

IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY
AT DODOMA

APPEAL CASE NO. 148 OF 2013

BETWEEN

M/S COOL CARE SERVICES LTD.....APPELLANT

AND

BOARD OF TRUSTEES LOCAL
AUTHORITIES PENSIONS FUND.....RESPONDENT

DECISION

CORAM:

- | | |
|---------------------------------|----------------|
| 1. Hon. A. G. Bubeshi, J. (rtd) | -Chairperson |
| 2. Mr. H. S. Madoffe | -Member |
| 3. Mr. K. M. Msita | -Member |
| 4. Ms. E.J. Manyesha | - Member |
| 5. Ms. F.R. Mapunda | - Ag.Secretary |

SECRETARIAT

- | | |
|-----------------------|-----------------|
| 1. Ms. V. S. Limilabo | - Legal Officer |
| 2. Mr. H. O. Tika | -Legal Officer |

FOR THE APPELLANT:

1. Eng. Andrew Mwaisemba – Managing Director
2. Mr. Burton Mwakisu – Advocate, Burton Law Chambers
3. Ms. Miriam Mwaiswelu – Administration Manager

FOR THE RESPONDENT:

1. Mr. Steven T. Biko – Legal Counsel, LAPF
2. Mr. Valentino M. Daudi – Legal Counsel, LAPF
3. Mr. Emmanuel Mayage – Principal Procurement Officer
4. Mr. Nimrod Masele – Ag. Project Manager, LAPF

This Decision was scheduled for delivery today 13th of June, 2013, and we proceed to deliver it.

The Appeal at hand was lodged by M/s COOL CARE SERVICES LIMITED (hereinafter referred to as “the Appellant”) against the BOARD OF TRUSTEES OF LOCAL AUTHORITIES PENSIONS FUND commonly known by its acronym LAPF (hereinafter referred to as “the Respondent”).

The said Appeal is in respect of Tender No. PA095/2012/2013/W/02 for Supply, Installation, Testing and Commissioning of Air Conditioning and Mechanical Ventilation Installation Works to the proposed construction of Mwanza City Market Complex in Mwanza City (hereinafter referred to as “the tender”).

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

The disputed tender process commenced at the Pre-qualification stage whereby the Appellant was among the six applicants who submitted their applications.

The said applications were subjected to evaluation whereby it was established that amongst the six applications submitted, only two firms were found to have complied with the pre-qualification requirements and these were M/s Derm Electrics (T) Ltd and M/s Berkeley Electrical Ltd. Thus, they were recommended to be short listed for the tender under Appeal.

During the Tender Board meeting held on 11th December, 2012, the Procurement Management Unit (PMU) advised the Tender Board to invoke Regulation 15(25) of GN No.97/2005 which allows the procuring entity to relax the criteria issued in the Pre-qualification Document if all applicants failed to comply; subject to ensuring that the applicants meet the said conditions during tendering process. Furthermore, PMU recommended that, all six Applicants be given the Tender Document subject to rectification of the anomalies noted during submission of the tenders. Having deliberated on the advice given by PMU, the Tender Board directed that all six Applicants be invited to participate in the tender process with a caution

that all the anomalies noted at the pre-qualification stage be rectified during submissions of their Bids.

The Respondent vide a letter referenced LAPF/T.53/10/186 dated 20th December, 2012, invited the Appellant to submit their bid for the tender under Appeal. The said invitation was subject to rectification of deficiencies noted in their pre-qualification application which were as follows:

- i. Average annual turnover was less than Tshs. 3.96 Billion required by Particular Instruction To Applicants (hereinafter referred to as PITA)
- ii. Financial capability was less than Tshs.528 Million as required by PITA, Part B, 4.9
- iii. The Mechanical/Refrigeration Engineer has got 24 years total work experience, 4 years instead of 10 years experience in similar works and 4 years instead of 8 years as in charge of respective position.

Upon receipt of the invitation letter, the Appellant was dissatisfied with the deficiencies pointed out therein,

consequently, the Appellant on 28th December, 2012 vide a letter referenced CC/DE/DEJV/06/12 requested the Respondent to clarify on the type of certification of Audited Report that was required. To their understanding, their Audited Reports met the requirement of the Pre-qualification Document since their accounts were authenticated by Certified Accountants and Auditors. They also requested for the names of pre-qualified applicants for the tender under Appeal.

On 7th January 2013, the Respondent vide their letter referenced LAPF/T.53/11/09 replied to the Appellant's request for clarification, whereby the latter was informed that, the certification referred to in the Audited Report was the authentication by an Advocate, Notary Public and Commissioner for Oath. In the said letter, the Respondent further informed the Appellant the names of other Pre-qualified Applicants as listed herein under;

- M/s Derm Electrics Tanzania Ltd
- M/s Remco (International) Ltd
- M/s UniCool East Africa Ltd
- M/S Ashrea Air Conditioning Co. Ltd

- M/s Berkeley Electrical Ltd

Having purchased the Tender Document, the Appellant on 8th January, 2013, vide their letter referenced CC/DEJV/02/13, requested for clarification from the Respondent on among other things, the inclusion of Tshs. 145,000,000/- in the Bills of Quantities (BOQ) being travelling costs for 5 persons who were required to visit the Manufacturer of air conditioning equipment.

On 10th January, 2013, the Respondent vide a letter referenced LAPF/T.53/11/10 replied to the Appellant's request by issuing clarifications on all issues raised by them.

On 14th January, 2013, the Appellant vide a letter referenced CC/DEJV/04/13 requested the Respondent to issue a new Tender Document on the reason that, the one issued was for Supply and Installation of Information System which was different from what they were tendering for. Further, in same letter, the Appellant requested to be given more clarifications as they were not satisfied with replies given by the Respondent vide

their letter of 10th January, 2013. The Appellant furthermore, requested for one week extension of the deadline for submission of tenders.

On 17th January, 2013, the Respondent vide a letter referenced LAPF/T.53/11/11 issued a new Tender Document and drawings which were relevant for the tender under Appeal. The Respondent further, clarified on the other issues raised by the Appellant including extending the deadline for submission of tenders to 7th February, 2013 from 30th January, 2013 which was set earlier.

Having been dissatisfied with the clarifications given on some of the items, the Appellant on 20th January 2013, vide a letter referenced CC/DEJV/05/13 filed an application for review to the Respondent requesting for the following;

- BOQ pages be numbered
- Pressures for all fans be provided

- The amount of money and the number of persons relevant for factory visit be reduced
- Activities to be performed as attendance by the Main Contractor be stated
- The deadline for submission of tenders be extended for two weeks

The Respondent vide a letter referenced LAPF/T.53/11/12 dated 23rd January, 2013, replied to the Appellant's application for review, whereby the former confirmed the extension of deadline for submission of tenders to be 7th February, 2013. The Respondent also omitted from the BOQ the provisional sum intended for factory visit as the same could be discussed when actual costs are ascertained. Furthermore, the Respondent listed the activities which would be performed by the main contractor as it was requested by the Appellant.

The tender opening took place on 7th February, 2013 as extended and the following four tenders were submitted.

S/No	Tenderer's Name	Quoted price in TSHS
1.	M/s Cool Care Services Ltd in J/V Dar Essentials	4,889,534,612/=
2.	M/s REMCO International Ltd	4,422,995,416/=
3.	M/s UniCool East Africa Ltd	4,802,056,001/=
4.	M/s Derm Electrics (T) Ltd	4,014,581,976/=

The above listed tenders were subjected to evaluation. According to page 7 of the Evaluation Report, the evaluation process was conducted in four stages namely; fulfillment of conditions for Pre-qualification, general responsiveness to the Tender Document, technical specifications and financial conditions.

During the evaluation of fulfilment of conditions for Pre-qualification three tenders were disqualified, including the Appellant's tender for various anomalies noted therein. The Appellant's tender was disqualified due to the following reasons;

- i. Their Average turnover was less than Tshs 2.75 Billion as required by Clause 4.7 of Particular Instruction To Applicants (hereinafter to be referred to as PITA)
- ii. Their Financial capability was less than Tshs 450 Million as required by PITA, Clause 4.9
- iii. Their Mechanical/Refrigeration engineer had a total of 24 years of experience, 4 years (instead of 10 years) experience in similar works and 4 years (instead of 8 years) as in charge of respective position.

Having disqualified the three tenders, the Evaluation Committee observed that, only the tender by Derm Electrics (T) Ltd was responsive by complying with the conditions of Pre-qualification and therefore it was subjected to technical evaluation stage.

During the technical evaluation the tender was checked if it had fulfilled all the requirements specified in Section VI of the Schedule of Requirements and Section VII on

Technical Specifications. In the said evaluation process, it was observed that the tender submitted by M/s Derm Electrics (T) Ltd was substantially responsive to the requirements of the Tender Document.

The said tender was further subjected to financial evaluation. During that stage of evaluation the tender was found with arithmetical errors which were corrected as follows:

Tenderer's Name	Read out Price in TSHS	Corrected Price in TSHS	Difference
M/s Derm Electrics (T) Ltd	4,014,581,976/=	4,149,508,269/=	134,926,293/=

Having completed the evaluation process the Evaluation Committee recommended an award of tender to M/s Derm Electrics (T) Ltd at a corrected price of Tshs 4,149,508,269/=.

The Respondent's Tender Board at its meeting held on 14th March, 2013, approved the recommendation of the Evaluation Committee.

On 19th March, 2013, the Respondent vide a letter referenced LAPF/T.53/11/69 communicated the award to the Successful Tenderer.

Thereafter, on 16th April, 2013, the Respondent vide a letter referenced LAPF/T.53/11/181 informed the Appellant that their tender was unsuccessful.

Upon receipt of the tender result, the Appellant on 19th April, 2013 vide a letter referenced CCSL/TA/20/13 addressed to the Respondent requested to be given the reasons for being unsuccessful. They also wanted to know why the award was made on a price different from the amount read out during the tender opening.

The Respondent vide a letter referenced LAPF/T.53/11/206 dated 02nd May, 2013, and received by the Appellant on 6th May, 2013, informed the latter that their tender was disqualified for failure to fulfil the

criteria that had not been complied with during the Pre-qualification process.

Upon being dissatisfied with the Respondent's decision, the Appellant on 10th May, 2013, lodged their Appeal to the Public Procurement Appeals Authority (hereinafter to be referred to as "the Authority")

On receiving notification of the Appeal by the Appellant, the Respondent raised three points of Preliminary Objection which centred on the jurisdiction of this Authority to entertain the Appeal. In view of the objections raised, and as a matter of procedure, the Authority was obliged to resolve the Preliminary Objections before addressing on the merits of the Appeals.

THE RESPONDENT'S SUBMISSIONS ON THE PRELIMINARY OBJECTIONS

The Respondent's preliminary objections were that;

- a) The Appellant has no locus standi in this matter

- b) This Appeal is improperly before this Authority for contravening the provision of Rule 6(1) of the Public Procurement Appeals Rules of GN. No 205 of 2005 (herein after referred to as "the Appeals Rules")
- c) This Appeal is improperly before this Authority for contravening the provision of Rule 7 of the Appeals Rules.

During the hearing of the Appeal the Respondent withdrew ground (b) above relating to Rule 6(1) of the Appeals Rules. The Respondent submitted on remaining two points of Preliminary Objections as follows;

With respect to lack of locus standi the Respondent submitted as follows;

- i) The Appellant participated in the tender in joint venture with M/s Dar Essentials, hence, it was expected that the Appeal before this Authority

would be lodged in the name of the joint venture and not otherwise.

- ii) According to Black's Law Dictionary, 9th Edition, the term "Joint Venture" has been defined to mean a business undertaking by two or more persons engaged in a single defined project. The said definition encompasses, an express or implied agreement, a common purpose that the group intends to carry, shared profits and losses as well as each member's equal voice in controlling the project.
- iii) Considering the above definition, the Appeal had to be lodged in the name of the joint venture. Furthermore, the partners in the joint venture share losses and profits; thus, one of them alone cannot represent the joint venture in these proceedings.
- iv) The Appellant in the name of Cool Care Services Limited neither tendered nor was the contended

decision made against it; thus, giving it a right to Appeal before this Authority.

- v) In the case of Lujuna Shubi Balonzi, Senior Versus Registered Trustees of Chama Cha Mapinduzi, 1996 TLR 203(HC), Samatta JK (as he then was) held that "in order to maintain proceedings successfully, a plaintiff or an applicant must show not only that the Court has power to determine the issue but also he is entitled to bring the matter before the Court". In the Appeal at hand the Appellant is not entitled to file this Appeal in their own name rather they are obliged to file the Appeal as a joint venture.
- vi) If this Appeal would be entertained, any order issued thereafter would not be executable against the joint venture, as the other partner is not aware of the Appellant's action.
- vii) Therefore, the Appeal should be struck out with costs as it had been lodged by a party with no locus standi.

In relation to the second point of Preliminary Objection the Respondent stated that, the Appeal is improperly before this Authority for contravening the provision of Rule 7 of the Appeals Rules.

The Respondent expounded further that, the Appellant was informed about the tender results vide a letter dated 16th April, 2013 which was received by them on 18th April, 2013. Thus, the Appellant ought to have lodged their Appeal within 14 days from 18th April 2013. However, the Appeal to this Authority was lodged on 10th May, 2013, that is, 24 days after receipt of the Respondent's decision.

The Respondent submitted further that, the Appellant's act had offended the requirement of Rule 7 of the Appeals Rules for filing their Appeal out of time. Also there are no records to show that, they sought for leave to file the Appeal out of time.

Accordingly, the Respondent prayed that the Appeal be struck out with costs.

THE APPELLANT'S REPLIES ON PRELIMINARY OBJECTIONS

The Appellant's oral replies on the first point of Preliminary Objection may be summarized as follows;

- i) The Appellant has locus standi to file their Appeal before this Authority since they were one of the parties in the disputed tender process.
- ii) Clause 5.6 of the General Instructions To Applicants (hereinafter referred to as "GITA") allowed joint ventures to participate in the tender under Appeal and indeed the Appellant participated in the joint venture with M/s Dar Essentials.
- iii) According to Clause 1 of the Letter of Intent to Form a Joint Venture, the Appellant was identified to be the Lead Partner; therefore,

they had a right to file the Appeal in their name on behalf of the joint venture.

- iv) M/s Dar Essentials were aware of the Appeal lodged, but they were not able to appear due to being occupied with other activities at the time of this Appeal.
- v) They were interested parties in this tender, thus, it is not wrong for them to appeal.
- vi) Therefore, the Preliminary Objection should be dismissed and the Appeal be heard on merits

With regard to the 2nd point of Preliminary Objection the Appellant submitted that, they had lodged their Appeal within fourteen days as required by Section 82(2) of the Public Procurement Act Cap 410 of 2004 (hereinafter referred to as "the Act") read together with Rule 7 of the Appeals Rules.

The Appellant contended further that, they became aware of the circumstances giving rise to the Appeal after receipt of the Respondent's letter which informed them

the reasons for their disqualification. The said letter was written on 2nd May 2013 and was received by the Appellant on 6th May, 2013. The Appeal to the Authority was lodged on 10th May, 2013, that is, only four days after they became aware of the circumstances giving rise to the Appeal. Hence, the argument by the Respondent that the Appeal was lodged out of time was baseless.

Thus, they prayed that, the Preliminary Objection should not be entertained by this Authority and the matter be heard on merits.

ANALYSIS BY THE AUTHORITY AND RULING ON THE PRELIMINARY OBJECTIONS

Having gone through the documents submitted and having heard the oral submissions by parties in relation to the objections raised, the Authority resolved them by framing the following issue; whether the Appeal is properly before the Authority. Having identified the issue, the Authority proceeded to resolve it by framing two sub issues, namely;

- Whether the Appellant has locus standi before this Authority
- Whether the Appeal is incompetent in law for contravening Rule 7 of the Appeals Rules

Having identified the sub-issues, the Authority resolved them as follows:

- a) Whether the Appellant has locus standi before this Authority

The Authority noted that, in their submissions, the Respondent relied, to a great extent on the argument that the Appellant does not have the locus standi before this Authority as the Appeal was to be lodged by the joint venture and not each partner separately since they tendered jointly. On the other hand, the Appellant contended that, they had the right to file the Appeal as they were the Lead Partner in the joint venture; hence they were authorized to transact on behalf of the joint venture.

In resolving the conflicting arguments by parties', the Authority revisited Clause 5.6 of GITA which provided for the guidance on how the valid joint ventures should be. In the course of reviewing the said clause the Authority noted that for joint ventures to be valid, at the pre-qualification stage, it had to be accompanied by a copy of the Joint Venture Agreement or a Letter of Intent to execute the JV and a copy of the Proposed Agreement. For purposes of clarity the Authority reproduced the said Clause 5.6 as hereunder;

"A copy of the Joint Venture Agreement (JVA) entered into a partnership shall be submitted with the Application. Alternatively, a Letter of Intent to execute a JVA in the event of the successful bid shall be signed by all partners and submitted with the Application together with a copy of the proposed agreement...".
(Emphasis added)

After ascertaining what was required for a joint venture to be valid, the Authority went further and reviewed the application submitted by the Appellant during the pre-

qualification process and noted that, their application was submitted in joint venture with M/s Dar Essentials. In the said application they attached a Letter of Intent and a copy of the draft Joint Venture Agreement.

Furthermore, the Authority revisited the Letter of Intent and noted that under Clause 1 of the said letter, the Appellant was appointed to be the Lead Partner. Moreover, the Authority noted that, Clauses 4 and 5 of the said Letter of Intent had authorized Cool Care Services Ltd as a Lead Partner to do, amongst other things, undertake commitments, negotiations and correspond with the Employer. For purposes of clarity the Authority reproduced Clauses 4 and 5 of the Letter of Intent as hereunder;

Clause 4 "in the mean time and before entering into the Joint Venture Agreement (JVA), the partners shall be presented at all meetings, negotiation, undertakings, resolutions and commitments by COOL CARE as the Lead Partner and all commitments made by the said Lead Partner shall be taken to have the approval and

endorsement of the remaining Partner. The Lead Partner is authorized to incur liabilities and shall receive the instructions for and on behalf of the other Partner during the pre-qualification and the bidding periods and, in event of the successful bid, during contract execution". (Emphasis added)

Clause 5 "Any and all the correspondences among the Joint Venture and the Employer shall be made by COOL CARE on behalf of the Joint Venture". (Emphasis supplied)

The above quoted provisions entail that, M/s Cool Care Services Ltd as a Lead Partner had powers to incur liabilities and receive instructions on the behalf of the joint venture. Therefore, the Authority is of the firm view that, the Appellant's act of lodging the Appeal before this Authority in the name of M/s Cool Care Services Ltd did not violate the Letter of Intent since from its wording they have been authorized to do so and there was no need for the approval to be obtained from the other joint venture partner before lodging this Appeal.

Furthermore, the Authority revisited Clause 13 of the Letter of Intent which states as follows;

“...the joint venture hereby covenants and agrees to indemnify and hold harmless the Lead Partner and his or its designee from any and all liability incurred by the Lead Partner in connection with the carrying out of its duties hereunder; provided that such a Lead Partner or its designee, as the case may be, shall not have acted in bad faith, have been grossly negligent or have committed an act of wilful misconduct; and provided further that, any indemnity hereunder shall be provided out of and only to the extent of the Joint Venture assets...”
(Emphasis supplied)

The above provision entails that, the Joint Venture was ready to indemnify the Lead Partner for any liabilities incurred that were not done in bad faith or gross negligence. That said, the Authority rejects the Respondent’s argument that, if the Appeal is allowed in

the name of the Appellant, any order issued against them will not be enforceable. This is because the Lead Partner has been authorized to incur liabilities on behalf of the joint venture. Hence, it is possible for the orders issued to be enforced against the joint venture.

Furthermore, it is the considered view of the Authority that, the Appellant's act of lodging this Appeal cannot be deemed to be an act of bad faith or gross negligence as the same intends to protect the rights and enhance the interest of the Joint Venture in the disputed tender process.

Moreover, the contents of the Letter of Intent are consistent with Regulation 6(7)(a) and (d) of the Public Procurement (Goods, Works, Non Consultant Services and Disposal of Public Assets by Tender) Regulations (hereinafter referred to as "GN. NO 97/2005") which provides as follows;

Reg.6(7) "Where a tenderer submits a tender as part of a joint venture, consortium or association, the

solicitation or contract document shall state where appropriate:

(a) that a party to a joint venture, consortium or association shall be jointly and severally liable for the performance of the contract;

(b)

(c)

(d) that a joint venture, consortium or association shall appoint a lead member who shall have the Authority to bind the joint venture, consortium or association and the lead member shall at the time of contract award confirm the appointment by submission of power of attorney to the procuring entity".

(Emphasis added)

On the basis of the above quoted provision, the Authority is of the view that, the Appellant's act of lodging this Appeal to be proper as it has not contravened the letter of intent or the governing law.

Therefore, the Authority's conclusion on sub issue one is that the Appellant has the locus standi before this Authority.

b) Whether the Appeal is incompetent in law for contravening Rule 7 of the Appeals Rules

In resolving this sub issue the Authority deems it prudent to revisit Rule 7 of the Appeals Rules that was relied upon by the Respondent in that, it was not complied by the Appellant when lodging their Appeal to this Authority. The said Rule 7 provides as follows;

"Appeal to the Public Procurement Appeals Authority shall be lodged by filling a Statement of Appeal within fourteen days from the date when decision, matter, act or omission giving rise to an appeal was made".

In order to ascertain the validity of the conflicting arguments by parties' on this point, the Authority finds it proper to revisit the facts of this Appeal so as to verify if the Appeal was lodged out time.

In the course of doing so, the Authority noted that, the Appellant received the tender results notification from the Respondent on 18th April 2013, vide a letter date 16th April, 2013. On 19th April 2013, the Appellant requested the Respondent to inform them the reasons for their disqualification. The Authority noted further that, the letter from the Respondent which informed the Appellant of the reasons for their disqualification was received by the latter on 6th May 2013, though it was written on 2nd May, 2013. After being dissatisfied with the reasons given for their disqualification, the Appellant lodged the Appeal to this Authority on 10th May, 2013.

Having observed that, the Appellant lodged the Appeal after receipt of the reasons for their disqualification, the Authority finds it proper to revisit Section 82(2)(a) of the Act which is in *pari materia* with Rule 7 of the Appeals Rules so as to establish under what circumstances an Appeal could be lodged to this Authority. The said Section 82(2)(a) provides as follows;

S. 82(2) "A supplier, contractor or consultant entitled under section 79 to seek review may submit a complaint or dispute to the Public Procurement Appeals Authority: -

(a) if the complaint or dispute cannot be submitted or entertained under section 80 or 81 because of entry into force of the procurement contract and provided that the complaint or the dispute is submitted within fourteen days from the date when the supplier, contractor or consultant submitting it became aware of the circumstances giving rise to the complaint or dispute or the time when the supplier, contractor or consultant should have become aware of those circumstances". (Emphasis added)

The above provision entails that the Appeal to this Authority had to be lodged within fourteen days from the date the complainant became aware of the circumstances giving rise to the Appeal.

Based on the facts of this Appeal, the Authority is of the settled view that, the Appellant became aware of the circumstances giving rise to the Appeal on the 6th May 2013 when they received the reasons for their disqualifications and not on 18th April 2013 when they received the tender results notification.

The Authority observes further that, counting from 6th May, 2013, to 10th May, 2013 when the Appellant lodged the Appeal, it is obvious that the Appeal was lodged within four days after the matter became actionable. Thus, the Authority is satisfied that the Appeal was lodged within time.

Accordingly, the Authority rejects the 2nd Point of Preliminary Objection as the Appeal was lodged within time.

In view of the above findings, the Authority's conclusion on the main issue in dispute, is that, the Appeal is properly before it.

Having established that the Appeal is properly lodged, the Authority proceeded to determine the Appeal on merits.

SUBMISSIONS BY THE APPELLANT ON THE MERITS OF THE APPEAL

The Appellant's arguments as deduced from documents availed to this Authority, as well as oral submissions and responses to questions raised by the Members of the Authority during the hearing, may be summarized as follows;

That, they participated in the tender under Appeal under a Joint Venture with M/s Dar Essentials Ltd.

That, they had complied with the requirements of financial capacity and experience of Mechanical Engineer as required by the Tender Document.

That, they have complied with the average annual turnover since the amount of Tshs. 576,531,041.57 indicated in their tender exceeded the average amount of annual turnover of Tshs.3.96 billion.

That, they acknowledge to have not complied with Clause 4.7 of GITA on the Pre-qualification Document. Furthermore, the Appellant is of the view that, the said criteria was not complied by all tenderers who participated in the disputed tender process.

That, M/s DERM ELECTRICS (T) LTD is not registered by CRB as a civil works contractor therefore they did not comply with the said criteria.

That, they are of the view that the criteria used to evaluate both the Pre-qualification application and tender submitted by the successful tenderer were different from those applied to evaluate other tenderers. Thus, the Respondent's act in this regard had contravened Section 46(4) of the Act.

That, the Respondent had changed the tender price of the successful tenderer without notifying other tenderers as well as the reasons thereof; thus, contravening the provision Section 58(2) of the Act.

That, the sum Tshs. 145,000,000/= indicated in the Tender Document that was to cover travelling costs for 5 persons who were to inspect the Manufacturer of Air Conditioning equipment was very huge with no justification.

Finally, the Appellant prayed for the following orders;

- (a) The Respondent be ordered to restart the tender process afresh in observance of the law,
- (b) The Respondent be ordered to compensate the Appellant the sum of Tshs.6,770,000/= as per the following break down;
 - i. Appeal filing fees Tshs.120,000/=
 - ii. Legal fees Tshs. 5,000,000/=
 - iii. Travelling costs to Dodoma Tshs. 300,000/=
 - iv. Accommodation costs Tshs. 150,000 x 3 persons x 3 days = 1,350,000/=
- (c) To take any other action deemed necessary.

REPLIES BY THE RESPONDENT ON THE MERITS OF THE APPEAL

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

That, they issued a new Tender Document together with the drawings as requested by the Appellant and other matters were dealt with through the Minutes of the Pre-Bid Meeting held on 10th January, 2013 as admitted by the Appellant at sub paragraph 2 (e) of its Statement of Appeal.

That, the Appellant was provided with the reasons for rejection of their tender, that is, they failed to comply with the requirements of annual turnover, financial capabilities and lacked the required experience on the item of Mechanical/Refrigeration engineer.

That, the difference between the tender read out price and the awarded tender price was due to correction of errors which was made as part of the evaluation process.

That, the criterion on Clause 4.7(a) of GITA was not inserted by the Respondent instead it was contained in the Standard Tender Document issued by the Public Procurement Regulatory Authority (hereinafter referred to as PPRA) hence, the Respondent was not able to change it though it was not relevant for the tender under Appeal. However, the said criterion was not used during the evaluation process of the tender under Appeal.

That, the Appellant's act of lodging this Appeal is merely intended to frustrate the whole procurement process with no justifiable reasons as they are aware that their tender did not meet the required criteria.

Finally the Respondent's prayed for the following orders

- i. Dismissal of Appeal with costs,
- ii. Any other relief the Authority deems fit to grant.

THE AUTHORITY'S ANALYSIS ON THE MERITS OF THE APPEAL

In analyzing the contended issues by the parties, the Authority deems it prudent to point out from the outset that, during the hearing of the Appeal at hand, the Appellant upon being asked to justify how they met the criteria that led to their disqualification, admitted that they did not comply with the annual turnover required as well as the experience required for the Mechanical/Refrigeration engineer. However, the Appellant contended that, their Appeal was not based on unfair disqualification, but rather on the ground that the award of the tender to the successful tenderer was not proper since they too failed to comply with Clause 4.7(a) of GITA in respect of experience as civil works contractors. Furthermore, the arithmetic corrections done to the tender of the successful tenderer were not bonafide. Thus, they were of the opinion that the criteria which were used to evaluate the pre-qualification application and the tender submitted by the successful tenderer were different from those used to evaluate other tenders contrary to Section 46(4) of the Act.

Having considered the admission by the Appellant that, they lacked some of the qualifications and that their only ground of Appeal is that the award of tender to the successful tenderer was unfair, the Authority is of the view that, the Appeal is centered on the following two issues:

- Whether the award of tender to the successful tenderer was proper at law
- To what reliefs, if any, are the parties entitled to

Having identified the issues in dispute, the Authority proceeded to resolve them as follows:

1.0 Whether the award of tender to the successful tenderer was proper at law

In resolving this issue the Authority revisited the Appellant's major contention that, the award of tender to the successful tenderer was not fairly made since they

failed to comply with Clause 4.7(a) of GITA which required tenderers to show their experience in civil works. The Appellant contended further that, M/s Derm Electrics (T) Ltd has not been registered as a civil works contractor. Further, they submitted that, had the evaluation process been conducted fairly the successful tenderer ought to have been disqualified also for failure to comply with the aforesaid requirement.

Furthermore, the Appellant submitted that, they doubt the correctness of the arithmetic corrections done to the tender of the successful tenderer which led their tender price to increase from Tshs. 4,014,581,976/= that was read out during the tender opening to Tshs. 4,149,508,269.76 that was awarded to them.

In reply thereof, the Respondent submitted that the criterion of civil works contained under Clause 4.7(a) of GITA was not relevant to the tender under Appeal, but it was inserted in the Tender Document because it was contained in the Standard Tender Document issued by

PPRA. However, the said criterion was not used in the evaluation process.

Moreover, the Respondent contended that, the correction of arithmetic errors was done correctly and in accordance with the law, as there were some errors noted in the tender of the successful tenderer. Thus, there was nothing wrong with the awarded tender price.

In order to ascertain the validity of the arguments by parties, the Authority deemed it necessary to review the Evaluation Report so as to establish if the evaluation process was conducted in accordance with the law. To start with the Authority revisited the Tender Document and noted that, the procedures for evaluation of tenders were provided under Clauses 29 to 36 of the ITB.

The Authority reviewed the Evaluation Report and noted that, the evaluation was done in four stages, namely; fulfilment of conditions for pre-qualification, general responsiveness to the bid, technical specifications and financial conditions.

The Authority noted further that, in the first stage of evaluation, tenderers were checked if they had complied with pre-qualification conditions that had not been met during the pre-qualification stage. During that stage of evaluation, the tender submitted by M/s Derm Electric (T) Limited was found to have complied with the pre-qualification criteria. The remaining three tenders including that of the Appellant were disqualified for failure to comply with the pre-qualification conditions.

In the remaining three stages of evaluation, the tender of M/s Derm Electric (T) Limited was then evaluated for general responsiveness, technical evaluation and correction of arithmetic errors. After completion of the said evaluation the award was made to them.

In reviewing the Evaluation Report, the Authority observed that, the Respondent had conducted the evaluation process not in accordance with the procedures provided for in their own Tender Document, which required tenders to be evaluated in the following relevant stages, namely;

- Preliminary Evaluation as per ITB Clause 29

- Technical Evaluation as per ITB Clause 30
- Correction of errors as per ITB Clause 31
- Commercial Evaluation as per ITB Clause 33
- Determination of the lowest bid as per ITB Clause 35
- Post-qualification as per ITB Clause 36 and Clause 25 of the BDS

Contrary to the above listed provisions, the Respondent kick started the evaluation process by checking fulfilment of the pre qualification conditions which were required to be done at the Post-qualification stage as per ITB Clause 36 and BDS Clause 25. The Authority finds the Respondent's conduct to be contrary to Regulation 90(22) which provides as follows;

Reg.90(22)"Whether or not it has engaged in pre-qualification proceedings, the procuring entity may require the supplier, contractor, service provider or assets buyer submitting a tender that has been found to be the successful to

demonstrate again its qualifications. The criteria and procedures to be used for such post-qualification shall be set forth in the solicitation documents in accordance with Section 48 of the Act". (Emphasis supplied)

Regulation 90(22) quoted above requires compliance with Section 48 of the Act which in essence demands Post qualification to be conducted to the tenderer with the lowest evaluated tender in order to determine whether the successful tenderer has the capability and resources to carry out effectively the contract as offered in the tender. It is bizarre that, the Respondent in this tender engaged in a post-qualification exercise with respect to tenderers who had not yet been determined to have the lowest tender as the law requires. This is a classical case of putting the horse before the cart.

In the second stage of evaluation, the Respondent checked for the general responsiveness of the tender which was similar to the first stage of preliminary evaluation as provided for in the ITB Clause 29. In so

doing, only one tenderer was subjected to preliminary evaluation contrary to Regulation 90(6) of GN. No 97/2005 and Clause 29 of the ITB. Consequently, three tenders including that of the Appellant were not subjected to preliminary evaluation, whereby denying three tenderers equal treatment contrary to Section 43(b) of the Act which provides as follows;

S. 43 "In the execution of their duties, tender boards and procuring entities shall strive to achieve the highest standards of equity, taking into account: -

(b) fairness of treatment to all parties;

In their third stage of evaluation, they conducted technical evaluation, to the tender of the successful tenderer. That stage is consistent with the second stage of ITB Clause 30 which provides as follows;

"The Procuring Entity will carry out a detailed evaluation of the bids previously determined to be substantially responsive in order to determine whether the technical aspects are in

accordance with the requirements set forth in the bidding documents;

- (a) Overall completeness and compliance with the Technical Specifications and Drawings; deviations from the Technical Specifications as identified in Attachment 6 to the bid and those deviations not so identified; suitability of the facilities offered in relation to the environmental and climatic conditions prevailing at the site; and quality, function and operation of any process control concept included in the bid. The bid that does not meet minimum acceptable standards of completeness, consistency and detail will be rejected for non responsiveness.
- (b) achievement of specific performance criteria by the facilities
- (c) type, quantity and long-term availability of mandatory and recommended spare parts and maintenance services

any other relevant factors, if any, listed in the Bid Data Sheet, or that the Employer deems necessary or prudent to take into consideration". (Emphasis added)

Contrary to the above quoted provision, the Respondent's Evaluation Report contained simply a sweeping statement to the effect that;

"One Firm, Applicant Number 4/4, Messrs Derm Electrics (T) Limited has satisfied all criteria therefore qualifies to proceed to the financial evaluation"

There were no details to support this conclusion. Without such details it is not possible to determine whether the requirements of ITB Clause 30 were indeed complied with.

In their fourth stage of evaluation, they conducted what they called financial responsiveness where upon they checked for arithmetic errors. The said financial

responsiveness appears to be consistent with the stage for correction of errors as per ITB Clause 31.1.

Finally, the Evaluators recommended award to M/S DERM Electrics (T) Ltd and subsequently the Tender Board awarded the tender to them. The Authority finds the Respondent's decision to be contrary to Regulation 94(1) of GN. No. 97/2005, ITB Clause 36 and BDS Clause 25. As already noted above, the purpose of post-qualification is to determine the capability and resources of the successful tenderer, to carry out effectively the contract as offered in the tender. The Authority noted that, the Respondent invited the same four tenderers to bid at the same time for two separate projects, namely; Supply and Installation of Air Conditioning and Ventilation to the proposed construction of Mwanza City Market Complex and Supply, Installation, Testing and Air Conditioning and Ventilation to the proposed construction of Office Accommodation and Commercial Building at Dodoma Municipality.

The projects had different requirements in terms of average annual construction volume, that is, the tender

for Mwanza was Tshs.3.96 billion while the tender for Dodoma was Tshs.2.75 billion. The required financial capability was Tshs.528 Million and Tshs.450 million for Mwanza and Dodoma respectively. Without Post-qualification it is inconceivable how the Respondent was able to determine the successful tenderer's combined financial capability and the combined average annual construction volume for both projects which were required to be carried out simultaneously. It must be emphasized that, it was imperative to conduct post-qualification in order to ascertain if the successful tenderer had, amongst others, the combined annual construction volume as well as the combined financial capability to execute the two projects at the same time.

In addition to the above, the Authority noted with dismay that, the Evaluation Report was rife with generalities and sweeping statements. For example, in the purported evaluation for fulfilment of pre-qualification conditions, it was simply stated "comply" or "no comply" to the various criteria without detailed explanation on how the compliance or lack of it was arrived at. It is no wonder,

during the hearing the Respondent failed to justify on how some of the key criteria were complied with or were not complied with; that included the criteria for average annual construction volume and financial capability of both the successful tenderer and the Appellant. It should be noted that, the Respondent had ample time to provide proof of conformity in the areas of contention at the time of filling their statement of reply.

Based on the above noted facts, the Authority finds the Respondent to have erred in law for contravening Regulations 90(22) as quoted earlier, 14(5) and 90(4) of GN No. 97/2005 which provide as follows;

Reg.14(5) "the procuring entity shall impose no criterion, requirement or procedure with respect to the qualifications of suppliers, contractors, service providers or buyers other than those provided for in this Regulation."

Reg.90(4)"The tender evaluation shall be consistent with the terms and conditions

set forth in the tender documents and such evaluation shall be carried out using criteria explicitly stated in the tender documents". (Emphasis added)

Moreover, the Authority considered the parties' arguments on the requirement to show general experience in civil works and observed that, although under Clause 4.7(a) of GITA tenderers were required to show the said experience, under Clause 4.7 of PITA the same requirement was modified as follows;

"General Construction Experience

- Registered or eligible for registration with Contractors Registration Board (CRB) of Tanzania in Class one only in the service category". (Emphasis supplied)

From the above provision the Authority is of the view that, the requirement to show experience in civil works was modified and tenderers were required to show registration in class one "in service category". This means

that, the issue of civil works experience was no longer a requirement.

Furthermore, having considered Clause 4.7 of PITA the Authority failed to comprehend, the Respondent's intention of requiring tenderers to show evidence of registration in class one "in service category" while CRB does not have such a registration category. Thus, the Authority finds that, the Respondent inserted a criterion which was neither appropriate nor objectively justifiable thereby contravening Section 46(1) of the Act and Regulation 14(6) of GN. No 97/2005 which provide as follows;

S.46(1)"In order to participate in procurement proceedings, suppliers, contractors and consultants shall have to qualify by meeting appropriate criteria set out by the procuring entity and, where appropriate, by the approving authority for those particular procurement proceedings".

Reg.14(6)"subject to Regulation 16(1) and Regulation 25(1) the procuring entity shall

establish no criterion, requirement or procedure with respect to the qualifications of suppliers or contractors that discriminates against or among suppliers, contractors, services providers, buyers or against categories thereof on the basis of nationality, or that is not objectively justifiable". (Emphasis supplied)

Moreover, the Authority considered the Appellant's concerns on the increase of the price in the tender of the successful tenderer and observes that, according to the Bills of Quantities attached to the signed contract, the arithmetic errors were properly done.

Therefore, the Authority's conclusion on issue number one is that the award of tender to the successful tenderer was not proper at law because the evaluation process was marred by irregularities.

2.0 To what reliefs, if any, are the parties entitled to.

Having resolved the issues in dispute the Authority proceeded to address the prayers by parties. To start with, the Authority considered the Appellant's first prayer that, the Respondent be ordered to restart the tender process in observance of the law. The Authority is of the view that, the Respondent should restart the tender process in observance of the law since it has already been established under issue number one above that, the Evaluation process was not in compliance with the law.

With regard to the Appellant's second prayer for compensation of Tshs. 6,770,000/- being Appeal filing fees, legal fees, travelling and accommodation costs, the Authority observes that, the Appellant deserves to be compensated the sum of Tshs. 4,270,000/- only as per the following break down;

- Appeal filing fees Tshs. 120,000/-
- Legal fees Tshs. 2,500,000/-
- Travelling costs Tshs. 300,000/-
- Accommodation costs Tshs. 1,350,000/-

Therefore, the Authority orders the Respondent to compensate the Appellant the sum of Tshs. 4,270,000/- only since the Appeal has merit.

As regards to the Respondent's prayer that the Appeal be dismissed, the Authority rejects that prayer as the Appeal has merit.

On the basis of the aforesaid conclusions, the Authority upholds the Appeal and orders the Respondent to:

- re-start the tender process afresh in observance of the law; and
- compensate the Appellant the sum of Tshs. Tshs. 4,270,000/- only

The Authority is making this decision in fully cognizant of the Public interest involved therein. This decision is not only in accordance with the law; it is also in broad public interest.

It is the considered view of the Authority that, public interest should not be determined in pecuniary terms *per se*, that is, the amount of money the public may lose as a consequence of this decision. Nor should it be determined simply on what the Appellant or the Respondent may lose or who amongst the two may lose more.

If public interest was to be myopically or narrowly interpreted in terms of the loss of public funds it would lead to absurd results, that is, public institutions would deliberately break the law knowing that they can get away with it merely by showing that if the law is allowed to take its course public funds would be lost.

We hasten to say that justice is indeed priceless and no prospective financial loss can be used as an excuse to bless illegality or breach of the law.

In our considered view, public interest can best be protected and enhanced by rule of law which is a key ingredient of good governance. In other words, public interest is achieved by observing the law. The Act and its

Regulations which were enacted precisely to protect the said public interest in public procurement and disposal which consumes the huge portion of the public funds but which is susceptible to wide spread abuse.

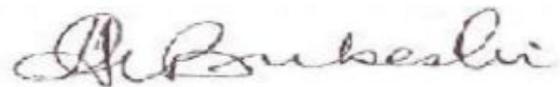
Sections 43 and 58 of the Act provide the manner in which all public procurement and disposal should be conducted, that is, in a manner to enhance competition and achieve economy, efficiency, transparency, value for money and equity.

Furthermore, public interest is protected by punishing breach and condemning or curtailing impunity and enhancing justice and fairness as provided under Sections 44 and 72 to 76 inclusive of the Act.

It is our ardent wish that the relevant oversight bodies will take appropriate measures in view of what we have alluded to in this decision.

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

This Decision is delivered in the presence of the Appellant and the Respondent this 13th June, 2013.



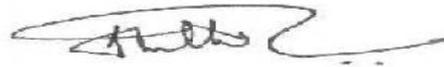
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JUDGE (rtd) A. BUBESHI
CHAIRPERSON

MEMBERS:

1. MR. H.S MADOFFE



2. MR. K. M. MSITA



3. Ms. E.J. MANYESHA

