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TERMINATION OF THE PUBLIC PROCUREMENT CONTRACTS FOR CONVENIENCE IN TANZANIA MAINLAND

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ABSTRACT

This article specifically discusses on termination of the public procurement contract for convenience in Tanzania Mainland, Tanzania which is officially the United Republic of Tanzania (Swahili language: Jamhuri ya Muungano wa Tanzania), is a country in East Africa within the African Great Lakes region. The authors, among other things, examine the ability of the Tanzanian government is through procurement enactments, to exercise its right of terminating contracts for convenience. “Termination for convenience” refers to the exercise of the government’s right to bring to an end the performance of all or part of the work provided for under a contract prior to the expiration of the contract “when it is in the Government’s interest” to do so. Government agencies typically incorporate clauses in their procurement contracts granting them the right to terminate for convenience. There is no clearly statutory guarantee on this in Tanzania Mainland. This area is, however, examined based on other foreign jurisdictions, particularly in the United States of America. For termination for convenience to occur, all above indicated situations should be taken into consideration by the government intending to exercise such a right and this article ends with conclusion and recommendation.

Keywords - Termination, Public Procurement Contract, Convenience, Tanzania Mainland.

I. INTRODUCTION

This article specifically discusses on termination of the public procurement contract for convenience in Tanzania Mainland, Tanzania which is officially the United Republic of Tanzania (Swahili: Jamhuri ya Muungano wa Tanzania), is a country in East Africa within the African Great Lakes region. The authors, among other things, examine the ability of the Tanzanian government is through procurement enactments, to exercise its right of terminating contracts for convenience. It is reported that, though the government is not exercising this right frequently, but when inevitable circumstances occur, the government should be able to do as inscribed under current procurement guidelines. The preparation of this article has been engineered by the recently saga, where the Tanzanian government

decided to termination procurement contract for convenience with a famous Kenyan Company viz., Indo Power Solutions Limited. By virtue of the contract which was entered between the government and the said company, the company was expected to purchase cashew nuts, worth 418 Billions Tanzania Shillings. However, while the procurement contract was in the execution stage, the Tanzania Government decided to terminate for convenience. The ability to make termination of the procurement contracts on public interest ground is one of the fundamental rights of the governments in public procurement in Tanzania Mainland. This right is also called “termination for convenience”. It allows the governments, making termination of the procurement contracts at any time when it is appropriate for the governments to do so, or deem appropriate so to be done. In many procurement contracts, this provision is specifically included to serve such purpose. As previously stated, when such a provision is included, it enables the governments to terminate procurement contracts at any time. It is further contended that, when such a scenario occurs, governments terminating procurement contracts at any time, the other party to the same procurement contract, that are procuring entities, are entitled to compensation for a value of the work as agreed, and should also be paid *quantum meruit* for the work already done.¹

II. CONCEPTUALIZING TERMINATION FOR CONVENIENCE IN PUBLIC PROCUREMENT

Termination for convenience has been conceptualized in different ways and perspectives. To begin with, termination for convenience is referred to as “the exercise of the government’s right to bring to an end the performance of all or part of the work provided for under a contract prior to expiration of the contract ‘when it is in the Government’s interest’ to do so.”² It is also defined as a standard clause

¹ Brownell, T. M., and Hallmark, G. R., “Wrongful Termination for Convenience Results in a Finding of Breach of Contract Against the Government.” BCA, 2010. This information is also available online through <https://www.hklaw.com> (Accessed on 5th June, 2019).

² Manuel, K. M., *et al*, Terminating Contracts for the Government’s Convenience: Answers to Frequently Asked Questions”, Congressional Research Service, 2015. p. 1.

in government contracts which gives the government the right to unilaterally terminate the contract at any time with or without giving any reason.³

“Termination for convenience” refers to the exercise of the government’s right to bring to an end the performance of all or part of the work provided for under a contract prior to the expiration of the contract “when it is in the Government’s interest” to do so. Government agencies typically incorporate clauses in their procurement contracts granting them the right to terminate for convenience. However, the right to terminate procurement and other contracts for convenience has also been “read into” contracts which do not expressly provide for it on the grounds that the government has an inherent right to terminate for convenience, or on other related grounds.⁴

III. HISTORICAL EVOLUTION ON TERMINATION FOR CONVENIENCE IN PUBLIC PROCUREMENTS

The right to terminate for convenience has historically been viewed as protecting the public interest by ensuring that the government does not have to pay for something that it may no longer dire necessity or want.⁵ Termination of procurement contracts in view of “termination for convenience” is a specific provision which is usually included in the procurement contracts, especially in procurement contracts involving government as one of the party. The provision allowing the governments to make termination of procurement contracts in respect to termination for convenience, historically, its origin started in the United States of America (USA), during constructions of warships

³ See Wrights, E., and Davidson, W. D., “Developing Effective Contracts for the Public Sector”, National Institute of Governmental Purchasing, 2014, p. 70. This is also available online through <http://www.businessdictionary.com/definition/termination-for-convenience.html> (Accessed on 5th June, 2019). See also James, E. P., “Termination for Default and for Convenience of Government”, *Boston College Law Review*, Vol. 5, Issue 1, 1963. pp. 65-78. See Klass, G., Letsas, G., and Saprai, P., *Philosophical Foundations of Contract Law*, Oxford University Press, 2014. pp.164 & 65.

⁴ <https://fas.org/sgp/crs/misc/R43055.pdf> (Accessed on 30th December, 2019).

⁵ See *Russell Motor Car Co. v. United States*, 261 U.S. 512, 512 (1923). In this case, it was viewed that, with the termination of the war, the continued production of war supplies would become not only unnecessary but useless. See also a famous case of *United States v. Corliss Steam-Engine Co.*, 91 U.S. 321,323 (1875). In this matter, it was also observed that, it would be a serious detriment to the public service if the power of the heads of the Federal agencies did not extend to providing for all possible contingencies by modification or suspension of the contracts and settlement with the contracts. This information is also available online through <http://www.fas.org/sgp/crs/misc/R43055.pdf> (Accessed on 5th June, 2019).

in the First World War, which took place as from 1918.⁶ The main purpose of invoking this provision in procurement contracts was to enable the US government to make termination of procurement contracts that were entered during the war, and when the wars are over, where US government was no longer in need of procuring warships. The provision became so famous in many country governments in the world, where governments were involved in various procurement contracts even after end of the First World War. This provision was eventually incorporated in procurement documents of various nations, which also include the World Bank procurement documents. This has been a global practice today the world over now.

IV. LEGAL POSITION ON “TERMINATION FOR CONVENIENCE” IN TANZANIA AND OTHER

FOREIGN JURISDICTIONS

Termination of procurement contracts in respect of termination for convenience is also practiced in Tanzania Mainland. This right of termination of procurement contracts becomes evident when the government is no longer interested with a particular procurement contracts. The practice has also been clearly indicated in various procurement documents and guidelines as issued by PPRA. The Standard Bidding Documents, for instance, indicates thus:

If the contract is terminated for employer’s convenience or because of fundamental breach of the contract by the employer, the Project Manager shall issue a certificate for the value of the work done, materials ordered, the reasonable cost of removal of equipment, repatriation of the contractor’s personnel employed solely on the works, and the contractor’s costs of protecting and securing the Works, and less advance payments received up to date of the certificate.⁷

⁶ The first case law which firstly articulated the idea of termination for convenience was a famous case of *United States v. Corliss Steam-Engine Co.*, 91 U.S. 321,323 (1875). This case for the first time provided the basic legal theory in support of the modern termination for convenience clause.

⁷ See section 60.2 of the Standard Bidding Document as issued by PPRA. See also Clause 28.1 of the GCC.

In terms of such above indicated provision, it is obvious that termination of procurement contracts in respect of termination for convenience is possible, and it is practiced in the current procurement system in Tanzania Mainland. The right to terminate procurement and other contracts for convenience has also been “read into” contracts which do not expressly provide or it on the grounds that the government has an inherit right to terminate for convenience, or on other related grounds.⁸ In addition to that, the exercise of this right, however, generally also entails some compensation for the contractors because there arguably would not be a binding contract if one party were unilaterally able to put a contract to an end without imposing contractual liability to the other.⁹ It is further contended that, failure of government to make necessary payments as a results of exercising such right to terminate for convenience would also generally be viewed as unfair to agencies’ contracting partners and could also diminish the willingness of vendors to deal with the government in conducting other procurement functions in the future. It was also viewed that, such a tendency would potentially result in the government having to pay higher prices for lower quality supplies and services, as the pool of potential vendors may likely decrease.¹⁰ Despite it being usual procurement practice, it is, however, important to note that, experience shows that, termination for convenience, despite its inclusion in prime contracts, the same is not included in the procurement contracts relating to subcontractors. In that regard, in the event where the prime contract is terminated on termination for convenience, the contractor of the prime procurement contract is under obligation to make payments to the subcontractors in terms of the clauses of their respective entered between the contractor and subcontractors. This means that, termination of contract in respect of termination for convenience is no way affecting subcontractors, and contractual relationship between the contractor and subcontractors, since such clause is nowhere indicated. It is further argued that, in some contracts

⁸ See *Aerolease Long Beach v. United States*, 31 Fed. Cl. 342.

⁹ See *First Fed. S&L Ass’n of Rochester v. United States*, 58 Fed. Cl. 139, 145 (2003). In this matter, it was observed that, for a binding contract to exist, an agreement should impose cognizable burdens known as “consideration” upon each contracting party must be accountable. It was further stated that, a contract that a purported to provide one party with the right to put the contract to an end at any time, would be found to be non-binding due to lack of necessary consideration.

¹⁰ *Ibid.*

were reportedly terminated, or considered for termination, for convenience in FY2013 as a result of sequestration.¹¹

Taking into account in Tanzania Mainland on the experience from other foreign jurisdictions, termination of procurement contract in respect of termination for convenience can take place in a number of circumstances and basis. This is observed in number of cases laws, to mention a few, a famous case of *Delta Africa Limited v. Vodacom Tanzania Public Company Ltd*,¹² and *Konoike Construction Co. Limited v. The Ministry of Works, Tanzania National Roads Agency, The Ministry of Transport , The Attorney General of the United Republic of Tanzania*.¹³ Considering experience from other foreign jurisdictions, particularly in the United States of America (USA), the rule is that, the government's right to terminate contracts for convenience generally arises from the terms of its contracts that were agreed upon by contracting parties.¹⁴ Furthermore, in the United States of America, for instance, the Federal Acquisition Regulations (FAR), this governs many acquisitions by executive agencies,¹⁵ though not all, which requires agencies to incorporate in their procurement contracts standard clauses granting the government the right to terminate the contract for its

¹¹ See Government Accountability Office, 2013 Sequestration: Agencies Reduced Some Services and Investments, While Taking Certain Actions to Mitigate Effects, GAO-14-244, 2014, p. 182. Also available online through <http://www.fas.org/sgp/crs/misc/R43055.pdf> (Accessed on 5th June, 2019).

¹² Commercial Case No. 95 of 2017.

¹³ ICC Case No. 18806/ARP/MD/TP.

¹⁴ This was observed in a case of *Davis Sewing Machine Co. v. United States*, 60 Ct. Cl. 201, 217 (1925). In this case, it was observed that, the general rule is that, absent a clause allowing the contract to be terminated, a buyer who informs a seller that he does not intend to purchase certain supplies and services provided for in the contract has breached the contract, and is liable for damages. Termination for convenience clause, however, avoids the operation of this general rule by granting one or both of the parties the right to engage in conduct that would otherwise constitute breach of contract.

¹⁵ Manuel, K. M., et al, *the Federal Acquisition Regulations (FAR): Answers to Frequently Asked Questions*, SRC Report R42826. See also Brownell, T. M., and Hallmark, G., "Wrongful Termination for Convenience Results in a Finding of Breach of Contract Against the Government", Holland and Knight, August, 2010, p. 3. See also Mchopa, A., "Integrating Contract Management Practices into the Achievement of Value for Money in Tanzania Public Procurement: Evidence from Selected Procuring Entities in Moshi Municipality", *Journal of Public Procurement*, Vol. 15, Issue 2, Summer 2015, pp. 129-149. See also Kyaruzi, L., "Treatment of the Tanzanian Government under Contract Law", ISIDORA&COMPANY ADVOCATES, 2019, p. 5. See also LOCAL GOVERNMENT TRAINING INSTITUTE, "Participant's Handbook: Standard Training Manual for Local Government Authorities in Procurement and Contract Management", Version 1.1, March 2017, p. 10. See also CRS Report, "Terminating Contracts for the Government's Convenience: Answers to Frequently Asked Questions", Feb-December, 2015, p. 15. See also Athumani, H. I., "Effectiveness of Contracts Management on Value for Money in Public Procurement of Goods in Tanzania: A Case of Ministry of Agriculture", *International Journal of Economics, Commerce and Management*, United Kingdom, Vol. 6, No. 4, April 2018. pp. 120-121.

convenience.¹⁶ It should, however, be born in mind that, the exact language of the said clause may vary depending upon the type and value of the contract concerned. More importantly, it is said that, clauses relating to termination for convenience that typically specify the form and content of the government notice to the contractor when it intends to exercise its right to terminate. There a number of issues that should also be taken into account when exercising this rights, which include but not limited to, the contractor's obligations upon receipt of such notice, disposal of the termination inventory, procedures for arriving at a termination settlement, all items that should be included in a settlement if the contractor and the agency completely fail to reach an amicable solution regarding the amount payable, and the contractor's retention of records in respect to the terminated portion of the contract, among others. It is contended that, even if the contract does not expressly provide for the government's right to terminate for convenience, the government has a general mandate to exercise this right, although as a matter of fact, the rational of construing the right to terminate for convenience as an implied term of government contracts has varied overtime.¹⁷ The Supreme Court in the USA had once happened to articulate the theory that the government can terminate the contracts for its convenience when certain contracts for equipments were no longer needed.¹⁸ There are a number of subsequent cases similarly emphasized the "public interest" when affirming the government's rights to terminate for convenience contracts that do not expressly provide for the right of termination for convenience.¹⁹ In various occasions, the courts have been emphasizing that, even if the government have not breached procurement contracts, and thus is not held accountable to pay anticipatory profits or consequential damages because of the right to terminate is a necessary adjunct to the government's authority to contract and an inherit right of the government, but necessary

¹⁶ A good example of such a scenario was observed in the case of *Coast Photo Finishers*, ASBCA 19010, 74-2 B.C.A. 10, 896. See also *Sigal Construction Corp.*, 10-1 BCA 34442, CBCA 508. In this case, it was decided that, the government's rights to terminate a contract for its own convenience is not limited, and that improper exercise of that power results in the award of damages for its lost profits, just as in private contracting.

¹⁷ See *Dep't of the Navy*, B-86077, 1949. It was observed in this matter that, the government retains the right to terminate contracts for convenience even if it expressly disclaims the right to terminate a contract for convenience.

¹⁸ This was observed in *Corliss Steam-Engine*, 91 U.S. 323. See also *Torncello v. United States*, 681 F. 2d 756, 764 (Ct. Cl. 1982).

¹⁹ As noted in the famous case of *Russell Motor Car*, 261 U.S., 521. See also *College Point Boat Corp. v. United States*, 284 U.S. 12, 15 (1925). Also in a case *De Laval Steam Turbine Co. v. United States*, 284 U.S. 61, 61 (1931). Also in a famous case of *G.L. Christian & Assocs. v. United States*, 312 F. 2d 418, 426 (Ct. Cl. 1963).

payments should be paid to the other party of a procurement contract. This was affirmed when the Court made the following conclusion as thus:

It would be of serious detriment to the public service if the power of the heads of federal agencies did not extend to providing for all...possible contingencies by modification or suspension of the contracts and settlement with contractors.²⁰

More importantly, however, when the government concerned need to terminate procurement contract on such basis, it is so imperative that, termination of the procurement contract should be made in a good faith. As previously noted, a major aim of exercising this right, it is mainly intended for the government to have a defence mechanism for all procurement contracts already concluded, and due to prevailing circumstances, to continue with those procurement contracts, will have not any benefits to the public in general, if the contracts continue with their execution. Contracts of such a nature includes, but not limited to, contracts relating to contracts that the government has entered into to deal with war, catastrophes, floods, eruption of diseases, etc, where the government enters into such procurement contracts to solve problems above mentioned. It is undisputable fact that, when such incidences are over, execution of such contracts becomes no longer useful and beneficial on public interest grounds. Procurement contracts of these kinds, however, they may have some challenges, especially when it comes to termination of procurement contracts on the basis of termination for conveniences as misuse of this right by some public officials of the procuring entities, are evident. This is due to the fact that, in some occasion, the right is being used without appropriate reasons. For the government to exercise this right, it is also important that, the employers should clearly show that, changes have occurred justifying that, execution of the procurement contracts entered is no longer beneficial to the public at large. Above all, an interesting part of the termination for convenience relates to at what time the government terminates a contract for convenience. There is no clearly statutory guarantee on this in Tanzania Mainland. This area is, however, examined based on other foreign jurisdictions, particularly in the United States of America. As above stated, the standard termination for convenience clauses are clearly prescribed under the Federal Acquisition Regulation (FAR). The regulation specifically states that, a termination for convenience is always based on the

²⁰ See *Corliss Steam-Engine*, 91 U.S. 323.

“Government’s interest”. This is contrary to the contract’s actual or anticipated failure to perform what is obliged to be carried in contractual procurement liabilities. The phrase “government interest” is, however, nowhere defined under FAR. But the terms have been broadly construed to mean whatever interest that the government might say or any assertion which the government may have made. The federal courts and other agency boards of contract appeals in USA, for instance, mostly have recognized the government’s interest in terminating a contract for convenience based on a number of considerations, which include, when the government is no longer in need of supplies or services covered by the procurement contract,²¹ also when the contractor refuses to accept a modification of the contract,²² when questions have arisen regarding the propriety of the award, or about continued performance of the contract,²³ when the contractor ceases to be eligible for the contract awarded,²⁴ when the business relation between the agency and the contractor has deteriorated,²⁵ it may also occur when the agency has decided to restructure its contractual arrangements or perform work in-house.²⁶ Finally, termination for convenience may also take place when the work contemplated by the contract is proving impossible or too costly.²⁷ For termination for convenience to occur, all above indicated situations should be taken into consideration by the government intending to exercise such a right.

V. CONCLUSION AND RECOMMENDATION

Termination of procurement contracts on the basis of termination for convenience is a statutory right provided to the governments. It is an important right in procurement contracts entered by the

²¹ As observed in a case of *Corliss Steam-Engine*, 91 U.S. 321 (1876).

²² As observed in *Saltwater, Inc.*, B-293335.3, 2004.

²³ As observed in a case of *Nationwide Roofing & Sheet Metal Co., Inc. v. United States*, 14 Cl. Ct. 733 (1988). Also in a case *Landmark Constr.* B-281957.3 (1999).

²⁴ This was also observed in a case of *International Data Prods. Corp. v. United States*, 64 Fed. Cl. 642 (2005).

²⁵ This issue of termination for convenience was also observed in a case of *Embrey v. United States*, 17 Cl. Ct. 617 (1989).

²⁶ This was observed in a number of cases such as *Northrop Grumman Corp. v. United States*, 46 Fed. Cl. 622 (2000). Also see *Corners & Edges, Inc., v. Dep’t of Health & Human Servs.*, CBCA Nos. 693, 762, 2008-2B.C.A. 33, 961. Also see *Dellew Corp. v. United States*, 108 Fed. Cl. 357 (2012). In this case, the Dellew court was of the view that, the contract was terminated in the middle of an option period and, but for the termination, the plaintiff could still have been performing the contract months even after the court has made its determination.

²⁷ This position was observed in cases of *Krygoski Constr. Co. v. United States*, 94 F. 3d 1537 (Fed. Cir. 1996), and in *Nolan Bros., Inc. v. United States*, 405 F. 2d. 1250 (Ct. Cl. 1969).

governments with other procurement stakeholders, such as suppliers, contractors and service providers in public procurement functions. As earlier noted, one of the purpose of this right, is to allow the government to enter into various procurement contracts on one hand, and at the same time, be permitted to terminate those procurement contracts when it is evident that, those procurement contract are against public interest on the other hand. Moreover, when this right is exercised by both the governments and other private institutions, it should be so implemented, as pointed earlier, in a good faith. A good faith in such respect is always measured by the fact that, continuation of the execution of the procurement contracts will be against public interests. It should also be taken into consideration that, when the government uses the right of termination of procurement contracts for convenience, such reasons used should have not been expected prior to the termination of the procurement contracts. It is argued that, however, despite the existence of this right under procurement contracts and guidelines, this right is not well publicly known as it is rare for governments to enter into procurement contracts of *force majeure* in nature.²⁸ It is recommended that, though this right is not publicly known by many, but it a high time now that, the same right be included in procurement contracts of subcontractors well to eliminate current challenges of the rights of the subcontractors in public procurement across Tanzania Mainland. Moreover, it is recommended that, the right of the government to exercise termination for convenience should also be recognized under current procurement laws and regulations in place. This matter, though it does not happen frequently, but there is a high need for incorporating specific provisions relating to termination for convenience in the current procurement system in Tanzania Mainland, citing an example from the United States of America.

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²⁸ See Clauses 26.1 and 26.2 of the General Conditions of Contracts (GCC) contained in the Standard Bidding Document as issued by PPRA.

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