

**IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY
AT DODOMA**

APPEAL CASE NO. 59 OF 2009

BETWEEN

**MPUTA SECURITY SERVICES
GUARDS CO. LTD1ST APPELLANT**

**FULL TIME SECURITY
(T) LTD.....2ND APPELLANT**

AND

**INSTITUTE OF RURAL
DEVELOPMENT PLANNING
- DODOMA.....RESPONDENT**

DECISION

CORAM:

Hon. A.G. Bubeshi, J. (rtd) -	Chairperson
Hon. V.K. Mwambalawa (MP)-	Member
Ms. E. J. Manyesha -	Member
Ms. B.G. Malambugi -	Secretary

SECRETARIAT:

Ms. E. V. A. Nyagawa -	Principal Legal Officer, PPAA
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FOR THE 1ST APPELLANT:

Mr. Lukanus N. Kayombo – Managing Director

FOR THE 2ND APPELLANT:

1. Mr. Mbembela Abeid Killindila – Representative
2. Mr. Abubakar M. Nkhangaa – Ag Administrative Officer

FOR THE RESPONDENT:

1. Prof Innocent Zilihona- Chairman of the Tender Board
2. Mr. Reginald C. Mavere – Head of PMU;

INTERESTED PARTY

1. Mr. Festus A. Nyakyi – Marketing Officer
Alliance Day & Night Security Guard Limited

This decision was scheduled for delivery today 6th January, 2010 and we proceed to deliver it.

The Appeal at hand was lodged by **Mputa Security Services Guards Co. Ltd** (hereinafter to be referred to as "**the 1st Appellant**") against **Institute of Rural Development Planning – Dodoma** (hereinafter to be referred to as "**the Respondent**"). Following notification of the Appeal lodged by the 1st Appellant, another tenderer namely, **Full Time Security Services (T) Ltd** opted to join as a party to this Appeal (hereinafter to be referred to as "**the 2nd Appellant**").

The said Appeal is in respect of Tender No. PA-026/2009-10/N/03 for Provision of Security Services (hereinafter to be referred to as "**the Tender**").

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

On 4th August, 2009, the Respondent invited tenders for Provision of Various Services for the Year 2009/2010. The Appeal at hand is confined to Tender No. PA-026/2009-10/N /03 for Provision of Security Services.

The tender opening took place on 27th August, 2009, whereby seven tenders were submitted as hereunder:

TENDERER	TENDER PRICE (TSHS)
Gema Security Services	62,400,000/=
Real Security Group	72,292,000/=
Mputa Security Services Guards Co. Ltd.	46,080,000/=
Alliance Day & Night Security Guard Ltd	82,128,000/=
Telesecurity Co. Ltd	93,456,000/=
Quiet Security System Co. Ltd	88,200,000/=
Full Time Security Services (T) Ltd	47,880,000/=

According to the Evaluation Report, the said tenders were evaluated in two stages namely, Preliminary Evaluation and Detailed Evaluation. Three out of the seven tenders were disqualified during Preliminary Evaluation for non compliance with the tender requirements.

The remaining four tenders were subjected to Detailed Evaluation whereby correction of arithmetic errors was done which adjusted the original quoted prices as hereunder:

Tenderer	Original Price	Corrected Price
Real Security Group	72,292,000/=	50,280,000/=
Alliance Day & Night Security Guard Ltd	82,128,000/=	56,356,800/=
Quiet Security System Co. Ltd	88,200,000/=	45,000,000/=
Full Time Security Services (T) Ltd	47,880,000/=	54,000,000/=

On 23rd September, 2009, the Tender Board approved award of the tender in favour of Quiet

Security System Co. Ltd at a contract price of Tshs. 45,000,000/=.

On 29th September, 2009, the Respondent *vide* letter referenced CG/IRP/166 VOL.III/40 communicated the award to the Successful tenderer.

On 1st October, 2009, the 1st Appellant *vide* letter referenced GF/MSSG/DOM/05/06/128 requested the Public Procurement Regulatory Authority (hereinafter to be referred to as "**PPRA**") to conduct an investigation on the award of the said tender.

PPRA requested the Respondent to submit a detailed account of what exactly transpired in the said tender. The said request was made on 12th October, 2009, *vide* letter with reference No. PPRA/PA/026/3.

On 21st October, 2009, the Respondent replied to PPRA's letter and gave a brief explanation on the 1st Appellant's complaints.

On 6th November, 2009, the 1st Appellant received the Respondent's letter referenced CG/IRP/166 VOL.III/65 dated 26th October, 2009, informing them that their tender was not successful.

Being dissatisfied with the tender results, the 1st Appellant *vide* letter referenced GF/MSSG/DOM/05/06/110 dated 7th November, 2009, requested the Respondent to review the award decision.

On 17th November, 2009, the 1st Appellant *vide* letter referenced GF/MSSG/DOM/05/06/110 communicated their dissatisfaction of the tender award to the Public Procurement Appeals Authority (hereinafter to be referred to as "**the Authority**"). The 1st Appellant was advised to lodge a formal appeal with the Authority as the procurement contract had already entered into force; which they did.

SUBMISSIONS BY THE 1ST APPELLANT

The 1st Appellant's arguments deduced from their Statement of Appeal, oral submissions as well as responses from questions raised by Members of the Authority during the hearing were as follows:

That, the contract sum of Tshs. 45,000,000/= awarded to the Successful tenderer was not read out during the tender opening. According to the Appellant's recollection and records, none of the tenderers whose prices were read out during the tender opening, had quoted Tshs. 45,000,000/=.

That, the Respondent's act of adjusting the Successful tenderer's price from Tshs. 88,200,000/= to Tshs. 45,000,000/= was unjustified as the reasons thereof were unknown.

That, some tenderers had quoted close to Tshs. 45,000,000/= but they were not awarded the tender. Furthermore, if the 1st Appellant's tender had shortcomings, why were the other tenderers with lower prices not awarded. The 1st Appellant

wondered why and for whose benefit did the Evaluation Committee waste time and resources to modify the Successful tenderer's price.

That, during the tender opening meeting, the 1st Appellant's Bid Securing Declaration indicated the suspension period to be 3 months instead of 3 years specified by the Respondent. The 1st Appellant explained before the said meeting that, it was a mere typographical error as it was intended to read 3 years.

That, the tender process is expected to be fair but the tender under Appeal was not fairly conducted.

Accordingly, the 1st Appellant declared that, they had no intention of claiming for any compensation but requested the Authority to order the tender process to be started afresh.

SUBMISSIONS BY THE 2ND APPELLANT

The 2nd Appellant seconded the submissions by the 1st Appellant and made the following additions:

That, having surveyed and established the magnitude of the assignment, the optimal number of security guards required was professionally established by individual security firms. On the basis of this and other factors, security firms submitted bids which contained both technical and financial proposals.

That, it was expected that the Respondent would have involved all substantially responsive bidders in establishing the optimal number of security guards required, but this was not done.

That, the bidding procedures relating to National Competitive tendering specified under GN. No. 97 of 2005 were not adhered to and therefore, the 2nd Appellant requested the Authority to order the tender to be re-advertised.

THE RESPONDENT'S REPLIES

The Respondent's arguments as deduced from the documents submitted to the Authority, oral submissions as well as responses to questions raised by the Members of the Authority during the hearing of the Appeal may be summarized as follows:

That, the 1st Appellant contravened Regulation 111 of GN. No. 97 of 2005, in that, instead of submitting their complaint first to the Accounting Officer they submitted the same to PPRA.

That, the said tender was advertised for the first time, *vide* a General Procurement Notice which appeared in the Daily News dated 24th June, 2009, followed by a Specific Notice advertisement on 4th August, 2009, inviting interested eligible tenderers.

That, tenders were subjected to Preliminary Evaluation whereby tenders which were non

responsive, the Appellant's tender inclusive, were eliminated.

That, the 1st Appellant's Bid Securing Declaration was found to be defective during the tender opening meeting and it is not true that the said tenderer clarified the matter.

That, the Appellant's tender did not meet the requirements, and was therefore disqualified for, among others, failure to submit the required Bid Securing Declaration. Furthermore, the 1st Appellant being the incumbent service provider for the Respondent, at the time when the tender was being processed, had shown some weaknesses in service delivery.

That, the Successful tenderer had the lowest evaluated tender price of Tshs. 45,000,000/= as corrected and modified in accordance with the optimal number of security guards required, which was done to all responsive tenders. The said price adjustments were based on the following factors:

- (i) Optimum number of guards required for all premises was 25, and therefore the adjustment was intended to bring all tenderers to the optimum number of guards as prepared by the Respondent.
- (ii) The charges were to cover 12 months and not 9 ½ months as shown in the tender

submitted by Full Time Security Services (T) Ltd.

ANALYSIS BY THE AUTHORITY

Having gone through the documents submitted and having heard the oral arguments from parties, the Authority is of the view that the Appeal is based on the following issues:

- **Whether the Appeal is properly before the Authority;**
- **Whether the tender process was properly done;**
- **Whether the award of the tender to Quiet Security System Co Ltd was justified; and**
- **What reliefs, if any, are the Appellants' entitled to.**

Having identified the issues in dispute, the Authority proceeded to resolve them as hereunder;

1.0 Whether the Appeal is properly before the Authority

In their Written Replies, the Respondent contended, *inter alia*, that the 1st Appellant erred in submitting their complaint directly to PPRA instead of submitting the matter first for review by the Accounting Officer of the Respondent. Since this matter hinges on the Authority's jurisdiction to entertain the Appeal, the Authority deems it prudent to resolve it first. In its endeavour to ascertain whether the Appeal is properly

before it, the Authority intends to give a detailed account on the *modus operandi* pertaining to settlement of disputes arising from the procurement process.

Dispute settlement mechanism under Part VII of the Act provides for **two avenues** which tenderers may follow in submitting procurement complaints or appeals. **Under the first avenue**, complaints arising during the procurement process **before a procurement contract enters into force** must be submitted first, to the Accounting Officer then to PPRA and finally to this Authority. Sections 79(1), 80(1), 81(1) and 82(1) of the Act stipulate the procedure involved in submitting complaints or appeals in the normal course of business prior to entering into force of a procurement contract.

Under the second avenue, complaints arising **after the procurement contract has entered into force** are submitted directly to this Authority. In other words, the Authority has sole original jurisdiction over such complaints in accordance with Sections 80(3) and 82(2)(a) of the Act. For purposes of clarity, the Authority reproduces Section 55(7) of the Act which stipulates as to when a procurement contract comes into force. The said sub-section provides as follows:

S. 55(7) "The procurement contract shall enter into force when a written acceptance of a tender has been communicated to the successful

supplier, contractor or consultant”
(Emphasis added)

Linking the second avenue to the Appeal at hand, the Authority finds that, at the time when the Appeal was lodged with the Authority the procurement contract had already entered into force in line with Section 55(7) of the Act. Moreover, once a procurement contract enters into force, the accounting officer does not have jurisdiction to entertain such a complaint as per Section 80(3) of the Act which states as hereunder:

“The head of a procuring entity or of the approving authority shall not entertain a complaint or dispute after the procurement contract has entered into force.” (Emphasis added)

The Authority is of the view that, given the facts of this Appeal, the 1st Appellant could neither submit complaints to the Accounting Officer nor to PPRRA as the only recourse open for them was to appeal to this Authority in accordance with Section 82(2)(a) of the Act which states as follows:

“(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 ...” (Emphasis added)

In light of the above findings, the Authority concludes that, the Appeal is properly before it.

2.0 Whether the tender process was properly done

The Authority observes that, for any procurement process to be properly done it has to satisfy all legal requirements provided for under the Act and as specified in the tender document issued by a procuring entity. In order to satisfy itself as to whether the tender process pertaining to the tender under Appeal was properly done, the Authority deemed it prudent to review the whole procurement process so as to ascertain whether all legal requirements were adhered to. In its endeavour to do so, the Authority also considered the Appellants’ grounds of Appeal which lead to the formulation of the following sub-issues:

- **Whether the correction and modification of the tender prices quoted by the tenderers was proper at law; and**
- **Whether evaluation of the tenders was properly done.**

Having framed the sub-issues, the Authority proceeded to resolve them as follows:

(i) Whether the correction and modification of the tender prices quoted by tenderers was proper at law

In resolving this sub-issue, the Authority revisited contentions by parties in respect of this point. The Appellants argued that, during the tender opening, none of the tenderers, the Successful tenderer inclusive, had quoted a price of Tshs. 45,000,000/=. They therefore questioned the magnitude and rationale behind the price adjustments made by the Respondent which reduced the Successful tenderer's original quoted price from Tshs. 88,200,000/= to Tshs. 45,000,000/=.

The Respondent, on the other hand, contended that, during the evaluation process, it became difficult to evaluate the tenders as each one had indicated a different number of guards to be deployed in execution of the said tender. In this case, the Respondent further contended that, the Evaluation Committee opted to use the optimum number of 25 guards required for all the premises in calculating the costs for each tender thus resulting into price adjustment to the four tenders which had qualified for Detailed evaluation.

In order to ascertain the validity of the contentions by parties on this sub-issue, the Authority examined the applicable law as well as the Tender Document in order to establish whether the alleged corrections of arithmetic errors were done

in accordance with the law. To start with, the Authority revisited Clauses 31.2(a) and 29.1 of the Instructions to Tenderers (hereinafter to be referred to as “**ITT**”) which provide the circumstances in which correction of errors will be done. The said Clauses state as follows:

“31.2 In evaluating the tenders, the evaluation committee will determine for each tender the evaluated Tender Price by adjusting the Tender Price as follows:

(a) **Making any correction for errors pursuant to ITT Clause 29;**

29.1 Tenders determined to be substantially responsive will be checked for any arithmetic errors. **Errors will be corrected by the evaluation committee as follows:**

(a) **if there is any discrepancy between unit prices and the total price ...;**

(b) **if there is an error in a total corresponding to the addition or subtraction of subtotals ...;and**

(c) **where there is a discrepancy between the amount in figures and in words ...”** (Emphasis added)

Moreover, Regulation 90(11)(a) of GN. No. 97 of 2005, guides as to what corrections should be made in the following manner:

“Notwithstanding sub-regulation (6), **the procuring entity shall correct purely**

arithmetical errors that are discovered during the examination of tenders ...”
(Emphasis supplied)

The Authority analysed the above quoted provisions *vis a vis* the correction of errors done by the Evaluation Committee and observes as follows:

- The alleged correction of errors does not fit in any of the circumstances specified under the above quoted Clause 29.1 of the ITT and therefore does not qualify to be termed as such. It goes without saying that, the purported correction of errors contravened Clause 29.1 of the ITT and Regulation 90(11)(a) of GN. No. 97 of 2005.
- The said correction of errors were effected in the tender documents submitted by the tenderers which amounts to tampering with the same.
- The Evaluation Committee erred in adjusting the prices basing on the optimum number of 25 guards as it was not communicated to the tenderers prior to the tender opening date. Moreover, the Schedule of Requirements gave the tenderers liberty to state the number of guards they deemed fit to be deployed in the specified locations.

- The Authority noted that, in adjusting the tenderers quoted price the Respondent relied on Clause 27.1(e) of the ITT which reads as hereunder:

“In case high cost by bidders due to number of security guards, optimum number as determined by the procuring entity will rule, and adjustments for the same will be done.” (Emphasis supplied)

The Authority’s observations on the above quoted Sub-clause are as follows:

- (i) The said Sub-clause was wrongly placed under Preliminary Examination of tenders as it has nothing to do with that subject.
- (ii)** Had the Respondent intended to modify the Tender Document to suit this specific tender, such amendments should have been made to the Tender Data Sheet and not the ITT. It was therefore wrong for the Respondent to insert it in the first place.
- (iii) The said Clause erodes the element of competitiveness in the tender process.

- By limiting the number of guards to 25, the Respondent defeated the purpose of competitive tendering contrary to Section 58 of the Act which states as follows:

“58(1) All public procurement and disposal by tender shall be conducted in accordance with the basic principles set out in this Act.

(2) Subject to this Act all procurement and disposal shall be conducted in a manner to maximize competition and achieve economy, efficiency, transparency and value for money.” (Emphasis added)

- The Authority shares the Appellants’ concern that, the magnitude of the said price adjustment in respect of the price quoted by the Successful tenderer, namely, Quiet Security System Co. Ltd was astronomical and by any standard unacceptable.
- The adjusted prices were not communicated to the respective tenderers for confirmation as required under Regulation 90(11)(a) of GN. No. 97 of 2005 which states in part;

“... the procuring entity shall give prompt notice of any such correction to the supplier, contractor, service

provider or asset buyer that submitted the tender;” (Emphasis added)

In view of the above findings, the Authority’s conclusion in respect of the first sub-issue is that, the correction and modification of the tender prices quoted by the tenderers was not proper at law.

(ii) Whether evaluation of the tenders was properly done.

In ascertaining whether the evaluation of the tenders was done in accordance with the law, the Authority reviewed the evaluation process in its entirety. However, in order to do so, the Authority revisited the Tender Document, the Evaluation Report as well as the tenders submitted by both the 1st and 2nd Appellants as well as the Successful tenderer. The Authority, started by reviewing the Tender Document issued by the Respondent so as ascertain if it complied with the requirements of the applicable law.

The Authority revisited Regulation 83 of GN. No. 97 of 2005 which guides as to the content of the solicitation documents. According to the said Regulation, the content thereof should include, among others; eligibility criteria, technical specifications, evaluation criteria and methodology as well as the modality of determining the successful tenderer.

Having reviewed the Tender Document, the Authority noted that, it contained, among other things, the required eligibility criteria and evaluation criteria. Thus, the Authority is satisfied that, to a great extent, the content of the Tender Document complied with the law.

Having established that the Tender Document contained the necessary information, the Authority embarked on establishing whether in evaluating the tenders, the Evaluation Committee observed the provisions of the Tender Document and the Act. The Authority noted that, according to the Tender Document the evaluation was to be done in the following stages:

- Preliminary examination of tenders as per Clause 27 of the ITT;
- Technical evaluation in accordance with Clause 28 of the ITT;
- Commercial evaluation of tenders – as per Clauses 31, 29 and 33 of the ITT; and
- Post-qualification in line with Clause 34 of the ITT read together with Item 34 of the Tender Data Sheet.

The Authority further noted that, in checking responsiveness of tenders the Evaluation Committee was supposed to be guided by Clauses 27.1, 3.3 and 12.3 of the ITT, read together with the Tender Data Sheet. Under Clause 27.1 of the ITT, the Evaluation Committee had a duty to check if the tender:

- “27.1(a) meets the eligibility criteria defined in ITT Clause 3;**
- (b) has been properly signed;**
- (c) is accompanied by the required securities; and**
- (d) is substantially responsive to the tender document.**

The procuring Entity’s determination of a tender’s responsiveness will be based on the contents of the tender itself.” (Emphasis added)

The eligibility criteria were to be ascertained *vide* documents submitted by the tenderers under Clause 12.3 of the ITT, read together with the Tender Data Sheet. For purposes of clarity, the Authority deems it necessary to reproduce Clause 12.3 of the ITT which states as follows:

“If the Procuring Entity has not undertaken pre-qualification of potential Bidders, all Bidders shall include the following information and documents with their bids in Section 9, unless otherwise stated in the Bid Data Sheet:”

- (a) copies of original documents defining the constitution or legal status, place of registration, and principal place of business, written power of attorney authorizing the signatory of the tender to commit the Tenderer;
- (b) total monetary value of service(s) performed for each of the last three years;

- (c) experience in service(s) of a similar nature and size for each of the last three years...;
- (d) major items of equipment proposed to carry out the Contract;
- (e) qualifications and experience of key management and technical personnel proposed for the Contract;
- (f) reports on the financial standing of the Tenderer, such as profit and loss statements and auditor's reports for the past five years;
- (g) evidence of adequacy of working capital for this Contract (access to line(s) of credit and availability of other financial resources);
- (h) authority to seek references from the Tenderer's bankers;
- (i) information regarding any litigation, current or during the past five years ...;
- (j) information regarding labour, occupational health and safety records of the company for the past five years; and
- (k) proposals for subcontracting components of the Service(s) amounting to more than 10 percent of the Contract price."

According to the documents submitted, pre-qualification was not conducted and therefore all tenderers were duty bound to submit information and documents that were listed under Clause 12.3 of the ITT, as supplemented in the Tender Data Sheet.

Having reviewed the Evaluation Report, the Authority noted that, the Evaluation was done in two stages, namely, Preliminary Evaluation and Detailed

Evaluation. The Authority further examined whether the said stages were conducted in accordance with the applicable law and the Tender Document, whereby the following shortfalls were detected:

- During preliminary evaluation, the tenders were supposed to be checked whether they contained, amongst others, the Bid Securing Declaration. However, according to the Record of Bid Opening availed to this Authority, the 1st Appellant's Bid Securing Declaration was identified to be defective during the tender opening meeting. The Authority is of the view that, it was wrong for the Respondent to check the validity of that document at that stage, as it was tantamount to evaluating the same. However, the Authority is satisfied that, by indicating the suspension period to be 3 months instead of 3 years specified by the Respondent, the 1st Appellant altered the Bid Securing Declaration which rendered their tender to be non responsive. Moreover, the 1st Appellant was required to fill in the areas which were so indicated in the Tender Document as per Item 23 of the Tender Data Sheet which stated categorically that "A Tender Securing Declaration form shall be filled by the Tenderer".
- The Evaluation Committee erred in evaluating the 1st Appellant's experience during preliminary evaluation. At this stage the Evaluation Committee was supposed to check compliance to the requirements, that is, if documents

showing the said tenderer's experience had been attached.

- The evaluation criteria specified under Item 31 of the Tender Data Sheet were not used in evaluating the tenders. The said Item 31 provides as hereunder:

“Criteria for Tender evaluation shall be:

- **Completeness of the Bidding Document**
- **Eligibility of the tenderer**
- **Experience**
- **Satisfactory Insurance cover**
- **Satisfactory equipment**
- **Enough skilled, qualified and competent Personnel**
- **Bid price.”** (Emphasis added)

The Authority observes that, the Evaluation Committee's failure to use the specified evaluation criteria contravened Sub-regulations (4) and (18)(a) of Regulation 90 of GN. No. 97 of 2005. The said Regulation 90(4) states that:

“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 the criteria explicitly stated in the tender documents.”
(Emphasis added)

- Had the evaluation been properly done, the Evaluation Committee would have found that, most of the tenderers, including the 1st Appellant and the Successful tenderer, did not comply fully with the requirements of Clause 27 of the ITT. The Authority points out some of the anomalies detected, as follows:

- (i) 1st Appellant submitted a defective Power of Attorney as it purported to delegate power from the Appellant's Managing Director to himself. Such a defect renders a tender to be non responsive.
- (ii) The Power of Attorney submitted by the Successful tenderer, namely, Quiet Security System Co. Ltd was equally defective as it was not signed by a person authorizing such delegation on behalf of the said Company. It goes without saying therefore that, the said tender should have also been rejected for being non responsive.
- (iii) The Successful tenderer had attached Financial Statements for one year only instead of 5 years as per Clause 12.3(f) of the ITT since the said Clause was not modified under Item 14 of Tender Data Sheet. The said tender did not comply with the requirements of the Tender Document.

- Footnote 2 on page 6 of the Evaluation Report states the second reason for the 1st Appellant's disqualification as being **"the bidder's past experience is not acceptable as assessed during the 2008/09 contract for the same service for the Institute"**. The Respondent conceded during the hearing that, past experience in respect of the other tenderers was evaluated merely on the basis of the documents attached to their tenders, an explanation which was neither backed by the Evaluation Report nor any other documentary proof.

However, an Internal Memorandum from the Chairman of the Tender Board to the Principal referenced CG/IRP/166.VOL.III/55 dated 19th October, 2009, sheds light as to how the issue of the 1st Appellant's past experience was brought to the attention of the Evaluation Committee. The said Memorandum states in part, as hereunder:

"... the complainant, who was engaged for the service in the financial year 2008/09, had some weaknesses, which were brought to the attention of the evaluation committee (as the user department was among the team), which again contributed to the complainant to fail the test for competence in performing similar assignment." (Emphasis added)

The Authority strongly observes that, in absence of any other proof to the contrary, it was wrong for the Evaluation Committee to employ such a criterion which applied to the 1st Appellant alone. This was not only discriminatory but also placed the Appellant in a disadvantageous position compared to the other tenderers who have not worked for the Respondent. Thus, the Respondent's conduct contravened Section 43(a) and (b) of the Act which requires all tenderers to be treated equally and fairly.

- According to Clause 28.2 of the ITT the procuring entity was to evaluate the technical aspects of the tenders to confirm that all requirements specified in Schedule of Requirements had been met. However, on looking at the Evaluation Report the Authority observes that, the technical evaluation of tenders was not done and instead price adjustments to the tenders was carried out contrary to the requirements of the Tender Document.
- Post-qualification was not done in contravention of Section 48(1) of the Act read together with Regulation 90(22) of GN. No. 97 of 2005 and Item 34 of the Tender Data Sheet. The said subsection reiterates the need for post-qualification as hereunder:

“If tenderers have not been pre-qualified, the procuring entity and the tender board shall determine whether the tenderer whose tender or disposal has been determined to offer the lowest evaluated tender, in the case of procurement or the highest evaluated tender in the case of disposal of public assets by tender, has the capability and resources to carry out effectively the contract as offered in the tender.”
(Emphasis added)

The need to verify the lowest evaluated bidder’s qualifications and capabilities even where pre-qualification was carried out is re-emphasized under Regulation 90(22) of GN. No. 97/2005 which reads:

“Whether or not it has engaged in pre-qualification proceedings, the procuring entity may require the supplier, contractor, service provider or asset buyer submitting the 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)

The Authority is satisfied that, by not subjecting the Successful tenderer to Post-qualification, the Respondent did not ascertain whether the said

tenderer had the requisite capability and resources to carry out effectively the contract in accordance with Section 48 of the Act.

- As it has already been established that, price adjustments contravened the law, the Authority is of the considered view that, when the Respondent purported to award the tender to Quiet Security System Co. Ltd for Tshs. 45,000,000/=, the former was actually issuing a counter-offer. It goes without saying therefore that, the Respondent did not accept the offer submitted by the said Quiet Security System Co. Ltd as their valid offer for the tender was Tshs. 88,200,000/= and not Tshs. 45,000,000/=.

Having analysed the second sub-issue, the Authority finds that, evaluation of the tenders was not properly done.

In view of the above findings, the Authority's conclusion in respect of the second issue is that, the tender process was not properly done.

3.0 Whether the award of the tender to Quiet Security System Co. Ltd was justified;

Having found that, the tenders submitted by the 1st Appellant and the Successful tenderer did not comply with the requirements of the Tender Document and therefore should have been disqualified at the Preliminary stage for non compliance. The Authority

concludes that, the award of the tender in favour of Quiet Security System Co. Ltd was not justified and hence a nullity in the eyes of the law.

4.0 What reliefs, if any, are the Appellant's entitled to

Having resolved the contentious issues in dispute, the Authority revisited the prayers by the 1st and 2nd Appellants' who had requested this Authority to order the tender process be started afresh. Having established that, the tender process was, in its totality marred by irregularities and that there was no award in the eyes of the law, the Authority orders the Respondent to restart the tender process in observance with the law.

Other matters that caught the attention of the Authority:

In course of handling this Appeal the Authority came across some pertinent matters which are worth mentioning:

- (a) The duration of the tender advertisement did not meet the required 30 days as stipulated in the Third Schedule to GN. No. 97 of 2005. The said advertisement appeared in the Daily News dated 4th August, 2009 while the tender opening took place on 27th August, 2009. From the second paragraph on page 1 of their Written Replies, the Respondent wrongly deemed the General Procurement Notice

issued on 24th June, 2009, as the first advertisement for the tender under Appeal.

(b) The Tender Document contain a number of errors some of which misled the tenderers such as:

(i) Item 2 of the Tender Data Sheet mentioned the expected period for provision of the service to be '**within Financial year 2009/2010**' commencing from 15th September, 2009. No wonder one of the tenderers, namely, Full Time Security Service (T) Ltd quoted price for 9 ½ months because as a general rule, the financial year for most public institutions runs from 1st July – 30th June of the following year. The said tenderer therefore, acted on the Respondent's misinformation that the contract will be **within** 2009/2010. Obviously, a 12 months contract that commenced on 15th September, 2009, will end in the financial year 2010/2011.

(ii) Item 2 of the Tender Data Sheet states the commencement date to be 15th September, 2009.**8.**

(iii) Tender Securing Declaration form indicates the commencement of the

suspension to be 28th August, 2008, while the tender is for 2009/2010.

- (iv) Item 2 of the Tender Data Sheet states the Financial Year as 2008/2010.
- (c) Site visit and pre-tender minutes were neither prepared nor availed to the tenderers contrary to Items 6 and 7 of the Tender Data Sheet.
- (d) The content of the second paragraph on page 5 of the Minutes of the Tender Board meeting held on 23rd August, 2009, indicate that the award of tender to Quiet Security System Co Ltd was in respect of 45 guards. However, the number of guards listed in the Table appearing on the same page, refers to 25 guards.
- (e) Given the shortcomings pointed out above, the Authority questions the competency of the Members of the Evaluation Committee. The Authority is concerned that the Evaluation Committee did not do their job as required in terms of the Tender Document and the applicable law. The Authority also observes that, the Tender Board acted irresponsibly for failure to detect the anomalies in the Tender Document and Evaluation Report and institute relevant remedial measures.
- (f) The Authority is also concerned with the conduct of the PMU which was supposed to

detect the shortfalls contained in the Evaluation Report and advise the Tender Board accordingly.

- (g) The Rector's letter to PPRA referenced CG/IRP/290/3 dated 21st October, 2009, stated the contract sum awarded to Quiet Security System Co. Ltd as Tshs. 46,080,000/= instead of Tshs. 45,000,000/= appearing in the award letter.
- (h) The Authority appreciated the physical presence of the Rector of the Institute of Rural Development Planning – Dodoma, at the hearing and the concern shown by him towards the anomalies detected in the tender under Appeal.


Having considered all facts and evidence, the Authority concludes that, the tender process was marred by irregularities and the award made in favour of Quiet Security System Co. Ltd is a nullity at law.

On the basis of the aforesaid findings, the Authority finds that the appeal has merit and accordingly upholds it and orders the Respondent **to restart** the tender process afresh **in observance of the law**.

That said, it is the sincere hope of this Authority that, the Respondent in particular and other procuring entities in general, will take a lesson from this decision in abiding with the law.

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

Decision delivered in the presence of the 1st Appellant, the 2nd Appellant, the Respondent and the Interested Party this 6th January, 2010.



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JUDGE (rtd) A. BUBESHI
CHAIRPERSON

MEMBERS:

1. HON. V.K. MWAMBALASWA.....


2. MS. E. J. MANYESHA.....
