

IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY
AT DAR ES SALAAM

APPEAL NO 146 OF 2013

BETWEEN

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

AND

BOARD OF TRUSTEES OF NATIONAL

SOCIAL SECURITY FUND..... RESPONDENT

DECISION

CORAM:

- | | |
|---------------------------|-----------------|
| 1. Mr. K.M. Msita | - Chairperson |
| 2. Mr. H.S. Madoffe | - Member |
| 3. Mrs. N.S. N. Inyangete | - Member |
| 4. Ms. F.R. Mapunda | - Ag. Secretary |

SECRETARIAT:

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

FOR THE APPELLANT:

1. Eng. Andrew Mwaisemba – Managing Director
2. Mr. Burton Mwakisu – Advocate,
3. Mr. Wilfred Charu – Director of Operations

FOR THE RESPONDENT:

1. Mr. Jamal Mwashu – Legal Officer, NSSF
2. Mr. Hussein Meena – Procurement Manager
3. Mr. Randolph Shimbo – Legal Officer, NSSF
4. Mr. Ally O. Mikella – Procurement Officer
5. Mr. Halfan sanga – Procurement Officer

This Decision was scheduled for delivery today 30th of May, 2013, and we proceed to deliver it.

The Appeal at hand was lodged by M/S COOL CARE SERVICES LTD (hereinafter referred to as “the Appellant”) against the BOARD OF TRUSTEES OF NATIONAL SOCIAL SECURITY FUND commonly known by its acronym NSSF (hereinafter referred to as “the Respondent”).

The said Appeal is in respect of Tender No. PA/004/2012-2013/HQ/W/03 Lot 1 for Sub-contractors for Air Conditioning Installation for the Proposed Construction of Tourist Hotel along Station road at Capri Point area in Mwanza City Tanzania (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 Respondent vide the Daily News paper of 4th February, 2013 invited sub contractors for Air

conditioning to participate in the pre-qualification process of the above named tender.

The Appellant was among the seven Applicants who purchased the Pre-qualification Document. Having read the said document the Appellant was dissatisfied with two clauses, namely;

- a) Clause 5.4 of General Instructions To Applicants (hereinafter referred to as GITA) which provides for limitation of partners in Joint ventures, and
- b) Clause 4.7(b) of GITA which provides for the annual turnover of Tshs.4,000,000,000/-.

Having been dissatisfied with the above listed provisions the Appellant, on 20th February, 2013, vide a letter referenced CCSL/TA/0913, filed an application for review to the Respondent.

On 27th February, 2013, the Respondent vide a letter referenced NSSF/HQ/T.17/1667/V/09 rejected the Appellant's application for review on the reason that the

disputed requirements were suitable for the tender under Appeal.

The Appellant was dissatisfied with the Respondent's decision; thus, on 11th March, 2013, filed an application for administrative review to the Public Procurement Regulatory Authority (hereinafter referred to as PPRA).

On 11th April 2013, the Appellant received PPRA's decision vide a letter referenced PPRA/PA/004/"B"/18 dated 10th April, 2013. In the said decision PPRA rejected the Appellant's complaint for having no merit since four Applicants out of seven met the requirement of annual turnover of Tshs. 4,000,000,000/-. Furthermore, the limitation of two partners in the joint venture had not contravened the law since the law itself is silent on the number of partners that are required to form the joint venture.

Upon being dissatisfied with PPRA's decision, the Appellant on 17th April, 2013, lodged their Appeal to the

Public Procurement Appeals Authority (hereinafter to be referred to as "the Authority").

As the Appellant was processing the review, the Respondent continued with the pre-qualification process; whereby the deadline for submission and the opening of the pre-qualification documents took place on 5th March, 2013. During the opening the following firms submitted their documents;

S/N	TENDERERS NAME
1.	M/s Berkeley Ltd
2.	M/S Remco (International) Ltd
3.	M/S M.A.K Engineering in J/V Derm Electrics
4.	M/S Tanpile Ltd in J/V Dar Essential Ltd

The pre-qualification documents submitted were subjected to preliminary evaluation whereby all

Applicants were found to be substantially responsive to the Pre-qualification Document and they were subjected to detailed evaluation.

During detailed evaluation, Applicants were evaluated to determine whether or not they met the minimum criteria on experience, resources, capacity and financial standing.

Having completed the evaluation process, the Evaluation Committee recommended four Applicants to be shortlisted and invited to tender.

The Respondent's Tender Board at its meeting held on 12th April, 2013, approved the recommendation of the Evaluation Committee.

On 18th April, 2013, the Respondent vide a letter referenced NSSF/HQ/N.12/144/VOL.VII/105 informed the shortlisted Applicants that their applications were successful.

SUBMISSIONS BY THE APPELLANT

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, the Appellant was among the Applicants who purchased the Pre-qualification Document for the tender under Appeal.

That, having purchased the Pre-qualification Document, they were dissatisfied with the contents provided therein. Hence, they sought for administrative review to the Respondent and later to PPRA; in both stages their complaint was rejected.

That, their Appeal to this Authority is based on two main grounds, namely;

- i) unrealistic amount of annual turnover of Tshs.4,000,000,000/- and

- ii) unfair limitation of partners in the joint venture

In expounding the two grounds the Appellant submitted that;

- i) Unrealistic Annual Turnover

- a) That, the annual construction volume of Tshs. 4,000,000,000/- was too high taking into account that most of the works undertaken by HVAC local contractors starts from Tshs. 1,000,000,000/- downwards.

- b) That, out of seven Applicants who purchased the Pre-qualification Document only four submitted their applications. Thus, the Appellant believed that the failure of the remaining three Applicants was caused by the fact that they were not able to comply with the requirement of annual turnover of Tshs. 4,000,000,000/-.

- c) That, they dispute the findings of PPRA's Complaints Review Committee (hereinafter referred to as CRC) that all four Applicants were able to comply with the

annual turnover of Tshs.4,000,000,000/- on the reason that, CRC used wrong information to assess the said annual turnover.

d) That, the Respondent erred in law for assessing the annual turnover by using Audited Accounts since they were required to assess it based on payment certificates of completed contracts or ongoing contracts.

e) That, the annual audited accounts includes all the income of the company for the respective year. Thus, it was not fair to assess the income of other firms that have been obtained from other activities instead of HVAC works only.

f) That, according to "GLOSSARY" of the Pre-Qualification Document turnover is the gross earnings of the firm. It is also defined as the billings for contract works in progress or completed, normally expressed on the annual basis and excludes income from other sources. Therefore, the CRC's act

of modifying the definition of turnover to mean annual income of the company regardless of which activities the company carries out had contravened the provisions of the Pre-qualification Document; as it implies turnover includes even income obtained from selling stationery, crops, Pharmaceuticals, construction of roads, bridges etc.

g) That, the definition of turnover given by CRC contravenes the main aim of imposing such criterion as the same is meant to assess the general managerial experience of the Applicant to perform contracts with similar nature with the tender under process. Therefore, CRC had misinterpreted the requirement of the Pre-qualification Document.

ii) Limitation of Partners in the Joint Ventures

a) That, Regulation 10(1) (c) and 15(18) 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") does not limit the number of partners in

the joint venture; hence, the Respondent's act of limiting the same had contravened the law.

b) That, the CRC's act of ruling that the Respondent was at liberty to limit the number of partners since the governing law is silent has contravened the law as the non limitation of the law had intended to increase the number of the firms that are able to form joint ventures and participate in the intended tender.

c) That, it is not true that more partners in the joint venture expose the Procuring Entity to the risk of none performance as there are various contracts which have been performed by the joint ventures formed by several companies. Thus, the Respondent argument in this regard is mere speculation and has no justification.

That, the Respondent's act of limiting the number of partners who could form the joint ventures as well as their unrealistic annual turnover of Tshs.4,000,000,000/-

had limited the competition in the disputed tender process contrary to Section 58(2) of the Public Procurement Act, Cap 410 of 2004 (hereinafter referred to as "the Act")

That, the Respondent's act in this regard had also infringed the opportunity of the local contractors to participate in the tender under Appeal contrary to section 43(a) of the Act since the amount of annual turnover was too high to be complied by local contractors.

Finally the Appellant prayed for the following;

- a) Nullification of the pre qualification process
- b) The Respondent be ordered to restart the pre qualification process in accordance to the law.
- c) To be Compensated the sum of Tshs. 5,120,000/= as per the following breakdown;
 - i) Appeal filing fees Tshs.120,000/-
 - ii) Legal fees Tshs. 5,000,000/-
- d) To take any other action deemed necessary.

REPLIES BY THE RESPONDENT

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

That, the Appellant's argument before PPRA was made in vain without any proof and therefore the decision issued thereafter was correct and reasonable.

That, the Appellant's complaint is based on matters of beliefs and not facts since the argument that the three applicants failed to submit their documents because of the annual turnover threshold of Tshs. 4,000,000,000/- were mere speculations, fictitious, vexatious and misleading.

That, the Appellant's argument that the issue of annual turnover had made the three Applicants not to submit their documents had nothing to do with the Respondent as there was ample opportunity to find strong firms to partner with. Hence, their failure to submit the Pre-

qualification documents should not be imposed on the Respondent.

That, the estimated annual turnover of Tshs. 4,000,000,000/- was realistic in relation to the project to be under taken. Furthermore, the Appellant had failed to justify how the said amount was unrealistic and how it infringes their rights in the disputed tender process.

That, the formula used by the Respondent to calculate the annual turnover based on the guidance given by PPRA, that is;

$$\frac{\text{Estimated cost of the project} \times 1.5 \text{ or } 2.0}{\text{Time for completion.}}$$

Based on the above formula the annual turnover of Tshs.4,000,000,000/- was obtained.

That the interpretation of the term “turnover” stated by the Appellant is misleading for being self innovative, irrelevant and repugnant to the wording of Clause 4.7 of GITA.

That, the governing law is silent on the number of partners required to form joint ventures. Thus, the Respondent having realised the risk of having a large number of partners in joint ventures decided to limit the number of partners so as to reduce the risk.

That, Regulations 10(1)(c), 14 and 15(18) of GN. No. 97/2005 which were relied upon by the Appellant to prove that the law does not limit the number of partners in the joint venture are irrelevant as the said provisions do not support their argument. Regulation 10(1) (c) provides for the eligibility of the bidder, Regulation 14 provides for general guidance of the pre-qualification process and Regulation 15(18) provides for how firms could be joined. None of the provisions relied by the Appellant relates to the number of partners in a joint venture.

That, the Respondent had used the Standard Pre-qualification Document issued by PPRA in 2007. The said document allows the number of partners in joint ventures to be limited from two partners to five partners. Thus,

the Respondent opted to limit the number of partners to two.

That, the Respondent should not be punished for using the document that was issued by PPRA because if there were provisions which contravene the law, the Respondent is not to be blamed.

That, the Appellant's arguments were based on mere speculation as no justifiable evidence was provided to this Authority to substantiate their contention. Thus, their prayer that the pre-qualification process be nullified should not be granted, since the same has huge impact to the beneficiaries whose funds have been involved in process.

Therefore, the Respondent prayed that the Appeal be dismissed in its entirety as it has no merits.

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 centred on the following three issues:

- Whether the Pre-Qualification Document issued by the Respondent complied with the law
- Whether the evaluation for pre-qualification of the Applicants complied with the 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 Pre-Qualification Document issued complied with the law

In resolving this issue the Authority considered the Appellant's major contention that the Pre-qualification Document issued by the Respondent was in contravention of the law as it limited the participation of tenderers through an unrealistic annual turnover and limitation in the number of partners in joint ventures. In order to ascertain if the Appellant's contentions were justifiable the Authority deemed it necessary to frame the following sub issues to assist it in resolving the contentious arguments by parties;

- a) Whether the requirement of annual turnover of Tshs. 4,000,000,000/- was proper at law
- b) Whether the limitation given in the number of partners to form a joint venture was proper at law

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

i) Whether the requirement of annual turnover of Tshs. 4,000,000,000/- was proper at law

In resolving this sub issue the Authority deems it prudent to consider first, the conflicting arguments by parties on this point. To start with the Authority revisited the Appellant's contention that, the annual turnover of Tshs. 4,000,000,000/- was not realistic for the tender under Appeal as normally for HVAC works, the income per year does not exceed Tshs. 1,000,000,0000/-. The Appellant contended further that, the annual turnover of Tshs. 4,000,000,000/- had limited the number of eligible Applicants to participate in the disputed tender as they were not able to comply with the said requirement. Thus, they contravened Section 43(a) and Section 58(2) of the Act

In reply thereof, the Respondent submitted that, the annual turnover of Tshs. 4,000,000,000/- was not unrealistic as claimed by the Appellant because all the four Applicants complied with the said requirement. The Respondent stated further that, the Appellant had an

option to enter into a joint venture with a firm that had sufficient income so as to comply with the annual turnover criterion. Thus, it is not proper to argue that the annual turnover was unrealistic.

In order to ascertain the validity of the contentious arguments by parties, the Authority deems it necessary to review Clause 4.7(b) of GITA which provides for the requirement of annual turnover in the following words;

“that the Applicant has generated an average annual construction turnover during the period greater than the amount stated in the PITA.

“The average annual turnover is defined as a total of certified payment certificates for works in progress or completed by the firms or firms comprising the Applicant, divided by the number of years stated in the PITA” (Emphasis supplied)

The Authority also revisited Clause 4.7 of Particular Instructions to Applicants (hereinafter referred to as PITA) which states as follows;

4.7 "General Construction Experience

1. Time period in the Construction Business
FIVE YEARS
2. Required average annual turnover:
TZS 4,000,000,000 OR equivalent"
(Emphasis added).

Based on the above quoted provisions and the Respondent's oral submissions, the Authority observes that, the Applicants were required to have an average annual turnover of Tshs.4,000,000,000/- for the period of five years.

Having noted that the Pre-qualification Document had explicitly provided for the annual turnover of Tshs. 4,000,000,000/-, the Members of the Authority, asked the Respondent to explain the basis of the said annual turnover. In reply thereof, the Respondent submitted that, they used the formula provided by PPRA in the

Standard Pre-qualification Document for Procurement of Works. Therefore, the actual annual turnover of Tshs.4,000,000,000/- was calculated as follows;

$$\frac{\text{Estimated cost (Tshs. 7,500,000,000/-) x 1.5}}{\text{Estimated time for completion (two and half years)}}$$

After the said calculations were done, the annual turnover of Tshs. 4,500,000,000/- was obtained but the Respondent lowered it to Tshs. 4,000,000,000/- and incorporated that amount in the Pre-qualification Document.

In order to ascertain if the calculation of the annual turnover was properly done the Authority revisited the Pre qualification Document and noted that the estimated completion period was provided under Clause 1.5 of PITA which states as follows;

“Time for completion: approximately 3-4 years”
(Emphasis supplied)

The Authority revisited the formula used to calculate the annual turnover and noted that, the Respondent used two and a half years as completion period while the Pre-qualification Document indicated the completion period of three to four years. The Authority is of the view that, in calculating the annual turnover the Respondent was required to use the completion period expressly provided in the Pre-qualification Document and not otherwise.

The Authority observes further that, had the Respondent used the completion period provided for in the Pre-qualification Document, the corresponding annual turnover would have been between Tshs. 2,812,500,000/- and Tshs. 3,750,000,000/- as calculated hereunder;

a)
$$\frac{\text{Tshs.7,500,000,000} \times 1.5}{\text{Completion period four years (4)}} = \text{Tshs. 2.812.500.000/-}$$

b)
$$\frac{\text{Tshs.7,500,000,000} \times 1.5}{\text{Completion period three years (3)}} = \text{Tshs.}$$

The Respondent's act of calculating the annual turnover using an alien completion period had squarely contravened their own Pre-qualification Document.

Furthermore, the Authority is of the firm view that, the Respondent's act of calculating the annual turnover using a wrong completion period had caused the amount of annual turnover to be higher than it should be. Therefore, the Authority finds the Respondent to have erred in law by contravening Sections 46 (1) and (4) of the Act which provide as follows;

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

46(4) " Any qualification criteria shall be made known 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 added)

Based on the above findings, the Authority's conclusion on sub issue one is that, the annual turnover of Tshs. 4,000,000,000/- was not proper at law.

ii) Whether the limitation given in the number of partners required in a joint venture was proper at law

In resolving this sub issue the Authority considered the Appellant's contention that, the Respondent's act of limiting the number of partners in a joint venture had contravened the requirements of Regulations 10(1)(c) and 15(18) of GN. No.97/2005. The aforementioned provisions do not limit the number of partners in the joint venture.

In reply to the Appellant's contention the Respondent submitted that, the law is silent on the number of

partners required in joint ventures. Hence, they were at liberty to limit the number of partners in the joint ventures for the tender under Appeal. Furthermore, the Respondent contended that, the decision to limit the number of partners to two was reached after it was realized that there were great risks in associating with large number of partners in a joint venture than associating with two partners. The Respondent submitted further that, their limitation in the number of partners was guided by Standard Pre-qualification Document for Procurement of Works issued by PPRA.

In resolving the conflicting arguments by parties the Authority deemed it proper to revisit Regulations 10(1)(c) and 15(18) of GN. No. 97/2005 relied upon by the Appellant in substantiating their arguments. The said provisions provide as follows;

Reg.10(1) "unless otherwise specified in accordance with Regulations 25 and 26 participation in the invitation to tender and in award of contracts shall be open on equal terms to:

(c) Joint Ventures, consortium or association of firms”.

Reg.15(18) “Joint venture of firms may Pre-qualify by combining the capabilities and past experience of each of them and firms which have been individually pre-qualified may form a joint venture in order to submit a tender and firms which have been pre-qualified as partners in a joint venture shall not be allowed to submit individual tenders”. (Emphasis supplied)

Based on the above quoted provisions the Authority observes that, the law does not limit the number of partners in joint ventures. The only limitation allowed is for purposes of national preference or exclusive preference as provided under Regulations 25 and 26 of GN. No. 97/2005 respectively.

Furthermore, the Authority reviewed the Standard Pre-qualification Document for Procurement of Works relied

upon by the Respondent as the basis for their decision to limit the number of partners in the joint ventures. In reviewing the said document, the Authority noted that, under Clause 5.4 of PITA the Procuring Entity was given an option of either to insert the limitation or not. The said Clause 5.4 of PITA provides as follows;

Clause 5.4 "Partners Limitation:

[Insert "None" if there is to be no limit in the number of partners or alternatively, a number that the procuring entity considers appropriate according to the varied nature and size of the contract. Normally, the Applicant, if a JV should not be limited in the composition and number of partners. However, the risk to a procuring entity of possible default is greater if a JV were to comprise a large number of firms, jointly and severally bound to complete the contract, and a key firm or firms were to defect. Experience in public- financed contracts shows that the number of partners in JVs for civil works usually ranges from two to

five in a contract with a value up to about Tshs.200 billion]”. (Emphasis added)

From the above quotation, the Authority is of the view that, the contents therein are contrary to the law since they indicate that the Procuring Entities have options to either limit or not to limit the number of partners in joint ventures.

Moreover, the Authority revisited the PPRA’s decision and noted that, their CRC also acknowledges that the law does not limit the number of partners in the joint ventures. The Authority further noted that, the CRC was of the opinion that, the notes provided under Clause 5.4 of the PPRA’s document do not limit the composition and number of partners in joint ventures, but simply cautioned on the risks of having large numbers of partners in joint ventures.

Based on the above facts the Authority is of the settled view that, the law does not limit the number of partners in joint ventures.

From the above findings, the Authority is of the firm view that, the Respondent's act of limiting the number of partners required in a joint venture was not proper at law as it contravenes Sections 43(a) and 58 (2) of the Act which provide 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;

- (a) equality of opportunity to all prospective suppliers, contractors or consultants
- (b) fairness of treatment to all parties
- (c) the need to obtain best value for money in terms of price, quality and delivery having regard to the set specifications and criteria." (Emphasis added)

S. 58(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 supplied)

Therefore, the Authority's conclusion on sub issue two is that, the limitation given in the number of partners in a joint venture was not proper at law.

Accordingly, the Authority's conclusion on issue number one is that the Pre-qualification Document was not in compliance with the law.

2.0 Whether the evaluation for pre-qualification of the Applicants complied with the law

In resolving this issue the Authority started by revisiting submission by the Appellant which were as follows;

- i) It is not possible to determine the annual turnover, as per the Pre-qualification Document based on Audited Financial Statements as the said statements include incomes from sources other than HVAC.

- ii) If certified payment certificates of completed works and works in progress were to be used, none of the prequalified Applicants would have succeeded.

- iii) If clause 4.7 (a) of GITA was to be applied, none of the Pre-qualified Applicants would have succeeded as they are not Civil Works Contractors.

In reply thereof, the Respondent submitted that, Audited Financial Statements were appropriate in determining annual turnover. The Respondent contended further that, during the evaluation process all four Applicants were found to have complied with the annual turnover requirement which was assessed based on the Audited Financial Statements. However, the Respondent conceded that the annual turnover was not determined based on certified payment certificates as indicated in the Pre-qualification Document.

In order to ascertain the validity of the parties' arguments the Authority deems it proper to revisit the Evaluation Report so as to establish if the evaluation of the annual turnover requirement was conducted in accordance with the Pre-qualification Document so as to ascertain if all four Applicants were able to comply with the said criterion as contended by the Respondent. In the course of doing so, the Authority noted that, the Evaluation Report indicated that all four Applicants complied with the criterion of annual turnover.

Furthermore, the Authority observed that, the Evaluators considered the annual turnover of Tshs.4,000,000,000/- "in any of the three years during the last five years". It is the view of the Authority that, according to Clause 4.7 of PITA they were required to determine the annual turnover of five years "during the last five years".

In reviewing further the Evaluation Report the Authority noted that, it does not show how the annual turnover was evaluated. During the hearing, the Members of the Authority asked the Respondent to substantiate how the

annual turnover was determined and they explained that, it was calculated based on the submitted Audited Financial Statements of each of the Applicants.

Furthermore, according to the Pre-qualification Document the term turnover has been defined in the Glossary to mean;

“The gross earnings of a firm (in this context, a construction contractor), defined as the billings for contract work in progress and/or completed, normally expressed on annual basis, and excluding income from other sources” (Emphasis added)

The above quoted provisions entail that the annual turnover was to be determined based on the certified payments or billings for contract work. Based on that finding the Authority is of the firm view that, such information can be obtained from Financial Statements which are properly prepared as such statements would definitely show the Firms’ different sources of revenue.

Furthermore, Clause 4.7 of GITA requires Applicants to show the experience in civil works. Thus, the annual turnover in question should have been in respect of civil works. The Authority is in agreement with the Appellant that none of the Applicants would qualify if this criterion was applied in the evaluation since all of them were not civil works contractors. However, it is surprising that the evaluators found all of the Applicants to satisfy the requirement of Clause 4.7 in terms of experience related to civil works and its corresponding turnover.

Therefore, the Authority is of the settled view that the Evaluation process conducted by the Respondent had contravened Regulations 14(5) and 15(14) of GN No. 97/2005 as reproduced herein under;

Reg.14(5) "The procuring entity shall evaluate the qualification of suppliers, contractors, service providers or buyers in accordance with the qualification criteria and procedures set forth in the pre-

qualification documents or other documents for solicitation of proposals, offers or quotations”.

Reg.15(14)“Applications received for pre-qualification shall be analyzed by the procuring entity using the criteria for qualification explicitly stated in the invitation to pre-qualify and an evaluation shall be prepared recommending a list of firms to be considered pre-qualified”. (Emphasis supplied)

Furthermore, the criteria relating to civil works were not appropriate for HVAC works and contravened Regulation 14(6) of GN. No 97/2005 for not being objectively justifiable. The said provision reads as follows;

“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)

Accordingly, the Authority concludes that, the evaluation for pre-qualification of the Applicants was not conducted in accordance with the law.

3.0 To what relief 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 pre-qualification process in observance of the law. The Authority is of the view that, the Respondent should restart the pre-qualification process in observance of the law since it has already been established under the issues above that, the Pre-qualification Document and the Evaluation process were not in compliance with the law.

With regard to the Appellant's second prayer for compensation of Tshs. 5,120,000/= being Appeal filing fees and legal fees, the Authority observes that the Appellant deserves to be compensated the sum of Tshs. 2,620,000/- as per the following break down;

- Appeal filing fees Tshs. 120,000/-
- Legal fees Tshs. 2,500,000/-

Therefore, the Authority orders the Respondent to compensate the Appellant a sum of Tshs. 2,620,000/- 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.

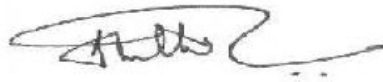
On the basis of the aforesaid conclusions, the Authority upholds the Appeal and orders the Respondent to:

- re-start the Pre-qualification process afresh in observance of the law; and

- compensate the Appellant a sum of Tshs. 2,620,000/- being appeal filing fees and Legal fees.

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 30th May, 2013.



.....
MR. K.M. MSITA

CHAIRPERSON

MEMBERS:

1. MR.H.S.MADOFFE



2. MRS.N.S.N. INYANGETE



