

**IN THE  
PUBLIC PROCUREMENT APPEALS AUTHORITY  
AT DAR ES SALAAM**

**APPEAL CASE NO. 120 OF 2012**

**BETWEEN**

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

**AND**

**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. Mrs. N.S.N. Inyangete       | - Member      |
| 5. Ms. B.G. Malambuigi         | - Secretary   |

**SECRETARIAT:**

- |                       |                           |
|-----------------------|---------------------------|
| 1. Ms. E.V.A. Nyagawa | - Principal Legal Officer |
| 2. Ms. F.R. Mapunda   | - Legal Officer           |
| 3. Mr. H. Tika        | - Legal Officer           |

## **FOR THE APPELLANT:**

1. Eng. Andrew Mwaisemba – Managing Director
2. Francisca Ngowi – Technical Assistant

## **FOR THE RESPONDENT**

1. Mr. Eliad E. Mndeme – Principal Legal Officer
2. Mr. Emmanuel Mayage – Principal Procurement Officer

## **FOR THE OBSERVER - M/s Mollel Electrical Contractors**

1. Mr. Godwin L. Masangwa – Company Secretary
2. Ms. Anna Moses – Business Manager

This decision was scheduled for delivery today 21<sup>st</sup> March, 2012, and we proceed to deliver it.

The appeal at hand was lodged by **M/s COOL CARE SERVICES LTD** (hereinafter to be referred to as "**the Appellant**") against **LOCAL AUTHORITIES PENSIONS FUND** commonly known by its acronym LAPF (hereinafter to be referred to as "**the Respondent**").

The said Appeal is in respect of the Pre-qualification of Contractors for Tender No. PA 095/HQ/2010/2011/W/21 for Construction of LAPF Office Accommodation and Commercial Building at Plots No. 4 & 5, Block 'W' Uhindini Area, Dodoma Municipality. The said pre-qualification involved six disciplines of specialist works, including, air conditioning works which is the subject matter of this Appeal (hereinafter to be referred to as "

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

The Respondent invited applications for pre-qualification of contractors for various specialist works, including air conditioning works (hereinafter to be referred to as "**HVAC WORKS**"), vide

the Daily News and Mwananchi newspapers of 8<sup>th</sup> and 20<sup>th</sup> July, 2011 respectively.

The opening of applications for Pre-qualification took place on 09<sup>th</sup> August, 2011, whereby the following twelve HVAC Contractors submitted applications:

- (i) M/s Daikin(T) Ltd;
- (ii) M/s Mollel Electrical Contractors Ltd;
- (iii) M/s Electro-Mechanical Agencies;
- (iv) M/s Unicool (EA) Ltd;
- (v) M/s Ashrea Air Conditioning Co. Ltd;
- (vi) M/s REMCO International (T)Ltd;
- (vii) M/s Cool Care Services Ltd;
- (viii) M/s Berkerly Electrical Ltd;
- (ix) M/s Derm Electrics (T) Ltd;
- (x) M/s Dar Essentials Ltd;
- (xi) M/s Hainan International Ltd; and
- (xii) M/s Chigo Air Conditioning (T) Ltd.

The applications were evaluated whereby only two firms, out of the twelve, qualified and were recommended for the tendering

process. The shortlisted firms were M/s Mollel Electrical Contractors Ltd and M/s Hainan International Ltd.

On 19<sup>th</sup> September, 2011, the Tender Board approved the recommendations of the Evaluation Committee.

On 19<sup>th</sup> October, 2011 the Respondent vide letter referenced LAPF/T.53/07/110, informed the Appellant that their application for pre-qualification had been rejected due to the following reasons:

- Inadequate annual turnover;
- Lack of total working experience in respect of the key personnel, namely, a Quantity Surveyor and the Site Foreman; and
- Lack of sufficient equipment required to execute the contract.

The said letter was received by the Appellant on 24<sup>th</sup> November, 2011.

In reply to the Respondent's communication of the pre-qualification results, on 24<sup>th</sup> November, 2011, the Appellant vide

letter referenced CCSL/TA/53/11 requested the Respondent to disclose the names of the successful applicants.

On 6<sup>th</sup> December, 2011, the Respondent vide letter referenced LAPF/T/53/08/22 informed the Appellant that, the shortlisted applicants were M/s Mollel Electrical Contractors Ltd and M/s Hainan International Ltd.

On 8<sup>th</sup> December, 2011, the Appellant vide letter referenced CCSL/TD/11/04, submitted an application for review to the Respondent as they believed that they had met all the criteria and therefore deserved to be included in the shortlist.

Having reviewed the complaint, on 10<sup>th</sup> January, 2012, the Respondent informed the Appellant vide letter referenced LAPF/T.53/08/77, that their application for review was rejected on the ground that they did not meet the criteria specified in the Pre-qualification Document.

The Appellant was dissatisfied by the Respondent's decision and applied for administrative review to the Public Procurement

Regulatory Authority (hereinafter to be referred to as "**PPRA**") vide letter referenced CCSL/TD/01/12 dated 17<sup>th</sup> January, 2012.

PPRA reviewed the matter and the decision was communicated to the Appellant vide letter referenced PPRA/PA/095/"A"/83 dated 15<sup>th</sup> February, 2012, that their application was also dismissed for lack of merit.

The Appellant was aggrieved by PPRA's decision also. Consequently on 24<sup>th</sup> February, 2012 they lodged an appeal to the Public Procurement Appeals Authority (hereinafter to be referred to as "**the Authority**").

On the day of the hearing of the Appeal, that is, on 13<sup>th</sup> March, 2012, one of the shortlisted tenderers, namely, M/s Mollel Electrical Contractors Ltd opted to join in the Appeal proceedings as an Interested Party vide letter referenced MEC/PPAA/03/09/01/073. Since the said tenderer did not submit their written statement as they were required, the Authority ruled that they should attend the hearing as mere observers, which they agreed.

## **SUBMISSIONS BY THE APPELLANT**

The Appellant'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 are challenging PPRA's decision as well as the Respondent's Written Replies, which contain the reasons for the rejection of the Appellant's application for pre-qualification, as follows:

### **a) Annual Construction Volume**

That, paragraph 6.2.8 of PPRA's decision, averred that the Financial Reports contained in the Appellant's application were not authenticated, in that, they were not supported by an independent auditor's report. This point was disputed by the Appellant for the following reasons:

- (i) The Appellant completed information Form No. 2 as required. Neither the said Form nor Clause 4.7 of

GITA/PITA indicated that the reports must be authenticated by an independent auditor.

- (ii) The Appellant's reports were prepared in accordance with Section 91(2) of the Income Tax Act, Cap. 332 (Revised Edition of 2006. Subsection 91(2)(b) of the said Act states that **"in the case of a corporation, be prepared or certified by a certified public accountant in Public practice"**, which means the law does not compel a person to employ an independent accountant to prepare its financial statements. However, their reports were prepared by an external accountant from a certified accounting firm known as M/S Information Development Services. Unfortunately, the pages bearing its name and stamp of the external Accountant which were not attached to the Report submitted were appended to the Appellant's Statement of Appeal as Annex VII.
- (iii) Pursuant to Clause 3, Part 2 of the Standard Prequalification Document for works user guidelines, the financial statements or reports are used to assess the financial soundness of the Applicant and not to assess or

as a proof of the annual construction volume or turnover. Turnover is defined on page V of the Pre-qualification Document as the billings for contract works in progress and/or completed, normally expressed on annual basis, and excluding income from other sources. Therefore the financial statement or report cannot be proof of annual construction volume or turnover of a contractor because in such a report, all sales of the company regardless of their sources are summed up together and shown in the income statement as "service income". If a contractor is registered in multiple construction disciplines (e.g. building works, Civil works, Electrical Works, HVAC Works etc.) the financial statements will not indicate the income realized from each discipline separately.

The Appellant conceded during the hearing that their Financial Reports were not authenticated as the pages containing the **Public Accountant's** certification were missing.

## **b) Personnel Capability**

That, paragraph 6.2.15 of PPRA's decision which states that a Registered Quantity Surveyor is essential in the execution of the HVAC contract is disputed on the reasons that:

- (i) PPRA's decision did not state the duty of a Quantity Surveyor in the execution of the said contract.
- (ii) Pursuant to Clause 7.1, Part 1 (Personnel Capabilities) of the Standard Prequalification Document for works user guidelines, the extent to which the Applicant should demonstrate having staff with extensive experience should be limited to those requiring critical operation or technical skills. The prequalification criteria should therefore refer to a limited number of such personnel. The Appellant stated that, skills of the Quantity Surveyor are not necessary in the execution of HVAC Works because they have been executing various HVAC Works as a registered contractor without a Quantity Surveyor and that they have never failed to execute their work or finish the project on time due to absence of the

same on the site. The Appellant submitted further that they have never received any complaint from any employer in their dealings despite working without a Quantity Surveyor. This requirement was therefore baseless; and it seems to them that the Tender Document in place was either prepared by incompetent personnel in the field or was copied and pasted without knowing the essence of the so called Quantity Surveyor in this project.

- (iii) The Appellant submitted further that, as far as they know, the role of the Quantity Surveyor is to conduct feasibility study, to estimate materials, time, labour, cost, prepare cost for tenders and contracts, to value completed work and arrange for its payments and many others in relation to civil and building work contracts due to their nature but not for HVAC works which is a specialized field and work.
- iv) As regards to the experience of the Site Foreman, the requirement of an experience of 10 years was disputed because it was not realistic, in Clause 7.1, of the user guide stated above, the proposed

experience is 3 years. The Appellant submitted further on this aspect that, the Pre-qualification document used by the Respondent was meant for both the Main contractor and sub-contractors. They believed that they were required to comply with those provisions which related to their area of specialization.

### **c) Equipment**

PPRA's act of upholding the decision of the Respondent to disqualify the Appellant on the reasons that they failed to meet the requisite requirement since out of the list of 24 items stated under Clause 4.13 of PITA only 7 items required were met by the Appellant is disputed because:

- (i) Smoke detection testers, replacement sensor tips, pipe sizers, cases, smoke cartridges, smoke matches stated under item (2) and items (4) (5), (6), (7), (8), (15), (21) are not required in the execution of the HVAC works. The list of equipment shown under Clause 4.14 of PITA seems to have been prepared by a person who is not competent

with HVAC installation works. It seems that the list was just copied blindly from somewhere by the author of the Pre-qualification Document. After realizing that the said list was vague, the Appellant submitted a proper list of critical tools required in the execution of HVAC works. The Appellant stated further that they did not seek clarification from the Respondent on items generally listed because they are conversant and competent with requirement of HVAC works.

- (ii) The Appellant submitted a list of 22 HVAC tools which in their view are necessary for the execution of HVAC works, instead of a vague list of 24 items. As a matter of fact, the list stated in Clause 4.13 of PITA did not contain 24 tools or equipment as stated by the CRC, it only had 21 because, HVAC manifolds stated in item (12) has the same meaning as refrigeration gauges stated in item (2), HVACR tools stated in item (14) stands for all tools used in Heating, Ventilation, Air conditioning and Refrigeration (HVACR) and smoke cartridges stated in item (21) is also mentioned in item (2).

(iii) Besides Clause 8. 1 (Equipment Capabilities) of the Standard Prequalification Document for works user guide states clearly that, in most cases Applicants can readily purchase, lease, or hire equipment for major contracts; thus, without necessarily owning them. The pass – fail criteria adopted should be limited only to specialized items that are critical for the type of project to be implemented and that may be difficult for the contractor to obtain quickly.

**d) Fairness**

The Appellant's complaint submitted to PPRA raised concern on whether the Respondent treated the former's application fairly in accordance with section 43 (b) and 46 (4) of the Public Procurement Act, Cap. 410 (hereinafter to be referred to as '**the Act**'). The concern was raised after finding that the name of Hainan International Limited which was among the two shortlisted contractors, was not included in the directory of contractors which was issued by CRB in year 2010 which entails that the same was registered after year 2010, hence, making them not able to meet the condition stated under Clause 4.7 (a) of GITA. Paragraph 6.3.2 of the

CRC decision stated that the Appellant did not submit any evidence to consult CRB about the matter and established that M/s Hainan International limited is registered as a Mechanical Specialist Contractor and therefore could tender for mechanical specialist works. The Appellant was surprised by the CRC statement which entails that registration of M/s Hainan International Limited as a Mechanical Specialist Contractor was the only criterion required to be fulfilled by the same in order to qualify for prequalification while the same CRC upheld their disqualification for pre-qualification knowing that they were registered in the field by CRB long before M/s Hainan International came into being as an HVAC contractor. Besides; the Appellant's complaint was not whether M/s Hainan International was a registered contractor in HVAC or not, but whether the same fulfilled the condition stated in Clause 4.7(a) of GITA.

PPRA's decision prompted the Appellant to conduct more investigation on the matter and established that, M/s Hainan International Ltd was registered for the first time as a Mechanical Works Contractor in November 2009 and issued with a registration certificate number M1/0019/11/2009,

which means that as of 9<sup>th</sup> August, 2011, which was the deadline for the submission of the applications for prequalification, the same was less than two years old as a Mechanical Contractor and therefore did not qualify for the said prequalification. Furthermore, the Authority should take note that M/s Dar Essentials Limited who has been practicing as a registered HVAC contractor for a longer period than M/s Hainan International Limited was disqualified for the reason that its period in construction works was not satisfactory.

**e) PPRA's Credibility**

In view of the foregoing facts it is obvious that PPRA after consultation with CRB on the status of M/s Hainan International Limited found the truth that the Appellant's concern about the matter was genuine, but since the same was not happy with the truth it decided to conceal the said truth in its decision. The truth stated above entails that the decision of the PPRA to reject the Appellant's application for review was based on personal feelings of its members against the Appellant which makes the credibility of its members in fulfilling the objectives of PPRA stated in section

6(a) of the Act and in discharging the functions of the same stated in Section 7 (0) of the Act to be questionable. Had PPRA dealt properly with the competence of all Applicants who participated in the pre-qualification process, the same would have come with an objective conclusion as to which Applicant qualified for the next level in accordance with conditions of the Pre-qualification Document.

That, the criteria used by the Respondent to disqualify the Appellant's application were imposed contrary to Reg. 14 (40) of GN. No. 97 of 2005 and the same contravened Sections 43(b) and 46(4) of the Act in the evaluation of the applications for prequalification.

Therefore, the Appellant prayed to this Authority for the following:

- (i) The Respondent be ordered to restart the pre-qualification process afresh in observance of the law.
- (ii) To take any other action deemed necessary.

## **THE RESPONDENT'S REPLIES**

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, the Appellant was among the applicants who applied for Pre-qualification for HVAC Works, however, their application was rejected for failure to comply with the requirements of the Pre-qualification document.

That, the cited provision of the Income Tax Act, Cap 332 is misconceived for it applies to corporations and not firms.

That, the additional documents appended by the Appellant are improper before the PPAA since they constitute new evidence which was not tendered before the Accounting Officer or PPRA. Thus, they should not be accepted in this Appeal as they bring new issues at the appellate level.

That, from the Appellant's documentary and oral submissions, their Appeal is centered on three issues, namely;

- i. Annual construction volume.
- ii. Personnel capability.
- iii. Equipment submitted.

That, the Respondent fully agrees with PPRA's reasoning and final order which they duly adopt in their submissions. In addition, however, the issue of annual construction volume was clearly analyzed by PPRA and the Respondent's Evaluation Committee to the effect that the contractor was required to prove that he has met the required Annual construction volume for the nature of works they were tendering for. The criterion provided for assessing experience of Annual Turnover which in this case was calculated to be Tshs. 2,750,000,000.00, the Appellant has failed to prove to have it based on documents submitted to the Respondent and PPRA.

That, the Audit report submitted by the Appellant was not authenticated since the name of the auditor and his stamp was not there. This, according to the Respondent was an omission

which the Appellant himself has admitted and conceded, so he should himself bear his own consequences.

That, on the issue of annual turnover, this is not a new idea in the procurement process relating to the Construction Works. In Appeal Case No. 116 of 2012 between the Appellant and the Respondent, this Authority reiterated and accepted the importance of the annual turnover in assessing the general experience of contractors. The Authority then, assessed the formula used as provided for in the Bid Data sheet and PITA at the end it found that what the Respondent did was to apply the formula to the fact. In that case, this Authority found that the Respondent applied a more advantageous formula compared to the strict one provided for in the guidelines. That being the case, the Appellant did not submit evidence to that effect hence this ground brought by the Appellant must fail.

That, with regards to personnel capability, the Respondent adopts the reasoning of PPRA and the Evaluation Committee in that the Quantity Surveyor and the Site Foreman were both essential in undertaking HVAC works. The Respondent could not down play the importance of the Site Foreman so as to ensure that the

proposed project is undertaken in compliance with the acceptable standards. For that reason, the Respondent finds that the 10 years experience required was appropriate and relevant considering the nature and magnitude of the work. Further the intended project is a specialized one, and that for that reason the Respondent could not down grade such requirement in order to avoid an inexperienced person to supervise the work to the detriment of the Procuring Entity.

With regards to the equipment, the Respondent submitted that the Appellant himself has admitted that he did not submit sufficient equipment as provided for in the tender document hence the reasoning by the PPRA was proper and correct. The Respondent averred further that, the Appellant's attempt to justify his omission by indicating the items provided for in the tender document to be not proper in the execution of HVAC was in attempt to cover up his weaknesses and lack of the named items listed by the Respondent in the Pre-qualification Document. The Respondent wondered as to why other Applicants did not raise that concern while the same were as competent and as experienced as the Appellant but they complied with the requirements of the Pre-qualification Document. The Respondent

went on to submit that, if at all the Appellant found that there was a problem with the list, why did they not seek clarification with the Respondent in this regard. Why did they have to wait until they were disqualified to raise this concern?

That, apart from above, the Respondent's Pre-qualification Document provided room for the Applicants to propose for alternative types of equipment in place of those listed in the Pre-qualification Document with supporting explanation of the said proposal to be made. The Appellant did mention the new items in his tender with no sound explanations of his proposal, hence, rendering all his acts to be meaningless. For that matter therefore, the Respondent finds that the Appellant has neither his own equipment nor assured access to key items of equipment. What the Appellant did was just to claim that the key equipment in the tender document were not relevant without giving necessary supporting explanation to justify their argument.

That the issue of M/s Hainan International Limited was not raised by the Appellant when seeking review to the Procuring Entity and that PPRA was wrong to entertain this matter. The Respondent

submitted further that PPRA and PPAA acquire their mandate from the law and not otherwise.

Therefore, the Respondent prayed for the following;

- (i) Dismissal of the Appeal with costs.
- (ii) Any other relief the Authority may deem fit

### **ANALYSIS BY THE AUTHORITY**

The Authority deemed it necessary to mention at the outset that, the Officials who attended the hearing on behalf of the Respondent were neither conversant with HVAC works nor could they respond to some of the technical points raised by the Appellant on the HVAC works and the Members of the Authority regarding the evaluation process. In this case therefore, the Authority's analysis in so far as the Respondent's submissions are concerned, is based solely on the Respondent's summary of submissions on the Appeal hearing which was availed to the Authority during the hearing as well as PPRA's decision which was partly adopted by the Respondent.

Having gone through the PPRA's decision, the documents submitted and having heard the oral arguments from parties, the Authority is of the view that the Appeal is centred on the following key issues:

- **Whether the pre-qualification process was conducted in accordance with the law; and**
- **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. Whether the pre-qualification process was conducted in accordance with the law**

In resolving this issue the Authority took note of the Appellant's self admission on the non compliance with the requirement of annual turnover as well as the authenticity of the Financial Reports. In this case therefore, the Appellant's remaining contentions are mainly centred on the equipment which the applicants were required to indicate, experience of the shortlisted applicants as well as the requirement of having a Quantity

Surveyor and a Site Foreman **with ten years experience** amongst the key personnel. In resolving the issues contested by the Appellant, the Authority reviewed the evaluation process as it is the stage from which all the grounds of Appeal raised by the Appellant originate. However, in so doing the Authority will confine itself to the three evaluation criteria from which the Appellant's contentions are based. The Authority therefore framed the following sub-issues as guidance towards obtaining answers to the said contentions:

- **Whether the list of equipment requested by the Respondent were relevant and essential for the satisfactory execution of HVAC works;**
- **Whether the shortlisted applicants had the required experience of five years in HVAC works;**
- **Whether the Quantity Surveyor is essential for HVAC works; and**
- **Whether ten years experience was necessary for the Site Foreman.**

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

**(a) Whether the list of equipment requested by the Respondent were relevant and essential for the satisfactory execution of HVAC works**

In resolving this sub-issue the Authority revisited submissions by parties on this particular point vis-à-vis the Pre-qualification Document and the applicable law. In their submissions, the Appellant while admitting that they did not fully comply with this requirement, they contended that the criterion in dispute was somewhat misleading and that the Evaluators were incompetent for the following reasons:

- The Pre-qualification Document was prepared by persons not conversant with HVAC works as the list provided was vague as it included nine items in the list which are not relevant for HVAC works. The said items include: smoke detection testers, replacement sensor tips, pipe sizers, cases, smoke cartridges, smoke matches.

- The Evaluators were not conversant with the equipment required for HVAC works as they failed to identify equipment listed in the Appellant's application which are used to execute similar tasks as the ones requested in the Pre-qualification Document. For instance, the Appellant had listed HVAR tools in item 14 which stands for all tools used in Heating, Ventilation, Air conditioning, and Refrigeration. Also the Appellant had included amprobe which is also a **multimeter** which performs the tasks intended for two other equipment requested in the Pre-qualification document, namely, **Digital clamp meters** and **HVAC Multimeter**. Furthermore, the '**Refrigeration gauges**' has the same meaning as '**HVAC Manifolds**' which were listed as two separate items of equipment in the Pre-qualification Document.
- Conceded that that they did not indicate some of the requested equipment and their main argument was that, HVAC equipment are in most cases small tools which may be purchased once a contract is awarded as they are not that expensive. They further stated that, according to Clause 8.1 of User Guide for the Standard Pre-qualification

Document issued by PPRA in July 2007, assessment of equipment capability should be limited only to bulky or specialized items that are critical for the type of project to be implemented and which may be difficult for the contractor to obtain quickly.

In reply thereof, the Respondent's written replies which to a great extent relied on PPRA's reasoning may be summarized as follows:

- Part B of the Pre-qualification Document provides for specific contract requirements and lists under Clause 4.13 of PITA the types of the required equipment for HVAC works. The said Clause is a modification of Clause 4.13 of GITA which provides guidance on the required equipment in the following words:

**"The Applicant shall own, or have assured access (through hire, lease, purchase agreement, other commercial means, or approved subcontracting) to key items of equipment, in full working order, as listed in PITA, and must demonstrate that, based on known commitments, they will be available for timely use in the proposed contract. The Applicant may also**

**list alternative types of equipment that it would propose for use on the contract, together with an explanation of the proposal.”** (Emphasis supplied)

- With regard to the Appellant’s argument that the equipment may be purchased after the award of the contract, the Respondent stated that, under Clause 4.13 of GITA as quoted above, they were required to demonstrate that the equipment which was not owned by the Applicant, at that time, would be available for timely use in the proposed contract, which the Appellant did not do. Furthermore, Applicants were given an opportunity to list alternative types of equipment for use in the contract, together with an explanation of their proposal.
- The evaluators had rightly disqualified the Appellant for failure to comply with Clause 4.13 of PITA, in that; out of the 24 required items of equipment they indicated only 7.
- The Appellant conceded that they did not comply with the criterion in dispute.

Having summarized submissions by parties on this sub-issue, the Authority deemed it necessary to analyse the validity of the said submissions in light of the Pre-qualification Document and the applicable law. To start with, the Authority observes that the Appellant having admitted that they did not comply with the criterion in dispute, the main concern on this sub-issue was not their disqualification, but the shortcomings of the HVAC equipment list contained in the Pre qualification Document and the incompetency of the Evaluators. The Authority's observations on this sub-issue are as follows:

- For a firm to be registered by CRB as a Specialist Contractor in Class One it must have the minimum required equipment as indicated herein below:

- |                          |   |
|--------------------------|---|
| i) Vacuum pump           | viii) Air compressors (min<br>1 H.P.0 75kw) |
| ii) Welding equipment    | ix) Ladders (5m length)                     |
| iii) Tube cutter/blender | x) Hydraulic trolleys                       |
| iv) Complete tool box    | xi) Light duty vehicle                      |
| v) Hand grinder          | xii) Sheet cutting<br>machine               |
| vi) Hand drills          | xiii) Non tipping truck                     |
| vii) Pop rivet gun       |   |

- |                                   |                          |
|-----------------------------------|--------------------------|
| xiv) Flaring tool                 | xviii) Testing equipment |
| xv) Blowers                       | (Amprobe, Avometer,      |
| xvi) Leakage testers              | Gauges)                  |
| xvii) Generators (min 3.5<br>KVA) |                          |

Having compared the CRB list quoted above and the equipment list contained under Clause 4.13(b) of PITA, the Authority noted that, most of the items from CRB's list are not included in the Respondent's list of equipment. The Authority further noted that, out of the list of 21 items indicated under Clause 4.13(b) of PITA, only twelve are recommended, seven items are not necessary, one item not clear and another item is not required, as indicated in the Table below:

<b>S/ No.</b>	<b>Type of Equipment/Tool</b>	<b>Suitability for HVAC works</b>	<b>Remarks</b>
1.	4WD Pick Up	Recommended	
2.	Accessories	<b>Not necessary</b>	<b>The items mentioned are confusing as they have been mentioned elsewhere in the documents.</b>
3.	Anemometers	Recommended	This is an instrument to measure the speed or velocity of gases either in contained flow such as airflow in a duct or in unconfined flows such as atmospheric wind.
4.	Balometers	Recommended	A device to measure airflow.
5.	Carbon monoxide Gas analyzers & Detectors	Recommended	Instrument that can be used to test safe air conditions and to detect gas leakages.
6.	<b>Cleaning Supplies</b>	<b>Not necessary</b>	<b>This is not a working tool. They consist of cleaning equipment, chemicals and paper products for cleaning.</b>
7.	<b>Combustion analyzers</b>	<b>Not necessary</b>	<b>The item is not clear as item 5 above is adequate to perform the same function.</b>
8.	<b>Dehumidifiers</b>	<b>Not necessary</b>	<b>It is not a working tool.</b>
9.	Digital clamp meters kit	Recommended	These are devices for electrical testing during installation and repair of electrical systems and HVAC equipments.
10.	<b>Glass inspection</b>	<b>Not necessary</b>	<b>Not a working tool</b>
11.	Humidity meters	Recommended	This is a device that measures humidity, temperature, airflow and light level under harsh industrial conditions.
12.	HVAC Manifolds	Recommended	This is a device that is designed to control and measure the flows of refrigerant in an HVAC system.
13.	HVAC Multimeters	Recommended	Clamp meter and multimeters kits can perform similar functions.
14.	<b>HVAC Tools</b>	<b>Recommended but not clear</b>	<b>These are many testing and working tools.</b>
15.	<b>Industrial heaters</b>	<b>Not necessary</b>	<b>Not a working tool.</b>
16.	<b>Inspection mirror</b>	<b>Not necessary</b>	<b>Not a working tool.</b>
17.	Manometers	Recommended	This is a device for measuring pressure
18.	Refrigerant charging	Recommended	
19.	Refrigerant detectors	Recommended	
20.	Refrigerant recovery	Recommended	
21.	<b>Smoke cartridges</b>	<b>Not required</b>	<b>Not a working tool. These are small items and are many product s ranges.</b>

- The Authority also noted that, the following key equipment for HVAC works were missing in the Respondent's list:
  1. Vacuum pump
  2. Welding equipment
  3. Tube cutter/blender
  4. Complete tool box
  5. Hand grinder
  6. Hand drills
  7. Pop rivet gun
  8. Air compressors (min 1 H.P.0 75kw)
  9. Hydraulic trolleys
  10. Sheet cutting machine
  11. Non tipping truck
  12. Flaring tool
  13. Blowers
  14. Leakage testers
  15. Generators (Min 3.5 KVA)

The Authority observes this to be a clear indication that, those who prepared the Pre-qualification Document as well as the respective Tender Board which approved it lacked

expertise on HVAC works or did not exercise due care in dealing with the same. Equally the Evaluators were culpable. In view of the serious inadequacy of the Respondent's list of essential tools, it is difficult for the Authority to determine the right contractor for the HVAC works envisaged and which applicant to be disqualified.

- The Authority, however, observes that, had the Appellant sought for clarification on the matter with the Respondent in terms of Regulation 15(12) of GN. No. 97 of 2005 they could have assisted the Respondent in making the necessary corrections. The said regulation provides as follows:

**“A procuring entity shall respond to any request by a supplier, contractor, service provider or buyer for clarification of the pre-qualification documents that is received by the procuring entity within two weeks prior to the deadline for the submission of applications to pre-qualify. The response by the procuring entity shall be given within three working days so as to enable the supplier, contractor, service**

**provider or buyer to make a timely submission of its application to pre-qualify.”** (Emphasis added)

In view of the above findings, the Authority is satisfied that, some of the equipment requested by the Respondent was not relevant and essential for the satisfactory execution of HVAC works and indeed some of the essential equipment were not included in the said list.

**(b) Whether the shortlisted applicants had the required experience of five years in HVAC works**

In their submissions the Appellant contended that the shortlisted applicants did not qualify as they did not have the five years experience stipulated in the Pre-qualification Document. The Appellant further contended that, according to CRB records M/s Hainan International Ltd was registered in November 2009. During the hearing the Respondents were shown copies of the CRB Certificates of Registration which were contained in the applications submitted by M/s Mollel Electrical Contractors Ltd and M/s Hainan International Ltd; and were requested to state if the said applicants had the requisite experience. The Respondents

were also referred to the Evaluation Report and requested to comment on the evaluation of the criterion which reads:

**“Time period in the construction works – At least 5 years (Ref. PITA, Part B, 4.7(a))”** (Emphasis supplied)

For purposes of clarity, the Authority reproduces the said Clause 4.7(a) of PITA which states as follows:

**“Time period in the construction of similar works for Main and Sub-contractors: At least Five Years”** (Emphasis added)

The Respondents were requested to clarify **why their Evaluation Report indicated that the said Applicants had complied with the said criterion** while their registration Certificates for HVAC Works indicated they became Class one Specialist Contractors in HVAC Works in 2008 and 2009 respectively. They could not provide a satisfactory explanation.

Based on the above submissions, the Authority observes that the shortlisted applicants did not have the required five years experience for the following reasons:

- M/s Mollel Electrical Contractors Ltd was registered as a Specialist Contractor Class One in the field of Heating, Ventilation and Air Condition on 5<sup>th</sup> November, 2008, while M/s Hainan International Ltd were registered as Class One contractors in Mechanical Works on 18<sup>th</sup> November, 2009. This information was deduced from the copies of CRB registration certificates contained in the documents submitted by the said applicants. The Authority observes that, at the time of submitting the applications, the two shortlisted applicants had three and two years experience respectively. Had the Evaluators taken into account the provisions of Regulation 15(11) (a) and (14) of the GN No. 97 of 2005 they would have disqualified the shortlisted applicants for non-compliance. The said provisions state as follows:

“(11) Where pre-qualification is undertaken, qualification of tenderers by a procuring entity shall be based upon the capability and resources of the applicants to perform the particular contract satisfactorily, taking into account their:

(a) **experience** and past performance on similar contracts;

(14) **Applications received for pre-qualification shall be analysed by the procuring entity, using the criteria for qualification explicitly stated in the invitation to pre-qualify** and an evaluation report shall be prepared recommending a list of firms to be considered as pre-qualified.” (Emphasis added)

- By indicating that the said applicants had complied with the said criterion, the Evaluators had contravened sub-sections (1) and (4) of Section 45 of the Act which provide as follows:

“(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.

(4) Any qualification criteria shall be made known to, and **shall apply equally to all** suppliers, **contractors** or consultants and a procuring entity shall impose no discriminatory criteria, requirement or procedure with respect to the qualifications of any supplier, contractor or consultant." (Emphasis supplied)

- By pointing out shortfalls in the Appellant's documents and deliberately ignoring the lack of the required experience on the part of the two shortlisted applicants, the Evaluators contravened Section 43(a) and (b) which provides as follows:

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

**(a) equality of opportunity to all prospective suppliers, contractors or consultants;**

**(b) fairness of treatment to all parties;"**

(Emphasis added)

- The Authority observes that PPRA failed to address the Appellant's contention on the lack of experience by M/s Hainan International Ltd in HVAC works, despite stating in paragraph 6.3.2 of their decision that they had consulted the CRB on the matter. Had they consulted the CRB Register and scrutinized the Registration Certificate attached in their application (M/s Hainan International Ltd) they would have certainly found that the said applicants did not have the required five years experience. Furthermore, they would have discovered that there had been unequal treatment of the applicants by the Respondent.

In view of the foregoing, the Authority is of the settled view that the shortlisted applicants did not have the required experience of five years in HVAC works.

**c) Whether the Quantity Surveyor is essential for HVAC works**

In resolving this sub-issue the Authority revisited submissions by parties on this point. To start with the Authority revisited the

Appellant's argument that, the Quantity Surveyor was not necessary for HVAC works for the following reasons:

- They have executed other HVAC works successfully for the past eleven years without engaging a Quantity Surveyor. They are currently executing a similar contract for the Respondent, namely, the Rehabilitation of the Millenium Tower at Kijitonyama, in Dar es Salaam, in which the services of a Quantity Surveyor were not amongst the requirements and they have not received any complaint so far.
- PPRA's decision indicates that a Registered Quantity Surveyor is important in the execution of the HVAC works; however, his importance and his duties thereof were not elaborated.
- The Appellant's perception of the role of a Quantity Surveyor is as follows:
  - (i) to conduct feasibility studies to estimate material, time and labour costs in a construction project;

- (ii) to prepare, negotiate and analyze costs for tenders and contracts; and
- (iii) to value completed works and arranging for payment.

The functions stated under (i) and (iii) are essential for building works contracts because of the nature of the works executed, but not for HVAC works particularly the disputed contract as it involves installation of equipment and accessories as well as assembly of the ducts which do not need the expertise of a Quantity Surveyor to evaluate. The expertise required in the tender under Appeal is that of an engineer because a Quantity Surveyor is not conversant with HVAC works and therefore cannot perform the function stated under (ii) above.

In their replies, the Respondent disputed the Appellant's contention that a Quantity Surveyor is not essential in the execution of HVAC works. According to them, the problem was that the criteria contained in the Pre-qualification Document did not differentiate between the key staff requirements for the Main contractor and the sub-contractors.

In analyzing the validity of submissions by parties, the Authority noted that, neither PPRA's decision nor the Respondent's replies specified the role of the Quantity Surveyor in the application under Appeal.

In order to substantiate whether a Quantity Surveyor is essential in the execution of HVAC works, the Authority revisited CRB's requirements for registration of a Class I contractor in HVAC works and noted that the required key personnel are:

- a) Head of Organisation
- b) Refrigeration engineer/mechanical engineer
- c) Refrigeration or Air Conditioning Technician/Artisans
- d) Electrical Engineering Technician/Artisans

Based on the above list, the Authority is of the firm view that a Quantity Surveyor is not among the essential personnel required in execution of HVAC works. Had they been essential CRB would have included them in their key personnel list required for registration of HVAC Class I contractor.

The Authority is astounded by the Respondent's decision to shortlist M/s Hainan International Ltd despite noting in their own

Evaluation Report that the person identified as a Quantity Surveyor in the application submitted by the said Applicant did not fit that description. The Evaluator's note appearing on page 10 of the Evaluation Report reads:

**“Submitted personnel are not Quantity Surveyors”**  
(Emphasis added)

The Authority further observes that in the case of the other shortlisted applicant, namely, M/s Mollel Electrical Contractors Ltd the same shortcoming was interestingly ignored by the Respondent.

The Authority does not comprehend what triggered the different treatment of the applicants, as non compliance of this particular criterion was one of the reasons that disqualified the Appellant's application. Such conduct was a clear breach of Section 43 of the Act which provides for, among other things, equality of opportunity and fairness of treatment to all parties.

In view of the foregoing, the Authority is satisfied that a Quantity Surveyor was not among the essential personnel required for execution of HVAC works.

**d) Whether ten years experience was necessary for the Site Foreman**

The Authority considered the Appellant's submission that, the requirement of ten years experience for the Site Foreman was unduly restrictive. They argued that, the five years experience of their proposed Site Foreman was quite satisfactory for the execution of the tender in dispute.

In reply thereof, the Respondent's submitted that, the experience of ten years for the Site Foreman was intended to **"ensure that the proposed project is undertaken in compliance with acceptable standards ... taking into account the nature and magnitude of the work envisaged in the proposed building... for that reason we cannot downgrade the requirement in order to allow an inexperienced person to supervise the work at the detriment of the PE."**

In analyzing the validity of submissions by parties on this particular point, the Authority revisited clause 4.12 of GITA which guides on the key personnel as it states as follows:

“GITA 4.12 The Applicant shall supply general information on the management structure of the firm, and shall make provision for **suitably qualified personnel to fill the key positions listed in the PITA**, as required during contract implementation...”  
(Emphasis added)

The Authority noted that, in amplifying the clause above quoted, Clause 4.12 of Part B of PITA specified the experience of the Site Foreman in both “**total work experience**” and “**experience in similar works**” to be ten years. The Authority observes that, had the Appellant found the number of years attached to the said criterion to be unreasonable, they should have sought for clarification from the Respondent pursuant to Regulation 15(12) of GN. No. 97 of 2005. The Authority wishes to remind the Appellant that, the said sub-regulation was purposely promulgated to accord an opportunity to prospective applicants to express, inter alia, their dissatisfaction with the terms and

conditions contained in the pre-qualification documents. That said, the Authority is of the considered view that, the ten years experience for the Site Foreman was a mandatory requirement and the Appellant was obliged to comply.

Accordingly, the Authority's conclusion on the forth sub-issue is that, the ten years experience for the Site Foreman was necessary.

Having reviewed the evaluation process specifically on the four sub-issues above, the Authority concludes that the pre-qualification process was not conducted in accordance with the

## **2. To what reliefs, if any, are the parties entitled to**

Having resolved the issues in dispute the Authority partly upholds the Appeal as the following three grounds of Appeal have merit:

- **that, some of the equipment appearing on the list requested by the Respondent were neither relevant nor essential for the satisfactory execution of HVAC works;**

- **that, the shortlisted applicants did not have the required experience of five years in HVAC works;** and
- **that, a Quantity Surveyor is not essential for HVAC works.**

The Authority rejects the Appellant's fourth ground of Appeal after satisfying itself that, the ten years experience for the Site Foreman was necessary.

Having so observed, the Authority considered prayers by parties and resolved as follows:

**(a) Prayers by the Appellant:**

The Authority revisited the Appellant's prayer whereby they had requested the Authority to order the Respondent to start afresh the pre-qualification process in observance of the law. Taking cognizance of the its conclusion in the first issue that, the pre-qualification process was not conducted in accordance with the law, the Authority accepts this prayer and orders the Respondent

to re-start the Pre-qualification of HVAC works in observance of the law.

With regard to the prayer that the Authority take any other action deemed necessary, the Authority is of the firm view that, no such order is necessary as the Appellant had conceded that they also did not qualify for pre-qualification.

**(b) Prayers by the Respondent:**

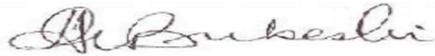
In their submissions, the Respondent prayed for dismissal of the Appeal with costs for lack of merit, the Authority rejects them in their entirety because, to a great extent, the Appeal has merit and the Respondent is not statutorily entitled to any compensation by virtue of Section 82(4) (f) of the Act.

On the basis of the aforesaid findings, the Authority partly upholds the Appeal and orders;

- **the Respondent to re-start the pre-qualification process for Air Conditioning and Ventilation System in observance of the law; and**
  
- **Each party to bear its own costs.**

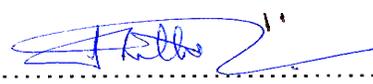
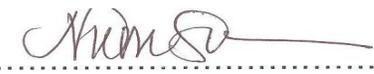
Right of Judicial Review as per Section 85 of the PPA/2004 explained to parties.

Decision delivered in the presence of the Appellant and the Respondent this 21<sup>st</sup> March, 2012.



.....  
JUDGE (rtd) A. BUBESHI  
**CHAIRPERSON**

**MEMBERS:**

1. MR. H.S. MADOFFE  .....
2. MR. K. M. MSITA  .....
3. MRS. N.S.N. INYANGETE  .....