IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY
AT ARUSHA

APPEAL CASE NO. 90 OF 2010

BETWEEN

M/S COOL CARE SERVICES LTD ……. APPELLANT

AND

ACCOUNTANT GENERAL'S
DEPARTMENT ………………………………RESPONDENT

DECISION

CORAM:

1. Hon. A.G. Bubeshi, J. (rtd) - Chairperson
2. Hon. V.K. Mwambalaswa(MP) - Member
3. Mr. M.R. Naburi - Member
4. Mr. K.M. Msita - Member
5. Mrs. N.S.N. Inyangete - Member
6. Ms. B.G. Malambugi - Secretary

SECRETARIAT:

1. Ms. E.V.A. Nyagawa - Principal Legal Officer
2. Ms. F.R. Mapunda – Legal Officer

FOR THE APPELLANT:

Eng. Andrew Mwaisemba – Managing Director

FOR THE RESPONDENT

1. Ms. Mwantumu Sultan – Legal Officer
2. Mr. David Kivembele – Principal Supplies Officer
3. Mr. Adonis Kamala – Consultant (Q/S), Ardhi University

FOR THE INTERESTED PARTY – M/s HAINAN INTERNATIONAL LIMITED

1. Ms. Angela Julius – Company Secretary
2. Ms. Zeng Qi – Company Engineer

This decision was scheduled for delivery today 22nd March, 2011, and we proceed to deliver it.

The appeal at hand was lodged by **COOL CARE SERVICES LIMITED** (hereinafter to be referred to as **"the Appellant")** against **ACCOUNTANT GENERAL'S DEPARTMENT** (hereinafter to be referred to as **"the Respondent")**.

The said Appeal is in respect of Tender No. IE/031/2010-2011/HQ/W/44 for the Proposed Construction of Treasury Building on Plot No. 3, Block "C" – NCC Link Area, Dodoma.

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

The Respondent advertised tenders *vide* the Daily News of 2nd September, 2010. The said advertisement invited only Class one Building Contractors.

The Appellant bought the Tender Document and noted that the type and nature of works to be done included building, electrical, air conditioning, lifts, and fire fighting

installations. Hence on that basis, the Appellant was of the view that the Respondent had intended to discriminate against other contractors for the various works listed above as they had opted to deal with building contractors only.

Upon further review of the Tender Document, the Appellant noted that, there were some unacceptable provisions which were included in the said document.

The Appellant being aggrieved by the conditions of the Tender
Document wrote to the Respondent letters referenced CCSL/TA/32/10 and CCSL/TA/33/2010 dated 6th September 2010 and 14th September, 2010, respectively, requesting for clarification on the following issues:

(i) Discrimination of some contractors including air conditioning contractors to participate in the public procurement.

(ii) Omissions of drawings in the Tender Document.

(iii) Inclusion of unacceptable conditions in the Tender Document, for instance;

- Item 3 of the Bid Data Sheet (hereinafter to be referred to as **"BDS"**) marginalized opportunity of contractors;
- Item 9 of the BDS and Clause 12.5(a)&(b) of the ITB contravened Regulation 14(4) of GN. No 97/2005; and
- Item 13 of the BDS and Clause 17.1 of the ITB contravened Regulation 88(3) of GN. No.97/2005.

Having received no reply from the Respondent, on 22nd September, 2010, the Appellant submitted an application for review to the said Respondent mentioning the issues that needed rectification.

On 23rd September, 2010, the Respondent replied to the Appellant's queries vide letter referenced IE/031/2010-11/HQ/G/04/01, which was received by the Appellant on

27th September, 2010, wherein the Respondent declined to accommodate the Appellant's proposals.

On 25th October, 2010, the Appellant filed an application for review to the Public Procurement Regulatory Authority vide letter referenced CCSL/TA/44/10 (hereinafter to be referred to as "**PPRA"**).

On 23rd November, 2010, PPRA *vide* letter referenced PPRA/ME/004/"E"/53 replied to the Appellant's application for review by informing them that, the main contractor who was responsible for the main works to be executed by other disciplines may opt to form joint ventures or sub contract the sub-components. Further that the Respondent's act of combining the tender as one package and restrict the tender process in favour of building contractors was aimed at achieving economies of scale and minimize costs for implementing the procurement process.

The Appellant being dissatisfied with PPRA's response, to their application for review, lodged an appeal to the

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

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, the disputed tender discriminated some of the contractors in the construction industry as only building contractors were invited to tender while electrical, air conditioning, lifts, plumbing and fire fighting contractors were excluded.

That, the Appellant believes that, the Respondent's act of inviting only building contractors to tender for a tender that included other disciplines in the construction industry, was meant to exclude other contractors and marginalize them (their opportunity in the public procurement), contrary to Section 43 (a) and (b) of the

Public Procurement Act of 2004, (Cap 410) (hereinafter to be referred to as "**the Act"**).

That, Item 8 of the BDS proves the Respondent's intention to discriminate some of the contractors in the tender process, as they were allowed to participate only if they teamed up with building works contractors.

That, the Appellant's further concern was how would they have known which (building contractor) among the 81 registered class one Building Contractors was interested to participate in that particular tender process and if such a contractor would have been interested to form an association with the Appellant.

That, Contractors' business and activities in Tanzania are governed and regulated by The Contractors Registration Act, 1997, The Contractors Registration (Amendment) Act, 2008 and GN No. 340 of 1999; which requires any Joint Venture (hereinafter to be referred to as **"JV"**) of contractors formed must be registered by the Contractors Registration Board (hereinafter to be referred to as

"CRB"). One of the conditions for registering a JV under this act is that, the parties forming a JV must be contractors of the same discipline. Therefore, a JV consisting of a building and air conditioning contractor cannot be registered by CRB.

That, the Respondent's Tender Document did not include the drawings for the air conditioning works contrary to Regulation 83(1) of GN.97 of 2005.

That, the Tender Document included unacceptable provisions which contravene the requirements of the law.

That, the Appellant disputes PPRA's reasons for the rejection of their application for administrative review for the following reasons:

a) Item 1.2 (a) and (b) of PPRA's reply:

Under this Item, PPRA concluded that the Main Contractor is responsible and liable for the works to be executed by other disciplines (Specialized Contractors)

with whom he opts to form a JV or sub contract the sub components. This is disputed on the reasons that:

(i) During the tendering stage there is no contract in place between the Respondent and any tenderer; hence at that stage there was no Main Contractor;

(ii) There is no provision in the Act and its Regulations which empowers a procuring entity powers to discriminate contractors during the tendering process by assigning powers to some contractors to rule and marginalize opportunities of other contractors; on the contrary, procuring entities are required to give all prospective contractors equal opportunity and fair treatment pursuant to Section 43(a) and (b) of the Act;

(iii) Contractors are registered and their businesses are regulated by the CRB established under the Contractors Registration (Amendment) Act,

2008. Section 4(1)(a) and (n) of the Contractors Registration (Amendment) Act, 2008 gives CRB powers to decide upon applications for registration and to effect registration of contractors and, to set criteria for registration and classification of contractors into different types, categories and classes. Types of contractors registered by the Board are provided for under Section 7(2) of the Act, 1997 as amended by Section 6(b)-(e) of the (Amendment) Act of 2008, and include; building works contractors, civil works contractors, electrical works contractors, mechanical works contractors and specialist contractors. Section 10 of the Contractors Registration Act, 1997 as amended by Section 10 of the 2008, Act, introduced a new Section 10A, which restricts execution of construction activities by a person or a firm not registered by CRB. In view of the foregoing, a building works contractor is not allowed to execute other types of works unless

registered by CRB and holds a valid certificate of registration for the respective type of works.

b) Item 2.2 (a), (b) and (c) of PPRA's reply:

Under this item, PPRA tried to justify discrimination of other contractors in favour of building contractors contrary to Section 46(4) of the Act. PPRA's statement that **"they concur with the clarification issued by the Respondent on sub item (a)"**, legalizes the discrimination of other contractors in this tendering process; this attitude contravenes Section 6(a) of the Act."

The Appellant's arguments on this item are based on the following facts:

(i) Clause 3.1 of the ITB states that, the basis for the formation of a JV , Consortium, or Association is a formal intent by parties to enter into such an agreement; otherwise any natural person, private entity or

government-owned entity is eligible to participate in the bidding proceedings provided they satisfy the requirement of Section 46(2) and (3) of the Act;

(ii) Clause 4.2 of the ITB has states that no firm can be a sub contractor while submitting a bid "individually or as a partner of a JV in the same bidding process". This means, air conditioning contractors and other contractors who have been referred to in this tender as sub contractors, which does not have any definition in the Act whose existence is not supported by any provision of the law; if not co-opted by any building contractor then they cannot participate in the tender under Appeal.

(iii) **"Subcontractor"** is defined under Clause 1.1 of the General Conditions of Contract as, a person or corporate body who has a contract with the Contractor to carry out

part of the work in the Contract, which includes work on the site. A **"Contractor"** is defined as a person or Corporate body whose bid to carry out the works has been accepted by the Employer. By virtue of these two definitions, before the bid is accepted by the employer; first, the Main contractor does not exist, secondly, there is no contract and therefore the subcontractor does not exist either; hence, bidding as a subcontractor is not possible.

(iv) Section 43(a) of the Act does not provide that air conditioning contractors or electrical contractors shall be sub contractors of building contractors. Equally, Regulation 98 of GN No.97/2005 does not say that the building contractor shall be the head of all other contractors.

c) **Item 3.2 and 4.2 of PPRA's reply:**

Under this item, PPRA defended contravention of the law by the Respondent by saying that, the Respondent's act of combining this procurement, as one package and restrict the tendering process in favour of building contractors was intended to achieve economies of scale and minimize costs for implementing the procurement processes. Further under item 4.2, PPRA tries to legalize illegal tender process. The contents of these items are disputed in the following sense:

(i) Section 58(1) of the Act requires the Respondent to conduct all public procurements by tender in accordance with the basic principles set out in the Act. Section 43(a) and (b) of the Act direct the tender boards and procuring entities to strive for achievement of highest standards of equity, taking into account, equality of opportunity to all prospective contractors

and fairness of treatment to all parties. The Respondent did not treat the air conditioning contractors and others fairly as compared to building contractors Moreover, the Respondent did not provide equal opportunity to air conditioning contractors as it was done to building contractors.

(ii) Firstly, tenderers for all works can be invited using one advertisement. Secondly, tender documents are not given to tenderers free of charge. Thirdly, opening of all tenders can be done together. Fourthly, evaluation of all tenders can be done by one committee consisting of experts from the respective disciplines of the works to be done. Fifthly, approvals of all lowest evaluated tenders can be done by the respective tender board in one sitting;

(iii) During project execution, whether the procurement is sliced in packages or

combined, the Respondent cannot avoid to employ the project manager, architect, Quantity Surveyors and consulting engineers in the respective types of works who will supervise the project execution;

(iv) Costs cannot be minimized and economy cannot be achieved at the expense of contravention of the law.

In view of the points analyzed under Roman (i) – (iii) above, there is no additional cost in giving all contractors equal opportunity in the public procurement process by following procedures stated under Regulation 50(1)-(4) of GN. No.97/2005. On the contrary; it is more expensive to use the illegal tender process opted by the Respondent because the building contractors, who in this tender process act as middlemen, add their margins on top of the prices quoted by other contractors. Also in order to maximize profit, the said building

contractors shall make sure that they work with the so called subcontractors who are loyal to them instead of being loyal to the Employer, and who are the cheapest without considering the quality of products and work which will be done. Since the procurement procedure of the said subcontractors co-opted by the Respondent is not regulated by the applicable law, unfaithful employees of the Respondent, who are involved in the various stages of this procurement proceeding and the said building contractors, might use this loophole to solicit bribes from innocent subcontractors who are desperate of losing business opportunities.

d) Item 5.2 (a) and (b) of PPRA's reply:

Under this item, PPRA rejected the Appellant's argument that, Item 9 of the BDS (ITB 12.5 (a)&(b) which required the bidder to have an average annual volume of construction of Tshs. 10,000,000,000.00 during the last 5 years and

must have done three projects each, with a minimum value to Tshs. 5,000,000,000.00, in order to qualify for award of the contract; is contrary to Regulation 14(1) and (4) of GN. No.97 of 2005. The only reason given by PPRA to support its objection is that, the requirements mentioned above are provided for in order to assist the Respondent to determine the tenderer's experience and capability to perform a project of similar nature. This is inconsistent with Regulation 14(1)(a) of GN. 97 of 2005; which requires a tenderer to have managerial capability, reliability, experience and reputation. The Appellant's observations on this point are as follows:

(i) The Contractors Registration Act, 1997 and Contractors Registration (amended) Act of 2008 has given powers to CRB; under Section 4(1)(d) to regulate the activities, promote and maintain professional conduct and integrity of contractors; under Section

4(1)(n) to set criteria for registration and classification of contractors into different types and categories and classes and to set class limits of projects to be executed by the contractors; under Section 4(1)(o) to review the registration criteria of contractors; under section 4(1)(p) to review registered contractors with view to ensuring that they meet the registration criteria applicable to the types, categories and classes concerned; and class one contractor of any type is unlimited to execute any project of any value. Therefore, any criteria concerning qualifications of contractors which are prejudicial to Contractors Registration Act, 1997, Contractors Registration (amended) Act, 2008 or any other law of the United Republic of Tanzania cannot be legally accepted.

(ii) Furthermore, neither Regulation 14(1) GN. No. 97 of 2005 nor any other provision in the Act mentions the annual construction volume of any value as a criterion for the contractor to qualify for the award of a tender of any magnitude. Therefore the qualification criteria set must to be in conformity with the law and not otherwise.

e) Item 7.2 and 10.1 of PPRA's reply:

Under this Item, the PPRA concurred with the Appellant's argument that, air conditioning drawings were not provided in the Tender Document and that without the drawings tenderers could not be able to price the BOQ accordingly. Surprisingly, PPRA's decision did not agree to order the Respondent to restart the tender process for the reason that, omissions of the drawings were not fatal to warrant restarting of the tender process.

Furthermore, the Appellant noted some serious deficiencies in the air conditioning BOQ, such that, no registered air conditioning contractor could have priced it properly without having the technical drawings. The discrepancies under sub heading "Tropical MPS Conditioners" on page 2/20/1 included the following;

(i) Item f, shows that, the number of outdoor units, each with cooling capacity of 43.92kw (150K Btu/h) is 3; this gives a total capacity of 131.76 kw (450K Btu/h). But item g, shows that the total number of indoor units each with capacity of 5.2 Kw (18K Btu/h) which will be connected to the outdoor units mentioned above is 97, giving a total capacity of 504.4 (1,746K Btu/h); this means that the total capacity of indoor units exceeded that of the outdoor units by 73.88%. According to the technical data of Tropical MPS system the total capacity of indoor units should be equal to or less than that of the outdoor unit. Therefore, the technical drawings in this

bidding process were required to show how this kind of technical design would be implemented.

(ii) Item h shows that, the number of 3 way branch distributors is 2 and that of 4-way is also 2. According to the technical data of the Tropical MPS system, a 3-way branch distributor for the 18K Btu/h indoor units can be used on 60K cycle to accommodate a maximum of 3 indoor units. Therefore, 2 branch distributors with 3 ways will accommodate a total of 6 indoor units. On the other hand 2, 4-way branch distributors can be used in 90K cycle to accommodate **4 x 2= 8** indoor units. Therefore the total number of indoor units which will be connected to the outdoor units through the branch distributors is 6 + 8 = 14 only. Therefore, how will the remaining 83 units be connected to the outdoor units? The technical drawings were required to indicate the details of this connection.

(iii) About 12 additional outdoor units each with capacity of 43.92 Kw (50K Btu/h) are required in order to accommodate 73.88% of the exceeded indoor units. The total purchase cost of these outdoor units is more than USD 73,000.00 VAT Exclusive. About 21 additional branch distributors are required in order to accommodate 83 indoor units left without distributors. The total purchase cost of the additional distributors is more than USD 13,650.00; VAT exclusive. About 15 units of 3 phase voltage protector /phase sequence monitor are required to protect the outdoor units but they are not included in the BOQ; the total purchase costs of the units is Tshs. 4,960,000.00; VAT exclusive. Basing on the commercial exchange rate at the CRDB Bank, Holland House Branch as at 10th March, 2011, of 1 USD = Tshs. 1,557.00 the total costs for additional outdoor units + branch distributors as at 10th March, 2011 is Tshs (73,000.00 +

13,650.00) x 1,557= Tshs. 134,914.05 plus Tshs. 4,960,000.000 for 15 units of three phase voltage protector/phase sequence monitor = Tshs. 139,874.05; VAT Exclusive. This amount does not include labour + overhead + indirect cost + profit margin and; cost for items mentioned in (iv) and (v) below.

(iv) After assessing the quantities of different sizes of refrigeration pipes given in the BOQ: the quantities of items; **b,e** and **f** on page 2/20/2 are underestimated by far. Therefore, there will be additional costs for refrigeration pipes. Technical drawings could help to establish the real quantities required.

(v) The Tropical MPS system requires cables from power supply isolator switch to the outdoor units ; control or interconnection cables from the indoor units to the branch distributors and from the branch distributors to the indoor

units. These cables are not included in the BOQ; therefore, additional costs will be required for cables.

That, in view of the discrepancies noted, the Appellant was of the view that, there was no design done for the air conditioning works. This is also the reason why the Respondent could not issue the drawings to the Appellant. This implies that there was no consulting engineer employed by the Respondent to design for air conditioning drawings.

That, in general the Respondent contravened the following provisions of the law:

- Sections 43(a) and (b), 46(2) and (4), 60, 61(1), and 62(3) & (2) of the Act.

- Regulations 6, 14(4), 83(1)(c) and 88(3) of GN. No. 97/2005.

The Appellant therefore requested the Authority to order the Respondent to:

a) restart the tender process in observance of the law; and

b) compensate the Appellant a sum of **Tshs 2,230,000/=** being costs arising from the following;

- purchase of the Tender Document – Tshs. 100,000/=;
- Administrative review fee paid to PPRA Tshs. 10,000/=;
- Appeal filing fees – Tshs. 120,000/=, and
- Legal consultation fee – Tshs. 2,000,000/=

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 lacked the *locus standi* to lodge this Appeal as they did not submit their tender.

That, the Appellant challenged PPRA's decision which upheld the decision of the Respondent to regard the disputed project as one package and that tenderers were given options to form JVs or associations for the items they were incapable of executing. The Appellant did not indicate any provision in the Act which directs the Procuring Entity to split a single project into several or fragmented heterogeneous trades. The packaging of a project into several lots is covered under Regulation 50(1) of GN No.97/2005; but slicing should be strictly for homogeneous (identical) lots.

That, the Appellant disputed the use of term "Main Contractor" by PPRA. This term was meant to indicate that, for every submission there should be a leading firm whether in association, partnership or JV. Therefore, the

use of the term “Main Contractor” in the reply for review by PPRA meant the contractor in charge during submission of tender. There are other provisions in the Regulations whereby the “Main Contractor” has been referred to as “Head Contractor” (Regulation 98(3) of GN. No. 97/2005). Thus, the Appellant’s contention is unfounded.

That, the Appellant tried to explain CRB’s requirement for companies intending to carry out construction business as the only lawful guide to be used by the Procuring Entity in establishing qualification criteria. However, Section 46(1) of the Act and other corresponding sections therein give mandate to the procuring entity to set its own appropriate criteria for the particular procurement proceedings in addition to tenderers satisfying all relevant requirements for registration with relevant statutory bodies.

That, no eligible tenderer was discriminated in the procurement process as claimed by the Appellant.

That, the Appellant misinterpreted Clause 4.2 of the ITB which was meant to bar tenderers from submitting tenders individually or as a partner of a JV, to appear again as sub contractors of a main contractor. The Appellant should know that not all terms used in the Act and Regulations are defined therein. Moreover, some of the terms are implicitly and others are explicitly implied. Section 49(3)(iii) of the Act and Regulation 98 of GN No. 97/2005 are some of the areas where the term sub contractor has been used.

That, the Respondent disputes the Appellant's interpretation of Regulation 50(1)-(4) of GN No. 97/2005 which provides for slicing of a project into several packages. The interpretation of the said regulation is that slicing of a project should be into homogeneous lots or packages. This Regulation applies to large projects (like housing estate or road works) which can be split into several similar packages. Execution of one package should neither affect nor be related to another package. In the Appeal at hand, to separate air conditioning installation from building works does not represent

homogeneous packages because they are completely different sections of the works and therefore they are heterogeneous packages.

That, the Appellant had overlooked Regulation 98 of GN No.97/2005 regarding the selection of sub contractors. Under the said Regulation tendering procedures for sub contractors cannot be undertaken at the same time with the Head Contractor. Regulation 98(3) clearly indicates that the Head (Main) Contractor needs to be in place and get consulted should he have any special arrangement to be incorporated in the Tender Document. This indicates that, even the Tender Document for sub-contractors cannot be finalized until the Head Contractor is in place. Therefore, the Appellant's attempt to show that the cost of tendering does not exist is hereby defeated.

That, the Tender Document contains sections of BOQs of which the Method of Measurements and Notes have been made in accordance with Clause A.5 of the specification, and this has not been disputed by the Appellant. The only entry point for the Appellant to this project as Air

Conditioning Contractor would have been to include a Prime Cost Sum in the Building Contractors' document then invoke Regulation 98 of GN No. 97/2005 so as to be selected. However, the inclusion of Prime Costs Sum in the BOQ mandates inclusion of separate cost to cover for profit and attendance (refer Clause A7 and B19 of the Standard Method of Measurement of Building Works), by the Head Contractor which together increase the cost of the project. The decision to aggregate this project in a single package was meant to reduce costs; transfer managerial responsibilities of fragmented trades from procuring entity to the Head Contractor and maximize economy and efficiency. Regulation 49(1) of GN. No.97/2005 encourages this approach to be applied.

That, the Appellant needs to focus on the requirements of the law and best practice. They should also refrain from using insulting statements such as unfaithful employees of the Respondent or soliciting bribes; allegations which can provoke litigation proceedings.

That, the Respondent's decision of establishing qualification criteria in getting a tenderer with managerial capability, reliability, experience and consistency was also supported by PPRA in their reply to the Appellant's application for review. Thus, the Appellant's observations of scrapping Regulation 14(1)(a) of GN. No.97/2005 and replacing it with the requirements of the Contractors Registration Act is contrary to Section 46 of the Act which mandates the Procuring Entity to set the qualifying criteria. The Appellant need to be advised and should understand that the Contractors Registration Act does not repeal and therefore override other laws of the Land.

That, the Appellant's claim that, annual volume of construction works is not stated anywhere in the Act or its Regulation is disputed as Section 46(1) of the Act mandates the Procuring Entity to set criteria which is appropriate to it. Furthermore, under Regulation 14(1) of GN No.97/2005 financial capability and experience are amongst the qualification criteria. Thus the decision of PPRA to uphold the criteria set by the Respondent is within the framework of the law.

That, with regard to the Appellant's argument that, PPRA had erred in law for observing that the Respondent's failure to issue architectural drawings with the Tender Document could not warrant cancellation of the tender and order the tender process to be restarted afresh, the Respondent submitted that drawings were bulky and were available for inspection at the office of the Secretary of the Tender Board. No tenderer failed to submit a tender on the ground that the Air Conditioning drawings were not availed to them.

Therefore, the Respondent prayed for dismissal of the Appeal with costs.

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 issues:

- **Whether the Appeal is properly before the Authority;**

- **Whether the Tender Document discriminated some of the contractors from participating in the tender process;**

- **Whether the omission of air conditioning drawings in the Tender Document contravened the law, and if so, whether that omission was fatal to the tender process; 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:

1.0 Whether the Appeal is properly before the Authority

During the hearing, the Respondent contended that, since the tender invited only Class One Building Contractors, which the Appellant is not, the latter was not only incompetent to tender, but also lacked *locus standi* to appeal as they did not tender. The Authority reviewed the provisions of the law in order to determine if the Appellant was entitled to seek review under the disputed tender process even though they did not submit a tender. In so doing, the Authority revisited Section 79 of the Act which was relied upon by both parties which provides that:

> "S. 79 any supplier, contractor or consultant who claimed to have suffered or **that may suffer any loss as a result of a breach of duty imposed on a procuring entity or approving authority by this Act may seek a review in accordance with Sections 81 and 82 of this Act**, provided that, the application for review is received by the procuring entity or approving authority within twenty-eight days of the supplier, contractor or consultant becoming

> aware of the circumstances giving rise to the complaint…" (Emphasis supplied)

Based on the above provision the Authority is of the view that, the Appellant was entitled to file an application for review as the same can be instituted by a tenderer who has been affected by the decision or a prospective tenderer who wishes to participate in the tender process but feels he may suffer a loss as a result of breach of duty by the Procuring Entity. In the Appeal at hand, the Appellant felt that some provisions in the Tender Document discriminated participation of some tenderers and as a result they applied for administrative review so that justice can be done in the said procurement process. The Authority also concurs with the Appellant that, the Respondent's contention that Section 79 can only be invoked by tenderers who submitted tenders is not correct as the Appellant had purchased the Tender Document. Thus, purchase of the Tender Document showed intent to participate and gave the Appellant the required *locus standi* to challenge the contents of the said document.

For the benefit of the parties, the Authority further deems it prudent to reproduce Rule 5 of The Public Procurement Appeals, Rules (GN. No. 205 of 2005) which highlights appellable matters as follows:

> "Except for a decision, matter or act or omission arising from the provision of subsection (2) of section 72 and subject to sections 79, 81 and 85 of the Act, **an appeal shall lie from the following matters:**
>
> (a)…
>
> (b)…
>
> **(c) Inclusion of unacceptable provisions in the tender documents;**
>
> **(d) Unacceptable tender process; …"**
>
> (Emphasis supplied)

The Authority is of the view that, the above quoted Rule provides tenderers or prospective tenderers with opportunity of filing appeals disputing the inclusion of unacceptable provisions in the tender documents as well

as unacceptable tender process. Thus, the Appellant had the right to seek for administrative review in accordance with Rule 5(c) and (d) of GN. No.205 of 2005 as quoted above.

Furthermore, it is not disputed that the Appellant first sought for administrative review to the Respondent and being dissatisfied with the Respondent's decision, referred the matter to PPRA whose decision equally aggrieved them hence the appeal to this Authority. The Authority noted that, in addition to having *locus standi*, the Appellant had observed the dispute settlement procedures as provided for under Sections 80, 81 and 82 of the Act. The Authority is therefore satisfied that, the Appeal is properly before it.

Accordingly, the Authority concludes that, the Appeal is properly before it.

2.0 Whether the Tender Document discriminated some of the contractors from participating in the tender process.

In its endeavour to resolve this issue, the Authority reviewed the written and oral submissions by parties vis-à-vis the applicable law and the Tender Document. To start with, the Authority revisited the arguments by parties' on this point. The Appellant's main contention was that, the Tender Document contains discriminatory and unacceptable conditions. The Authority deemed it proper to analyse first, the question of discriminatory provisions in the Tender Document and thereafter consider the alleged 'unacceptable conditions'.

The Authority's summary on the Appellant's submissions that the Tender Document contained discriminatory provisions, is as follows:

(i) The Respondent erred in inviting building contractors only while the tender involved other specialized disciplines in the construction industry,

namely, electrical, air conditioning, lift installation, plumbing and fire fighting; as each of the said specializations is subject to registration by CRB.

(ii) The Respondent's intent to discriminate some contractors is manifested under Item 8 of the BDS where the sub-contractors were only allowed to participate in the tender if they were in association with building works contractors.

(iii) The magnitude of each of the specialized works warrants packaging of the tender pursuant to Regulation 50(1) of GN. No. 97/2005.

(iv) Allowing building contractors to fill in prices for other specialized works contravened Section 46(2) of the Act; unless they are duly registered in the said disciplines.

(v) It was wrong for the Respondent to combine the different specialized disciplines in one package as the disadvantages of using such a method outweigh the advantages. The main advantage of this method is

that, the Respondent shifts the responsibility to oversee and supervise the execution of all works involved to the Building Contractor and in so doing saves time.

With regard to the disadvantages of this option, the Appellant mentioned them to be as follows:

- It subjects the sub-contractors to succumb to whatever conditions the building works contractor may impose upon them as the latter has the final say as to who he should work with and under what terms. In this case, the sub-contractor is reduced into a beggar and may be forced to accept the conditions set by the building contractor however cumbersome and unfavourable they might be to the former. This may result into sub-standard services as the sub-contractors may employ whatever tactics they may have to ensure they also get profit under such an arrangement.

- Had the Respondent divided the tender into various lots depending on the specializations involved, it would have been more economical as all the processes from tender advertisement, opening, evaluation etc would have been made simultaneously.

- Had the tender been divided into different lots, the Respondent would have been directly involved in overseeing the project. Hence, ensuring that competent sub-contractors were awarded the contracts and value for money realized.

- This methodology is more expensive as the building contractor, who in this tender acts as a middleman, employs the sub-contractors. In so doing, the building contractor adds their margin over and above the actual costs for each specialized discipline as opposed to the costs that would have been quoted by the respective sub-contractors had they been eligible to tender on their own.

- In most cases the sub-contractors are subjected to humiliation in the form of non payment, late payments and low rates, just to mention but a few.

- It marginalizes qualified specialist contractors who cannot participate in the tender independently contrary to Section 43(a) and (b) of the Act.

The Respondent's main submissions on this point are as summarized herein below:

- There were no discriminatory provisions as the sub-contractors, the Appellant inclusive, were given an option to form joint ventures or associations under Clause 3.1 of the ITB.

- It was more economical to combine the different works and service contracts into a single package, in terms of efficiency and transferring managerial responsibilities of the whole project to the Head

Contractor in terms of the provisions of Section 45(b) of the Act and Regulation 46(3) of GN. No. 97/2005.

- Slicing of tenders is only allowed under Regulation 50(1) of GN. No. 97/2005 for homogeneous (identical) lots therefore not applicable to the tender in dispute. This is usually done in large projects such as construction of housing estates or road works. Furthermore, Section 45(d) of the Act emphasises that splitting of tenders should not be used to defeat appropriate procurement method. The said Section reads as follows:

  "A procuring entity shall plan its procurement in a rational manner and in particular shall:-

    (d) **avoid splitting of procurement to defeat the use of appropriate procurement methods unless such splitting is to enable wider participation of local consultants, suppliers or contractors in which case**

the Authority shall determine such an undertaking." (Emphasis added)

- The Act accords procuring entities the mandate to decide on which methodology to employ provided they are within the confines of the law. The Respondent's option was therefore in accordance with the law.

Having summarized arguments by parties on this particular point, the Authority analyzed them in the light of the applicable law and the Tender Document. The Authority revisited some of the provisions relied upon by parties starting with Clauses 3.1 and 4.3 of the ITB which read as follows:

"3.1 A Bidder may be a natural person, private Entity, government-owned Entity, subject to ITB sub-Clause 3.4 or any combination of them with a formal intent to enter into an agreement or under an existing agreement in the form of a joint venture, consortium, or association, unless

otherwise specified in the **Bid Data Sheet**, all parties shall be jointly and severally liable."

"4.3 A firm, if acting in the capacity of subcontractor in any bid, may participate in more than one bid but only in that capacity."

In their Written Replies the Respondent stated that, the tender invitation allowed joint ventures, consortiums, or associations to participate in the tender. The Authority noted that, the modifications made in the BDS under Items 3, 8, and 9 suggest that neither joint ventures nor consortiums were allowed as the said items made specific references to **'associations'** only. However, the Authority's observation is not oblivious to the Form of Qualification Information, Bid Security (Bank Guarantee) and the Form of Bid Security (Bid Bond) which make reference to '**joint ventures'** only. Since, Bid Data Sheets are meant to customize the procurement, they are considered to take precedence over the provisions contained in the Form of Qualification Information, Bid

Security (Bank Guarantee) and the Form of Bid Security (Bid Bond).

In their submissions, the Appellant claimed that the Respondent's choice of the option to invite building contractors in association with sub-contractors was discriminatory. The Authority shares the Appellant's concerns on the disadvantages of the option employed by the Respondent as they represent what is actually happening on the ground. However, the said method is commonly practised whereby the Head Contractor enters into contract with sub-contractors. The said practice is recognized and provided for under Regulation 98 of GN. No. 97/2005 which provides as follows:

"Reg. 98(1) General conditions of Contract may give the contract supervisor the right to decide the manner in which the works or services shall be executed or provided where a provisional or prime cost sum has been provided for in schedule or contract.

(2) When work is to be carried out as a selected subcontract and the value is such that competitive tenders would be obtained, tenders shall close with appropriate tender board which approved the head contract regardless of the value involved and regardless of whether it is the supplier, service provider, contractor or the procuring entity which calls tenders.

(3) Tenders shall be invited in the name of the head contractor or service provider who may be consulted in regard to any special arrangements he may wish to have incorporated in tendering documents for the subcontract.

(4) Acting on recommendation of the contract supervisor, standard tender board procedures and approval actions are to follow, prior to the contract supervisor directing acceptance of the approved tender.

(5) The tender selected by the procuring entity is first to be referred to the head supplier, contractor or service provider for his perusal before instructions to accept it as a sub contract are issued.

(6) Tenders for provisional sums must not be invited prior to the main contract being let." (Emphasis supplied)

With regard to the Appellant's argument that, since the Head Contractors are the ones who filled in the BOQs irrespective of the specializations while they are not registered in those other disciplines, apart from building works, contravened Section 46(2) of the Act which states as follows;

> "Local suppliers, contractors or consultants wishing to participate in any procurement proceeding shall satisfy all relevant requirements for registration with appropriate current professional statutory bodies in Tanzania."

The Authority is of the view that, since Item 9 of the BDS compels the tenderers and their respective sub-contractors to submit documents showing their eligibility and the fact that the said documents would be subjected to evaluation, means the tender may have been submitted by the Head Contractor in association with the sub-contractor. This position is further cemented by Item 8 of the BDS which states categorically that,

> **"**Other information or materials required to be completed and submitted by bidders **are letters of association with registered Sub contractors in Class one for Electrical, Air conditioning and Lift installations. Disqualification of any associate during bids evaluation shall automatically lead to the disqualification of the Bidder."**(Emphasis added**)**

Based on the above quoted provision, the Authority is of the firm view that, the Appellant's contention is unfounded.

The Authority also considered the Appellant's contention that, the Tender Document contained unacceptable conditions, with respect to the inclusion of Item 9 of the BDS which modified Clause 12.5(a) of the ITB. The said provisions state as follows:

"**ITB 12.5** To qualify for award of the Contract, Bidders shall meet the following minimum qualifying criteria:-

(a) Annual volume of construction work over a period and of at least the amount specified in the Bid Data Sheet."

"**BDS 9.** The minimum required <u>average</u> annual volume of construction work extracted from the audited accounts for the successful Bidder for the last five years (2005 – 2009) shall be Tshs. 10,000,000,000.00 (Tanzania Shillings Ten Billion Only)."

The Authority concurs with the Respondent and PPRA that, the disputed requirement is intended to partly ascertain the bidder's financial resources and experience

to execute the contract satisfactorily. Hence, it actually implements Regulation 14(1)(a) of GN. No. 97/2005 which lists financial resources and experience amongst the qualification criteria which bidders ought to possess. The said provision states as follows:

> "**Reg. 14(1) To qualify to participate in procurement or disposal proceedings, suppliers, contractors, service providers or asset buyers shall meet the following criteria**:
>
> (a) **That they possess the necessary** professional and technical qualifications, professional and technical competence, **financial resources**, equipment and other physical facilities, **managerial capability, reliability, experience and reputation, and the personnel to perform the procurement or disposal contract**; (Emphasis added)

The above provision is further complimented by the pre-qualification and post-qualification criteria under Regulations 15 and 94 of GN. No. 97/2005 which have similar requirements.

In view of the above findings, the Authority's conclusion is that the Tender Document did not discriminate any contractor from participating in the tender process.

3.0 Whether the omission of air conditioning drawings in the Tender Document contravened the law, and if so, whether that omission was fatal to the tender process

In its endeavour to resolve this issue, the Authority reviewed submissions by parties on this particular point vis-à-vis the Tender Document and the applicable law. To start with, the Authority revisited the Appellant's contention that the Tender Document did not include the drawings for air conditioning works contrary to Regulation 83(1)(c) of GN. No.97/2005. The Appellant further submitted that, having noticed that the said

drawings were missing in the Tender Document, they sought for clarification from the Respondent on 6th and 14th September, 2010, respectively. It was not until the Appellant had sought for administrative review on 22nd September, 2010 that the Respondent replied to their letters on 23rd September, 2010. However, the said reply did not address the issue of the missing drawings at all. The Appellant further stated that, they did not receive the Respondent's letter which was allegedly circulated to all tenderers informing them that the drawings could be inspected at the Respondent's office.

In reply thereof, the Respondent submitted that, some of the designs and drawings were incorporated in the Tender Document. However, given the bulkiness of the drawings for the project, other drawings were placed in the Respondent's office for viewing by the tenderers. The Respondent stated further that, during the Pre-bid meeting, the prospective tenderers did not make any inquiries on drawings. Furthermore, having received written inquiry from one of the tenderers, namely, M/s Tanzania Buildings Works Ltd on the said drawings, they

circulated a letter to all tenderers informing them that the said drawings could be viewed at the Project Consultant's office. However, the said letter was not received by the Appellant. Thus, the Authority requested the Respondent to produce evidence to substantiate that the said letter was actually sent to the Appellant, the former promised to submit copy of the said letter as well as the dispatch book which was signed by the Appellant.

Having summarized the arguments by parties, the Authority proceeded to analyze them in order to ascertain their validity. To start with, the Authority revisited Regulations 83(1) (c) and 98(7) of GN. No. 97/2005 which were relied upon by the Appellant as reproduced herein below:

"Reg. 83(1) The solicitation documents shall include instructions to tenderers with at a minimum, the following:

(c) The nature and required technical and quality characteristics, in conformity with

Regulation 22 of the goods, works, or services to be procured, including, but not limited to, technical specifications, plans, **drawings** and designs as appropriate; the quantity of the goods, any incidental services to be performed;…" (Emphasis added)

"Reg. 98(7) Except for the specific approval not given in writing by the government architect, **tenders for building projects shall not be invited unless drawings and specifications for all building services subcontracts are complete and firm estimates of costs have been prepared**." (Emphasis supplied)

Based on the above quoted provisions, it is not disputed that drawings form an essential part of the Tender Document and it is a mandatory requirement in tenders relating to works and building works in particular. Most importantly, Regulation 98(7) requires drawings in projects relating to works, such as the tender under

Appeal to be prepared prior to the invitation of tender. That said, the Authority examined the issue in dispute, to wit, whether or not the information that drawings could be viewed at the Respondent's office was communicated to the Appellant. The Authority observes that, during the hearing the Respondent promised to submit a copy of the letter circulated to all tenderers, the Appellant inclusive, the dispatch signed by the Appellant as proof of receipt thereof and the minutes of the Pre-bid meeting. The Respondent only submitted the minutes of the Pre-bid meeting. Therefore, the Authority is inclined to accept the Appellant's submission that the said information was not relayed to them. In addition no proof was availed to the Authority to substantiate the existence of the air conditioning drawings. Moreover, the fact that one of the tenderers had inquired from the Respondent on the said drawings prior to the submission deadline as conceded by the Respondent during the hearing indicates that the said drawings were not in place when the Tender Document was issued.

The Authority also considered the Appellant's submissions on the discrepancies in the BOQ relating to installation of air conditioning and ventilation system as they have been summarized under the Appellant's submissions in this decision. In reply thereof, the Respondent stated that, in any building project discrepancies are normal and that for every discipline in a project there is a consultant supervising the works. The Authority was not convinced with the Respondent's replies since they did not address the issue of the financial implications arising from the cited discrepancies which could adversely affect execution of this tender. In view of the above, the Authority concurs with the Appellant that, the absence of drawings contributed to the uncalled for discrepancies observed in the BOQ.

The Authority also wishes to remind the Appellant that Pre-bid meetings are, *inter alia*, intended to resolve such omissions in the Tender Document. Even though tenderers are not compelled to attend such meetings, they are of benefit to both the tenderer and the Procuring entity , in that, they provide an opportunity for

them to clarify matters while the procuring entity is also alerted on any shortcomings that are in the tender document and the procurement process in general.

Accordingly, the Authority's conclusion on the third issue is that, the Tender Document did not include the air conditioning drawings and such an omission was fatal to the tender process.

4.0 To what reliefs, if any, are the parties entitled to

Having resolved the issues in dispute, the Authority considered the prayers by parties as follows:

4.1 Appellant's prayers:

The Appellant requested the Authority to order the Respondent to re-start the tender process in observance of the law. The Authority grants this prayer as the Tender Document was incomplete. With regard to the Appellant's

prayer for compensation, the Authority is of the view that, the Appellant is entitled to some compensation and therefore grants this prayer by ordering the Respondent to compensate the former a sum of **Tshs. 1,130,000/=** as per the following breakdown:

- Administrative review fee – PPRA Tshs. 10,000/=
- Appeal filing fees – Tshs. 120,000/=
- Legal consultation fees – Tshs. 1,000,000/=

4.2 Respondent's prayer:

The Authority considered the Respondent's prayer that, the Appeal be dismissed with costs and rejects this prayer as the Appeal has some merit.

Other matters that caught the attention of the Authority

The Authority observes that, although the grounds for this Appeal are confined to the provisions in the Tender

Document, having gone through the documents availed to it, including the Evaluation Report and minutes of the Tender Board meetings, the following shortfalls were detected:

(a) Item 5.2.2 of the Evaluation Report reads as follows:

"Bids were checked to ensure that:

- bidders are from **eligible source countries**;
- in case of a joint venture, all partners of the Joint Venture are from **eligible source countries**;"

The Respondent could not explain which specific countries were intended to be covered by the said phrase. The Authority noted that, this was amongst the evaluation criteria used while it is not stated in the Tender Document contrary to Regulation 90(4) of GN. No. 97/2005 which provides as follows:

"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 supplied)

(b) The Evaluation Report does not show the basis of the Evaluators using "YES" or "NO" under Table 7 of the Report. Need for transparency required them to indicate the basis for their "YES" or "NO". Accordingly, the Report lacked transparency which is amongst the pillars of the procurement law pursuant to Section 43 of the Act.

(c) During correction of arithmetic errors, the Evaluation Committee made corrections to the price quoted by the Successful Tenderer, namely, Group Six International Ltd resulting in an increase from **Tshs. 11,935,649,594/=** to **Tshs. 12,466,722,993/=**; a difference of **Tshs.**

531,073,399/=. The basis of the said adjustment is not stated in the Evaluation Report. Moreover, the letter which communicated the adjusted price to the said tenderer was also silent as to the rationale behind the difference.

(d) Item 23 of the BDS states that, **"Post-qualification 'may' be undertaken"** contrary to Section 48(1) of the Act which requires Post-qualification to be undertaken where Pre-qualification was not carried out. During the hearing it was evident that, both Pre-qualification and Post-qualification were not done. However, the Authority noted that, the criteria for Post-qualification were checked as part of detailed evaluation for eight tenderers who were substantially responsive contrary to the requirements of Clause 32.2 of the ITB which requires the procuring entity to determine to its satisfaction whether or not **the bidder** that is selected as having submitted the lowest evaluated

responsive bid **is qualified to perform the contract satisfactorily**. The position of the ITB is consistent with Regulations 94(1) and 94(5) of GN. No. 97/2005 which provides as follows:

> "**94(1) where appropriate Post-qualification may be undertaken to determine whether the lowest evaluated tender has the capability and resources to carry out the contract**" (Emphasis supplied)
>
> "**94(5)** Post-qualification shall be undertaken **for the lowest tenderer only"** (Emphasis supplied)**.**

(e) The letter of acceptance to the Successful Tenderer was copied to all unsuccessful tenderers before the performance guarantee was furnished contrary to Clause 39.3 of the ITB. This means that where the Successful Tenderer was unable to submit the required performance guarantee,

the procuring entity would be unable to opt for the next lowest evaluated tenderer pursuant to Regulation 97(9) of GN. No 97/2005 which states as follows:

> "**If the supplier service provider, contractor or assets buyer whose tender has been accepted** fails to sign a written procurement or disposal contract if required to do so, **or fails to provide any security for the performance of the contract,** the procuring entity shall, on the prior written approval of the appropriate tender board**, select a successful tender from among the remaining tenders that are in force,** subject to the right of the procuring entity, to reject all remaining tenders**.**" (Emphasis added)

Having considered all facts and evidence, the Authority concludes that, the Appeal filed by the Appellant has some merit.

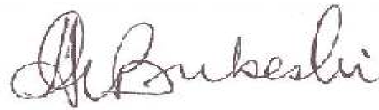
On the basis of the aforesaid findings, the Authority partly upholds the Appeal and orders the Respondent to do the following:

- **Re-start the tender process in observance with the law; and**

- **Compensate the Appellant a sum of Tshs. 1,130,000/= only.**

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 22nd March, 2011.



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JUDGE (rtd) A. BUBESHI
CHAIRPERSON

MEMBERS:

1. HON. V.K. MWAMBALASWA (MP)…......................................

2. MR. M. R. NABURI ……………………………………………………………

3. MR. K. M. MSITA ……………………………………………………………

4. MRS. N.S.N. INYANGETE ……………………………………………….