and Rule 6 .
37 Rule 5 (2) Law Reform (Fatal Accidents and Miscellaneous Provision)(Judicial Review Procedure and Fees) Rules, 2014.
38 Rule 8 (a) of the Rules.
39 Breakthroughattoneys (note 11 above) 1.

inconsistent with fundamental legal principles and appear to be a stumbling block to the smooth functioning of the legal framework.

3.1 Accounting officer as an adjudicator

First and foremost, the discussion begins by examining the rationale for placing the AO of a PE as the institution of first resort in the resolution of public procurement disputes. Because an AO is usually the chief executive officer of the PE whose action or omission is being complained against, it is naturally possible for the AO to have vested interests in this matter. Therefore, placing an AO as an adjudicator in a public procurement dispute is a violation of the fundamental principles of natural justice (rule against bias).

It is a principle of natural justice that no-one should be a judge of his own cause (*nemo judex in causa sua*).[40] Basically, natural justice has meant many things to many writers, lawyers and system of law, but in essence it is a fundamental rule which is universal and emphasizes fair play, fairness in order to prevent miscarriage of justice.[41] In *R v Gaming Board of Great Britain ex-parte Benaim & Khaida,* it was stated by Lord Denning that "it is not possible to lay down rigid rules neither as to when the principles of natural justice are to apply nor as their scope and extend. Everything depends on the subject matter".[42] The correct approach is to consider the nature of the case, the circumstances in which the decision maker is entitled to intervene, and the sanctions which can be imposed.[43]

Traditionally, common law recognizes two principles of natural justice, namely: i) *nemo debet esse judex in propria causa* which means no man should be a

40 C.K. Takwani & M.C. Thakker *Lectures on Administrative Law* (2010) 170.
41 Ibid, 171.
42 (1970) 2QB 417.
43 D. Scott & A. Felix *The principles of Administrative Law* (1997) 131.

judge in his own cause or rule against bias, and ii) *Audi alteram partem* which stands for no man should be condemned unheard or without a fair hearing.[44]

In carrying out the procurement or disposal of public assets by tender, an AO will want to ensure that his interests are protected by implementing a procurement plan that will meet his strategic objectives. Given these facts, the decision of an AO becomes questionable as to whether or not complies with the aforementioned natural justice principle of rule against bias, hence it cannot be perceived to be free from bias even if the decision might be impartial. It is a principle of natural justice that justice should not only be done, but also be seen to be done.[45]

It is normal court practice that when the interests of a magistrate or judge appear to conflict with the matter brought before him, he withdraws from presiding over it. This has been a legal requirement in some jurisdictions and the best practice in others. Therefore, it is high time the PPA is amended to ensure that the legal framework for the resolution of public procurement disputes aligns with the requirements of natural justice. As stated above, once the interests of an adjudicator conflict with the subject matter of the dispute, the legitimacy and impartiality of his decision naturally becomes questionable. Although an AO appears to play a pivotal role in administrative review and his position as an adjudicator expedites the resolution of public procurement disputes, the fundamental principles governing the administration of justice cannot be compromised due to his vested interests.

3.2 Quasi judicial body as party to subsequent appeal

44 C K Takwani (note 40 above) 177.

45 *R v Sussex Justices, ex parte McCarthy, [1924] 1 KB 256, [1923] All ER 233.*

Secondly, the legal framework for the resolution of public procurement disputes is subject to a *de-facto* quasi-judicial body which discharges its functions relating to the payment of compensation for the judicial decision it has made. In hearing and determining a debarment petition it implies that the PPRA is a *de-facto* quasi-judicial body.[46] The process of debarring a tenderer is more or less the same as the process of administering justice carried out by the ordinary law court. The procedure for debarring a tenderer is provided for in the provisions of Regulations 94, 95, 96, 97 and 97[47] which require the PPRA to determine the debarment proposal submitted by a PE. The PPRA will have to take into consideration documentary evidence submitted to it by both the PE and tenderer when making a debarment decision. At this stage, the PPRA functions as a regulator after being moved by one of the parties (PE).

As stated earlier, PPRA conducts a disciplinary process arising from the primary transaction, namely the public procurement or disposal of government assets by tender, the parties being the PE and the tenderer. Strangely, if a tenderer is aggrieved by a debarment decision made by the PPRA, the law allows it to appeal to the PPAA, and so the PPRA becomes a respondent. Furthermore, if the PPAA's decision is in favor of the appellant, the respondent is then subject to the PPAA's order(s), such as to pay the costs of the appeal and other related orders. Under normal court practice, a court can neither be made a party to an appeal lodged by an aggrieved party nor ordered to pay the costs of an appeal. On making a debarment decision, the PPRA stands as an adjudicator, whereby it can be construed as a court.

In this regard, the PPRA is required to make its debarment decision without fear or favor. At the same time, the PPRA runs the risk of being dragged to the PPAA as a respondent and of being issued with a compensation order, due to its faulty debarment decision. This state of affairs undermines the

46 See Regulations 94-98 of the Public Procurement Regulations, 2013 as amended in 2016.

47 Public Procurement Regulations, 2013 as amended in 2016.

independence of PPRA in making a debarment decision, hence, the quality of its debarment decision is questionable for the likelihood of being compromised.

Further, when the PPRA makes an incorrect debarment decision, it may suffer financial burden, when the compensation order is enforced against it. Financial liability so imposed by a compensation order may reduce the financial capacity of the PPRA to meet its objectives by failing to implement activities which have financial implications. This may in turn make the PPRA a financial liability to the government. Further, the PPRA staff is also running the risk of facing disciplinary action, and they may even being prosecuted for occasioning loss to the government. Under these circumstances, it is appropriate to consider amending the PPA to ensure that the PPRA adopts ordinary court practices while making debarment decisions. In other words it must be considered as a court while making a debarment decision, accordingly should not made a party to an appeal preferred subsequent to its decision or issued with compensation orders.

3.3 Limited number of disputes

Thirdly, the legal framework for the resolution of public procurement disputes does not absorb all complaints arising out of the procurement or disposal of public assets by tender. The PPA excludes disputes arising from a PE's selection of the procurement method, or disputes arising on the basis of nationality, and disputes arising from the refusal by a PE to respond to the expression of interest to participate in the request for the proposal to proceed.[48]

The rationale for excluding these disputes is best known to the legislature, although they are handled by the PPRA by virtue of the PPA.[49] The PPRA is a regulator per se that mainly oversees compliance with PPA and its Regulations

48 Section 95(2).
49 Section 95 (3).

by PEs,[50] whereby the PPA introduces a dual system of resolving public procurement disputes by making the PPRA (a regulator) a *dejure* quasi-judicial body to hear and determine appeals emanating from the areas cited above. This makes the legal framework for the resolution of public procurement disputes fragmented, complex and confusing.

3.4 Short-circuiting of resolution of dispute process

Fourthly, as stated earlier, when an AO has failed to reply to a complainant's letter within the time specified by the law, the complainant is at liberty to refer his complaint to the PPAA.[51] Referring to the PPAA at this stage may be construed as automatically transferring a complaint by operation of the law. Accordingly, it gives an impression that the legislature has short-circuited the process of handling public procurement disputes.

Even when the AO has failed to make a decision within the time specified, it would have been plausible to allow him or her to make decision out of time by giving reason depending on the nature of the situation, which has given rise to that delay. If the AO fails to give a decision within the time specified, the only interpretation, which is given by the law is that he has failed to handle the public procurement dispute, which is why it is referred to another body.[52] A law that is aimed at ensuring compliance with the set timeframe should be flexible to accommodate unforeseen events, which may cause the AO's failure to respond within the time specified.[53]

In some cases, the AO may require more time to verify some information given by the complainant, or the nature of the complaint may require expert opinion, which could not be made available within the time specified by the law, or it

50 Section 9(1) of PPA, Cap 410.
51 Section 96(7) of the PPA Cap 410.
52 Regulation 106 (10) of the Public Procurement Regulations, 2013 as amended in 2016
53 Ibid.

may require consultation with experts or persons conversant with the matter giving rise to the complaint, which it may not be possible to organize within the time specified.

In addition, since an AO is the chief executive of a PE, which is a public body, he may be pre-occupied with an emergency requiring immediate attention, or his office may fall vacant without being immediately replaced by someone capable of making a decision within the time specified by the law. These are some imaginable scenarios, but there might be more grounds for making law flexible to enable AOs to come to a decision outside the time specified by the law.

As pointed out earlier, a short-circuiting of the process of resolution of disputes results in the PPAA becoming a quasi judicial body of first instance. This state of affairs necessitates a complainant aggrieved by its decision to go to the High Court as the first appeal court through the judicial review process. Without the provision of the aforementioned section, the aggrieved complainant would have lodged his appeal with the PPAA to avoid the complex requirements of the High Court as discussed earlier.

Furthermore, at the moment, the High Court of Tanzania is striving to deal with a backlog of undecided cases, which may be due to the number of judges in relation to the workload. However, making the High Court the first appellate body is not the wisest choice for the resolution of public procurement disputes. Consequently, the handling of public procurement appeals may take more time than would have been the case in the PPAA. Generally, the procedure for resolving public procurement disputes should be made and kept simple. As contemplated by the PPA, dispute resolution should be incidental to procurement proceedings rather than the main party to the proceedings. Therefore, the resolution of public procurement disputes should take the simplest route possible, and for that reason the PPA should be made more

flexible to extend the specified time given to AOs to make a decision and reply to the complainant.

4.0 PRACTICAL CHALLENGES OF THE DISPUTE RESOLUTION PROCESS

Complementing the legal challenges which are stated above, this part identifies some of the practical challenges which undermine the dispute resolution process as below discussed:

4.1 Absence of standard procedural forms

Apart from the legal challenges discussed above, the legal framework for the resolution of public procurement disputes does not have a standard procedure or form for lodging a complaint with an AO, unlike in the PPAA whereby a complainant or appellant is required to fill in forms Nos. 1 and 2, and the complaint lodged with the AO in writing. In some cases, a letter written to AOs may neither relate to the settlement of public procurement dispute nor contains the facts that gave rise to them. Complainants who are largely not conversant with the PPA and general procedural rules are left without proper legal guidance.

It is imperative that the complainant categorically states the facts that led to a public procurement dispute and the relief sought from it, which would enable the AO to understand the nature of the dispute and the relief sought. In the same vein, the AO must make an impartial and rational decision, supported by sound reasons.

Therefore, the introduction of a standard procedure and complaint forms will, among other things, help the complainant to state precisely the issues needing to be attended to by the AO. In this way, a standard procedure and form will filter complaints and ensure that the AO only handles those deemed to have merit, thereby reducing the number of unscrupulous complaints and speeding up procurement proceedings.

It is worth noting that, if public procurement disputes are not checked at the earliest opportunity possible, this may lengthen the time specified for the implementation of procurement proceedings, hence failing to achieve value for money in public procurement. Borrowing a leaf from Kenya, the request for review is made in a prescribed form. An applicant must provide reasons for the complaint and state the alleged breach of the Act or Regulation.[54] In addition, all written applications must state name and address of the applicant, the procuring entity, and the date of submission of the written application, reference number of the procurement procedure and date of issuance of tender documents or request of proposal or request of quotation.[55]

4.2 Non appearance of parties during administrative review

Although a complainant/appellant or his legal representative may appear before the PPAA, there is no room for parties to a public procurement dispute or their legal representatives to appear before the AO during the administrative review, which is done through reviewing the documents, or simply replying to the complainant's letter. When an AO fails to review the complaint within the time specified by law, he still has original jurisdiction to hear and determine public procurement disputes, which means that the administrative review by the AO is required to be inclusive and exhaustive.

It must be inclusive to the extent of securing the appearance of the parties to the dispute or their legal representatives, and it must be exhaustive to extent of thoroughly examining the complaint and the documentary evidence relied upon to support it. Conventionally, the AO as a court in the first instance ought to be inclusive and exhaustive as opposed to an appellate court, which relies on the documents giving evidence of what transpired in the aforementioned court.

---

54 A. H. Karauka *Dispute Resolution Mechanism under the Kenyan Public Procurement and Disposal Act, 2005: A Critical Analysis* (Unpublished LL.M Thesis, University of Nairobi, 2009) 31.

55 Ibid, 32 & 32.

Therefore, parties to public procurement disputes or their legal representatives should be allowed to appear before the AO, which may help to expedite the resolution of public procurement disputes by facilitating the AO to get relevant facts and evidence at one sitting, hence expediting the decision-making process. In addition, the physical appearance of the parties to the dispute will make it easier to uncover all the practical problems pertaining to the execution of the procurement process, thereby enabling the AO to take appropriate corrective measures to perfect and expedite the procurement proceedings in the time stated by the law.

5.1 THE WAY FORWARD

On the basis of the foregoing discussion, it is evident that the legal framework for the resolution of public procurement disputes needs to be amended in various key areas. First and foremost, the administrative review, which is the first step in the resolution of public procurement disputes, is in violation of principles of natural justice. As earlier stated, administrative review is adjudicated by the AO of a PE, and because an AO is the chief executive officer, it is out right that such executive officer has vested interests sufficient to rule him out. Therefore, nobody should be a judge of his own cause, as it is considered to be a clear violation of the fundamental principles of natural justice.

The example of Kenya in this regard is helpful. There, the administrative review is carried out by an independent body called the Public Procurement Administrative Review Board (PPARB).[56] The PPARB is a separate from the AO established by the minister of finance, and is composed of experts appointed from various bodies, which are the main public procurement stakeholders.[57]

[56] Section 25 of the Public Procurement and Disposal Act, Cap 412 C.

[57] Regulations 40(1) and (2) The Exchequer and Audit (Public Procurement) Regulations, 2001 as revised in 2012.

The AO and the Public Procurement Oversight Authority (PPOA) merely provide logistics and administrative services to the review board.[58]

Furthermore, the PPARB hears complaints and makes a decision in the presence of the parties to the procurement dispute.[59] Therefore, the framework for the resolution of public procurement disputes should emulate these key features by introducing an independent review board as opposed to the AO to ensure that disputes are heard, determined and decided upon on before the parties concerned.

Secondly, the legal framework for the resolution of public procurement disputes should be amended to ensure that the original parties to a public procurement dispute remain the same throughout the procurement dispute resolution circle. As such; bodies which are vested with quasi-judicial roles, such as the PPRA and PPAA should not be parties to subsequent appeal proceedings. For instance, a PPRA, while making a debarment decision, should be immune from liabilities arising from its own decision. It is worth noting that while making a debarment decision, the PPRA should be considered a quasi–judicial body. Judicial and quasi judicial bodies are not made liable for decisions they make.

In that context, PPRA should not be made respondent when an appeal against its debarment decision by an aggrieved party is lodged in the PPAA. Equally, the PPAA should be precluded from making compensation orders against PPRA. As earlier stated, the legal framework for the resolution of public procurement disputes does not relieve the PPRA of liabilities arising from its debarment decision. Although the PPRA is regarded as a *de-facto* quasi judicial body when making debarment decisions, it is still made a respondent in an appeal lodged with it, and ordered to pay compensation. Therefore, to bring

58 Section 25(3) of the Public Procurement and Disposal Act, Cap 412C.

59 Regulation 42(6) of The Exchequer and Audit (Public Procurement) Regulations, 2001 as revised in 2012.

sanity to the legal framework for the resolution of public procurement disputes, the PPA needs to be improved to capture what has been discussed above.

Thirdly, the normal system for resolving public procurement disputes begins with the AO and may end at the Court of Appeal, as provided for by Section 95(2) of the PPA. However, Section 95(3) of the PPA introduced another system for resolving public procurement disputes outside the scope provided for under Section 95(2), as it allows parties to seek and obtain redress from the PPRA. This state of affairs creates a dual system for resolving public procurement disputes, which is confusing.

Kenya's legal framework for the resolution of public procurement disputes has limited the areas from which public procurement disputes may arise without referring to another body.[60] Therefore, to avoid confusion and for the purpose of bringing sanity to the legal framework, the provision of Section 95(3) of the PPA should be amended to do away with reference to the PPRA in public procurement disputes, which was not contemplated by Section 95(2).Therefore, an amended PPA will enable all procurement disputes to be handled within one system.

In addition to above, the provisions of Section 96(7) of the PPA tend to short-circuit the public procurement dispute resolution process. The original intention of the law was to ensure that public procurement disputes are handled administratively through a number of quasi-judicial bodies, which would reduce red tape, unnecessary legal technicalities and numerous procedural requirements, thereby helping to speed up the process so as to meet procurement objectives in a timely manner.

In this regard, AOs and the PPRA are quasi-judicial bodies with little or no legal technical expertise. The introduction of Section 96(7) of the PPA appears to create an environment that slows down the realization of procurement

60 Regulation 40(2) of the The Exchequer and Audit (Public Procurement) Regulations, 2001 as revised in 2012

objectives, which could be explored. By skipping the services of the AO, an aggrieved party will thus begin his journey in the resolution of a public procurement dispute at the PPAA, the next step being the High Court. It is worth noting that the procedure for lodging an appeal may be akin to a fresh hearing in the High Court. Appealing to the High Court may open up hearing afresh hence prolong the procurement process.[61]

Procedures in the High Court are somewhat complex and require specialized skills, but even when a matter is successfully lodged, the process may take some time due to the High Court's busy schedule. Therefore, to realize the objectives of the procurement dispute resolution process, Section 96(7) of the PPA should be amended to avoid short-circuiting it. Finally, although the existence of AOs in the legal framework for the resolution of public procurement disputes has been questioned earlier, they are still needed for the administrative review.

Therefore, a standard procedure should be adopted by AOs, and forms provided for them to use, which will help facilitate the resolution of procurement disputes. Finally, parties to a procurement dispute should appear before the AO or a newly established body, which will enable the parties to scrutinize evidence adduced, thereby helping the AO to reach an impartial decision.

5.2 CONCLUSION

In the context of the foregoing discussion, the legal framework for the resolution of public procurement disputes should be flexible to overcome all challenges highlighted above. As such, it must not consider an AO as an adjudicator, contrary to the natural justice principle of the rule against bias. Borrowing a leaf from the Kenya's legal framework an independent body separate from PE should be preferred.

---

61 A. H. Karauka (note 54 above) 19.

Further, the legal framework must not strictly impose a time frame for adjudication of disputes. As earlier mentioned, some dispute may require more time to be finalized, hence making these set time frame impractical. Accordingly, it was observed that in some instances where and when decision is not given within prescribed time, the dispute will be transferred to another superior body by operation of law. This tendency was considered to be short-circuiting of the resolution by operation of law and so the legal framework should strive to avoid the same.

The legal framework for the resolution of public procurement disputes needs to be effective in terms of resolving these disputes impartially, and efficient in the sense that the proceedings are conducted and decisions made in a timely manner. Going through the legal framework, some legal and practical problems have been observed and appropriate recommendations have been made. These recommendations are aimed at improving the legal framework to make it competitive and up to the standard required by the law. Furthermore, appraisal of the legal framework has revealed that the PPA has put a timeframe in place, which is reasonable and practical. However, in this regard, some flexibility in the law is needed to provide decision makers with extended time so that they make correct and impartial decisions.

LIST OF REFERENCES

1) Ajayi A. T & Buhari L.O "Methods of Conflict Resolution in African Traditional Society"(2014)8 *African Research Review* 149

2) Beker. L "Procurement Dispute at the State and Local Level: A Hodgepodge of Remedies" (1996) 25(2) *Public Contract Law Journal* 265

3) Breakthroughattorneys "Regulating and Compliance Law Update: Dispute Settlement Procedure in Public Procurement in Tanzania" available at www.breakthroughattorneys.co.tz [accessed 12 May 2021]

4) Decided appeals available at *www.ppaa.go.tz/sw/maamuzi* (accessed 20 April, 2021)

5) Karauka. A. H *Dispute Resolution Mechanism under the Kenyan Public Procurement and Disposal Act, 2005: A Critical Analysis* (Unpublished LL.M Thesis, University of Nairobi, 2009)

6) Law Reform (Fatal Accidents and Miscellaneous Provisions) (Judicial Review Procedure Fees) Rules, 2014

7) Maliganya E. C "The Next Age of the Public Procurement Reforms in Tanzania: Looking for the Best Value for Money" (2015) *Georgetown Washington University Law School* 5

8) Procurement Management Pressbook "Settlement of Disputes" available *at www.procurment management pressbok.com (*accessed 19 May 2021).

9) Public Procurement (Amendment) Act, 2016

10) Public Procurement (Amendment) Regulations, 2016

11) Public Procurement Act, 2011

12) Public Procurement and Disposal Act, Cap 412 (Kenya)

13) Public Procurement Appeal Rules, 2014

14) Public Procurement Regulations, 2013

15) Public Procurement Regulatory Authority "Annual Performance Evaluation Report 2018/2019" 12 available at https://www.ppra.go.tz/index.php/about-joomla/annual-reports/annual-performance-evaluation-reports (accessed 19 May 2021).

16) Public Procurement Regulatory Authority "Annual Performance Evaluation Report 2017/2018" 12 available at

https://www.ppra.go.tz/index.php/about-joomla/annual-reports/annual-performance-evaluation-reports (accessed 19 May 2021).

17) Public Procurement Regulatory Authority "Annual Performance Evaluation Report 2016/2017" 12 available at

https://www.ppra.go.tz/index.php/about-joomla/annual-reports/annual-performance-evaluation-reports (accessed 19 May 2021).

18) Public Procurement Regulatory Authority "Annual Performance Evaluation Report 2015/2016" 12 available at

https://www.ppra.go.tz/index.php/about-joomla/annual-reports/annual-performance-evaluation-reports (accessed 19 May 2021).

19) Public Procurement Regulatory Authority "Annual Performance Evaluation Report 2014/2015" 12 available at

https://www.ppra.go.tz/index.php/about-joomla/annual-reports/annual-performance-evaluation-reports (accessed 19 May 2021).

20) R v Gaming Board of Great Britain ex-parte Benaim & Khaida(1970) 2QB 417

21) R v Sussex Justices, ex parte McCarthy, [1924] 1 KB 256, [1923] All ER 233

22) Scott .D & Felix. A *The principles of Administrative Law* (1997) 131

23) Takwani C. K & Thakker M. C *Lectures on Administrative Law* (2010) 170

24) The Exchequer and Audit (Public Procurement) Regulations, 2001 (Kenya)