IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY

APPEAL CASE NO. 102 OF 2011

BETWEEN

M/S COOL CARE SERVICES LTD.....1ST APPELLANT

M/S EMEC ENGINEERING LTD.....2ND APPELLANT

AND

REGISTRATION INSOLVENCY AND TRUSTEESHIP AGENCY .....RESPONDENT

DECISION

CORAM:

1. Hon. A.G. Bubeshi, J. (rtd) – Chairperson
2. Mr. F.T. Marmo - Member
3. Mr. K.M. Msita - Member
4. Ms. E.J. Manyesha - Member
5. Ms. B.G. Malambugi - Secretary

SECRETARIAT:

Ms. E.V.A. Nyagawa – Principal Legal Officer

FOR THE 1ST APPELLANT:

Eng. Andrew Mwaisemba – Managing Director

FOR THE 2ND APPELLANT:

Mr. Ricco Shoo – Projects Coordinator

FOR THE RESPONDENT

1. Mr. Hussein Meena – Procurement Manager
2. Ms. Patricia Mpuya – State Attorney
3. Mr. Fanuel Muhoza – State Attorney
4. Mr. Wilfred Saitoria – UNDI Consultants Group Ltd
5. Qs. Joseph A. Karwima – KAMU Construction Cost Engineering Centre
6. Mr. Jonathan Mwaifuge – Supplies Officer

This decision was scheduled for delivery today 29th June, 2011 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 1st Appellant")** against the **REGISTRATION**

INSOLVENCY AND TRUSTEESHIP AGENCY commonly known by its acronym **RITA** (hereinafter to be referred to as **"the Respondent")**. Following notification of this Appeal to other tenderers who participated in the disputed tender pursuant to Section 83(1) and (2) of the Public Procurement Act, Cap. 410 (hereinafter to be referred to as **"the Act"**), **M/s EMEC Engineering Ltd** opted to join in the proceedings (hereinafter to be referred to as the **"2nd Appellant"**).

The said Appeal is in respect of the Pre-qualification of Contractors for Tender No. AE/057/2009-2010/HQ/W/08 for the Construction of the Proposed RITA Tower (hereinafter to be referred to as **"the Tender"**).

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

The Respondent had entered into joint venture with the National Social Security Fund (N.S.S.F) for the Construction of a 27-Storey Tower for RITA along Makunganya/Simu Street in Dar es Salaam; whereby N.S.S.F was mandated to manage the project as the client.

The Respondent invited contractors registered by the Contractors Registration Board (hereinafter to be referred to as **"CRB"**) in class one to apply for pre-qualification for the tender *vide* Tanzania Daima and Mtanzania newspapers dated 5th October, 2009; as well as Daily News and The Guardian newspapers of 7th October, 2009.

The advertisement attracted 20 applicants of which 13 were building contractors and the remaining seven were specialist contractors. The tender opening of the applications for pre-qualification took place on 18th November, 2009, whereby the read out applicants were as listed herein below:

S/ No.	Name of the Applicant	Remarks
1	M/s China Civil Engineering Construction Corporation	Main works
2	M/s Beijing Construction Engineering Company Ltd.	Main works
3	M/s ESTIM Construction Company Ltd	Main works
4	M/s LongXing International Ltd.	Main works
5	M/s Hainan International Ltd.	Main works
6	M/s DERM Electrics Tz. Ltd	Service works
7	M/s East African Ltd (SEC)	Main works
8	M/s Cool Care Services Ltd.	Service works
9	M/s United Builders	Main works
10	M/s OTIS East African Elevators Company Ltd.	Service works
11	M/s NOREMCO	Main works
12	M/s EMEC Engineering Ltd.	Service works
13	M/s TECHNO IMAGE Ltd.	Service works
14	M/s African Real Estate Co. Ltd	Main works
15	M/s Tanzania Building Works Ltd	Main works
16	M/s M.A. Kharafi & Sons Co.	Main works
17	M/s NANDRA Eng. & Construction Company Ltd.	Main works
18	M/s China Railways Gieng Chang Tanzania	Main works
19	M/s CATIC International Eng. Tz. Ltd.	Main works
20	M/s BERKLEY Electrical Ltd.	Service works

On 18th May, 2010, the Respondent *vide* letter referenced BD27/249/01/111, requested all applicants to confirm in writing if they were still interested to be pre-qualified for the tender. The Appellants submitted their confirmation to the Respondent within the prescribed time.

During evaluation of the applications for pre-qualification, the Project Quantity Surveyor (hereinafter to be referred to as **"the Consultant"**) advised the Respondent to evaluate the applications submitted by building contractors only and not specialist contractors as these would be procured later. Acting on the said advice, the Evaluation Committee evaluated the 13 applications submitted by building contractors whereby only five of them were short-listed as follows:

- M/s Estim Construction Co. Ltd;
- M/s Beijing Construction Engineering Group Co. Ltd;
- M/s China Railway Jianchang Engineering Co. (T) Ltd;
- M/s M.A Kharafi & Sons; and
- M/s NOREMCO.

The Evaluation Report on the Pre-qualification was approved by the Tender Board on 24th September,

2010, and directed that the shortlisted firms be invited to submit tenders.

On 15th October, 2010, the Tender Board approved the Tender Document for the proposed Construction of RITA Towers.

The deadline for submission of the tenders was set for 23rd November, 2010. Prior to the opening date two tenderers,namely, M/s NOREMCO and M/s M.A Kharafi & Sons, submitted letters of withdrawal from the tender process, while the tenders submitted by the other three tenderers were opened.

On 24th November 2010, the Appellant sent a letter referenced CCSL/TA/46/10 to the Respondent seeking for the outcome of the pre-qualification proceedings but did not get any response. A reminder letter referenced CCSL/TA/53/10 dated 20th December, 2010, was sent to the Respondent and copied to the Public Procurement Regulatory

Authority (hereinafter to be referred to as **"PPRA"**). Both letters were not replied to.

After the tender opening, an Evaluation Committee was formed consisting of five members, from KAMU Cost Engineering Centre, RITA, UNDI & Co. Ltd and two from NSSF. The three tenders were evaluated and were all found to be substantially responsive and qualified for execution of the works. The tenderers' corrected prices were compared to the Consultant's Estimates of Tshs. 37.5 billion and thereafter ranked as follows:

Tenderer's Name	Corrected Price Tshs. (VAT Inclusive)	Ranking
M/s Estim Construction Co. Ltd	36,425,701,889.02 (2.86% below the Consultants Estimates)	2
M/s China Railway Jianchang Engineering Co. (T) Ltd	35,862,550,578.57 (4.37% below the Consultant's Estimates)	1
M/s Beijing Construction Engineering Group Co. Ltd	39,416,115,060.00 (6.44% above the Consultant's Estimates)	3

Based on the above ranking, the Evaluation Committee recommended the award of the tender to M/s China Railway Jianchang Engineering Co. (T) Ltd at a contract price of Tshs. 35,862,550,578.57 (VAT inclusive) at a completion period of 30 months.

On 30th November, 2010, the Respondent communicated the award of the tender to M/s China Railway Jianchang Engineering Co. (T) Ltd (hereinafter to be referred to as **"the Successful Tenderer"**).

Being aggrieved by the Respondent's failure to respond to their letters inquiring on the pre-qualification results, the Appellant submitted an application for review to the Accounting Officer *vide* letter referenced CCSL/TA/12/11 dated 23rd February, 2011. The said letter was copied to PPRA.

On 8th March, 2011, the Respondent *vide* letter referenced BD27/249/02/36 informed PPRA, among other things, that during the evaluation of the applications for pre-qualification they were advised

by their Consultant not to evaluate specialist contractors as they would be procured locally. They also conceded that, there was an oversight, as they did not notify the unsuccessful applicants, including the 1st Appellant, on the pre-qualification results.

The Respondent vide letter referenced BD27/249/02/37 dated 9th March, 2011, communicated the pre-qualification results to unsuccessful applicants.

On 21st March, 2011, the Appellant lodged the Appeal to the Public Procurement Appeals Authority (hereinafter to be referred to as **"the Authority"**).

SUBMISSIONS BY THE 1ST APPELLANT

The 1st Appellants' arguments as deduced from 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 applied for pre-qualification for the disputed tender whereby the applications were opened on 18th November, 2009.

That, having waited for six months without hearing from the Respondent, on 24th November, 2010, vide letter referenced CCSL/TA/46/10, inquired on the pre-qualification results. They received no response from the Respondent.

That, on 20th December, 2010, they sent a reminder which was also copied to PPRA. In the said letter, among other things, they reminded the Respondent that they were obliged to communicate the pre-qualification results to the applicants pursuant to Regulation 15(19) and (21) of GN. No. 97/2005. Again no response was forthcoming.

That, having received no response from the Respondent, the Appellant submitted an application for administrative review on 23rd February, 2011, which was also copied to PPRA.

That, on 14th March, 2011, they received a copy of the Respondent's letter to PPRA, wherein the former stated that, the Consultant had advised them not to evaluate the applicants for specialist works as they would be employed as domestic contractors.

That, on the same date they received another letter from the Respondent referenced BD27/249/02/37 dated 8th March, 2011, which was addressed to all applicants. The said letter informed them that, their application was not successful. The letter which is quoted in part stated as follows:

"please be informed that the exercise for pre-qualification of Contractors for RITA was completed. We regret to inform you that your organization/company was not among the successful applications."

According to the 1st Appellant, the above quoted information was contradictory to that contained in the Respondent's letter to PPRA.

That, they recently visited the site of the project and found that the works have started, which means the contract had already entered into force. Moreover, a sign board found at the site indicated, amongst others, that M/s Unicool (East Africa) Co. Ltd was the contractor for HVAC (Air Conditioning) while M/s Tan Pile Ltd was the contractor for piling works. The said contractors did not apply for pre-qualification as their names were not amongst those read out during the opening of the applications on 18th November, 2009.

That, up to the time when the Appeal was lodged, the 1st Appellant was yet to receive any response on their application for administration review.

That, the 1st Appellant believes that undue influence was exerted on the Respondent's officers or Tender Board Members by the Consultant so as to gain advantage in the procurement in dispute contrary to Section 87(1)(d) of the Act.

That, the Respondent's officers or Members of the Tender Board colluded to favour the contractors mentioned herein above contrary to Section 87(1)(e) of the Act.

In view of the above, they requested the Authority to order the Respondent to do the following:

(i) Cancel all contracts with the above mentioned contractors.
(ii) To re-evaluate all applications for subcontractors works for which nominated subcontracts whose applications were opened on 18th November, 2009, and pre-qualify those who will participate in the tender.
(iii) Refer the matter to competent authorities for legal action against those who committed offences under Section 87(1)(d) and (e) of the Act.
(iv) Compensate the Appellant for the cost of filing this Appeal.

In addition thereto, the Appellant requested the Authority to take any other action as it deems necessary.

SUBMISSIONS BY THE 2ND APPELLANT

The 2nd Appellant's arguments as deduced from 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, in essence they support the submissions made by the 1st Appellant, save for the award of contracts to specialist contractors who did not participate in the pre-qualification process. This is because M/s Techno Image Ltd who was awarded the contract for security and telecommunications took part in the Pre-qualification process.

That, they participated in the pre-qualification of contractors for the tender under Appeal whereby

their applications were for both telecommunications and electrical works.

That, they received the Respondent's letter which required them to confirm whether they were still interested to be pre-qualified for the tender. They submitted the said confirmation letter on 20th May, 2010.

That, on 1st December, 2010, they inquired from the Respondent on the pre-qualification results, vide letter referenced EMEC/RITA/301/2010. They never received any feedback.

Accordingly, they requested the Authority to order the Respondent to re-evaluate all applications afresh in observance of the law, so that they can pre-qualify those who will participate in the tender process. Furthermore, they requested for compensation for the appeal filing fees.

THE RESPONDENT'S REPLIES

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

During the hearing, the Respondent raised a Preliminary Objection, to wit, the Appeal was time barred as the 1st Appellant did not observe the requirements of Rule 6(1) of the Public Procurement Appeals, Rules, GN. No. 205 of 2005 (hereinafter to be referred to as **"Appeals Rules"**).

According to the said Rule, the Appellant was required to lodge a Notice of Intention to Appeal within seven days of becoming aware of the cause of action. In their submissions the 1st Appellant conceded to have received the letter of notification of pre-qualification results on 14th March, 2011. The Respondent argued that they should have lodged the said notice within seven days from that date. Since

the Appeal was filed on 22nd March, 2011, which was not within the required seven days, the Appeal is therefore time barred.

Without prejudice to the above, the Respondent went on to submit on the merits as follows:

That, they were obliged to notify unsuccessful applicants, the Appellant inclusive, within one week of obtaining the required approvals. They further apologized for that omission.

That, the decision to opt for domestic subcontracting arrangement was advised by the Consultant and it was in line with Sections 45(b) and (c) and 58(2) of the Act as it was intended "to provide an efficient, cost effective and feasible means to procure the works". This decision was communicated to all bidders vide the invitation to tender dated 20th October, 2010.

That, the piling work was measured as part of the main contractor's work. The appearance of the piling specialist therefore on the sign board was an internal arrangement of the main contractor.

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

ANALYSIS BY THE AUTHORITY

Having gone through the documents submitted and having heard the oral submissions from parties, the Authority is of the view that, this Appeal is based on pre-qualification process and therefore its analysis will be confined to that particular stage. That said, the Authority identified the issues in dispute to be as follows:

- **Whether the Appeal is time barred;**
- **Whether the 1st and 2nd Appellants were unfairly disqualified**
- **Whether undue influence and collusion were employed in the tender process; and**

- **To what reliefs, if any, are the Appellants entitled to.**

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

1. Whether the Appeal is time barred

In order to resolve this issue, the Authority revisited submissions by the Respondent including Rule 6(1) of the Appeals Rules which was relied upon by the Respondent as well as replies by the 1st Appellant on this particular point. The said Rule 6(1) of the Appeals Rules is reproduced hereunder:

"A person who is dissatisfied with the matter or decision giving rise to a complaint or dispute **may give notice of intention to appeal within seven days** from the date when he became aware of the matter or decision." (Emphasis supplied)

In their submissions the Respondent contended that, the 1st Appellant was required to file a Notice of Intention to Appeal within 7 days pursuant to Rule 6(1) of the Appeals Rules. They cited paragraph 2)(g) of the 1st Appellant's Statement of Appeal which indicated that the Respondent's notification of pre-qualification results dated 9th March, 2011, was received by the 1st Appellant on 14th March, 2011. The Respondent therefore argued that, the 1st Appellant was required to lodge this Appeal within seven days from the date they became aware that their application was unsuccessful. That is to say, the time limitation started to run on 14th March, 2011, and expired on 20th March, 2011. However, the Appeal was lodged on 22nd March, 2011 when the said period had already expired. Hence, the Appeal was lodged out of time.

In reply thereof, the 1st Appellant stated that, the Respondent's contention was unfounded as the law required them to submit their complaints to PPRA prior to lodging an appeal to this Authority. They

therefore concluded that, they observed the procedures provided for under the Act.

Having revisited submissions by parties on this point, the Authority analyzed them in order to ascertain their validity in light of Rule 6(1) of the Appeals Rules which was cited by the Respondent. The Authority observes that, the above quoted Rule is not mandatory but rather discretionary as the catch word used is **"may"** and not **"shall"**. This means an aggrieved person is at liberty whether to file a notice of intention to appeal or not. The Authority therefore is of the considered view that, since adherence to Rule 6(1) of GN. No. 205/2005 is optional, the 1st Appellant cannot be said to have contravened it.

The Authority is surprised that, although the dispute resolution mechanisms provided for under the Act are also reproduced in the Pre-qualification Document issued by the Respondent, it appears the Respondents themselves are not conversant with the said processes. The Authority therefore wishes to

enlighten the Respondent that, according to Clause 11 of the General Instruction to Applicants (hereinafter to be referred to as **"GITA"**) an applicant had a right to submit to the Accounting Officer an application for review within 28 days from the date when he became or should have become aware of the circumstances giving rise to the complaint or dispute.

According to the documents availed to this Authority, on 23rd February, 2011, the 1st Appellant vide letter referenced CCSL/TA/12/11 with a sub-title **"APPLICATION FOR REVIEW"**, submitted an application for review to the Respondent's Accounting Officer pursuant to Clause 11.3 of GITA. The Authority observes that, by virtue of that particular letter, the 1st Appellant had put into motion the dispute settlement machinery as per Clause 11 of GITA read together with Section 80(1) of the Act. The said Section 80(1) reads as follows:

"80(1) Complaints or disputes between procuring entities and suppliers, contractors or consultants which arise in respect of procurement proceedings and awards of contracts and which cannot be resolved by mutual agreement shall be reviewed and decided upon a written decision by the Accounting Officer, Chief Executive of a Procuring Entity, unless the procurement has been reviewed and approved by an approving authority, in which case that approving authority shall review and decide on the dispute and give reasons for its decision in writing."

Having received the 1st Appellant's application for review, the Accounting Officer was supposed to make a decision within 30 days pursuant to Clause 11.6 of GITA read together with Section 80(4) of the Act. However, before the expiry of the said 30 days, the Appellant noticed that the works had commenced

at the project site which implied that the tender they had complained about was already awarded.

The Authority observes that, according to Section 80(3) of the Act, which is in *pari materia* with Clause 11.5 of GITA, the Accounting Officer's mandate to entertain a complaint ends once the procurement contract enters into force. The said Clause 11.5 provides as follows:

> "**Clause 11.5 The head of a procuring entity shall not entertain a complaint or dispute or continue to do so after the procurement contract has entered into force**.

Furthermore, Section 82(2)(a) of the Act and Clause 11.15 of GITA, ousts the jurisdiction of the Accounting Officer and PPRA to handle complaints once a procurement contract enters into force. The said Clause 11.15 as well as Section 82(2)(a) read as follows:

"Clause 11.15 The Applicant not satisfied with the decision of the Public Procurement Regulatory Authority or **whose complaint cannot be entertained by the Head of the Procuring Entity or the Public Procurement Regulatory Authority shall appeal to the Public Procurement Appeals Authority (PPAA).**

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

a) **if the complaint or dispute cannot be entertained under section 80 or 81 because of entry into force of the procurement contract** and provided that the complaint or dispute is submitted within fourteen days from the date when supplier, contractor or

consultant submitting it became aware of the circumstances giving rise to the complaint or dispute or the time when supplier, contractor or consultant should have become aware of those circumstances." (Emphasis added)

The above quoted provisions entail that the Authority has sole original jurisdiction on complaints where a procurement contract has already entered into force. For purposes of clarity, the Authority reproduces Section 55(7) of the Act which stipulates as to when a procurement contract enters into force. The said sub-section provides as follows:

> **"S. 55(7) the procurement contract shall enter into force when a written acceptance of a tender has been communicated to the successful supplier, contractor or consultant"** (Emphasis added)

The Authority is of the considered view that, having visited the project site and learnt that the execution of the project had started, the 1st Appellant rightly lodged the Appeal to this Authority as that was sufficient proof that the contract had already entered into force by virtue of Section 55(7) of the Act.

In view of the above findings, the Authority is satisfied that, Rule 6(1) of the Appeals Rules is optional hence not relevant to the Appeal at hand. Furthermore, the 1st Appellant had observed the dispute settlement procedures provided for under the Act as well as the Pre-qualification Document. That said, the Authority concludes that the Appeal was lodged within time and therefore rejects the Respondent's Preliminary Objection.

2. Whether the 1st and 2nd Appellants were unfairly disqualified

The Authority observes that, for any procurement process to be lawful it has to satisfy all legal requirements provided for under the Act and as specified in the solicitation document. In order for the Authority to satisfy itself as to whether the disqualification of the Appellants was justified or not, it is important to review the pre-qualification process in an endeavour to ascertain if the legal requirements thereof were adhered to.

The Authority deems it necessary to point out at the outset that, the content of the Particular Instructions to Applicants (hereinafter to be referred to as **"PITA"**) which contains the General and Specific Contract Requirements were not numbered, hence making it difficult to make reference to them. However, since the PITA makes reference to the clauses in the GITA which they complement, amend or supplement, for avoidance of doubt, the Authority will refer to the GITA clauses as specified in the PITA.

To start with, the Authority revisited Regulation 15(5) of GN. No. 97/2005 which guides on the invitation to pre-qualify in the following words:

"An invitation to pre-qualify shall contain at the minimum, the following information:

(a) the name and address of the procuring entity;

(b) the nature and quantity and place of delivery of the goods to be supplied or the nature, quantity and location of the works to be effected or the nature of the services and the location where they are to be provided;

(c) the desired or required time for the supply of the goods or for the qualification of the works or the timetable for the provision of the services;

(d) the criteria and procedures to be used for evaluating the qualification of suppliers

or contractors in conformity with Regulation 14;

(e) a declaration which may not later be altered that contractors or suppliers may participate in the procurement proceedings regardless of nationality or declaration that participation is limited on the basis of nationality pursuant to Regulation 25 and 26 as the case may be;

(f) the price, currency and terms of payment for the pre-qualification documents;

(g) the language or languages in which the pre-qualification documents are available; and

(h) the place and deadline for the submission of application to prequalify."

The Authority observes that, the Respondent's invitation to pre-qualify did not comply fully with the above quoted Regulation for the following reasons:

(i) The advertisement did not provide adequate information on the nature of the project, as the only disclosure thereof is found in the title and paragraph 1 of the said advertisement, to wit, **"Construction of RITA Tower"**. The Authority observes further that, the information does not disclose the quantity of the works for the Project as per the requirements of sub-Regulation 5(b) of Regulation 15 of GN 97/2005 cited above.

(ii) The invitation was extended to contractors registered in class one with CRB. However, according to the Evaluation Report, Minutes of the Tender Board dated 24th September, 2010, as well as the Respondent's oral submissions, the invitation was intended for building contractors only. The Authority does not agree with the Respondent, in that, had they intended to restrict participation of the applicants to building contractors alone, the advertisement should have specified clearly that it was only

open to **"building contractors"** registered with CRB in class one.

(iii) The evaluation criteria and procedures to be used were not disclosed contrary to sub-Regulations 5(d) and (14) of Regulation 15 of GN. No. 97/2005.

Having reviewed the invitation for pre-qualification, the Authority noted that, the opening of the said applications took place on 18th November, 2009. However, there is no consistency on the number of applications received as indicated below:

- According to the list of applicants taken during the opening of the applications, which was availed by the Respondent to this Authority, the total number of applicants was 20.

- Minutes of the Tender Board Meeting dated 24th September, 2010, indicated that;

"A total of Twenty Two (22) applicants (sic) were received and opened..." (Emphasis added)

- Item 2.2 of the Evaluation Report on the Pre-qualification reads as follows:
  "A total of Twenty Two (23) applications were opened ..." (Emphasis supplied)

During the hearing, the Respondent conceded that the number of applicants appearing on the last two bullets above, were mere typographical errors, as the actual number thereof was only twenty. The Authority emphasizes that, procuring entities have a duty to keep proper records of the procurement process.

The Authority reviewed the Pre-qualification Document issued by the Respondent in order to ascertain if it adhered to Regulation 15(10) of GN. No. 97/2005 which provides for minimum information to be contained therein. The Authority

noted that, to a great extent, the said document met the requirements of the said provision.

Having reviewed the tender advertisement and the Pre-qualification Document, the Authority proceeded to examine the next stage in the pre-qualification process, to wit, evaluation of the applications. To start with, the Authority revisited the circumstances leading to the evaluation of the applications as it was at this stage that the decision not to evaluate the applications submitted by specialist contractors, including the Appellants, was made. In doing so, the Authority revisited submissions by parties on this point vis-à-vis the Pre-qualification Document and the applicable law.

The Authority noted that, the Respondent had three versions of what led to the decision not to evaluate specialist contractors as indicated hereunder:

- In their oral submissions they stated that, what triggered the said decision was as stated **under**

Item 2.2 of the Evaluation Report on the Pre-qualification, that:

"A total of Twenty two (23) (sic) applications were opened as per item 1.3 above. However, out of these applications, only thirteen (13) were building contractors. **The rest were specialist contractors for which the advert didn't request them to apply for the pre qualification**." (Emphasis supplied)

- During the hearing they submitted that, the invitation was open to all contractors as the law requires so and that, identification of eligible applicants thereof was to be done at a later stage.

- According to their oral submissions they conceded that, they invited all contractors registered in class one, but later changed their mind and confined themselves to building contractors. This position is supported by their

letter to PPRA dated 8th March, 2011, which was also copied to the 1st Appellant, wherein it stated:

> **"During evaluation process, the Consultants advised that the Building Contractors application (sic) should be evaluated and not the specialist contractors as they will be tendered domestically."** (Emphasis added)

In cementing their argument, the Respondent submitted that the decision not to evaluate specialist contractors was in line with Sections 45(b) and (c) and 58(2) of the Act which provides for, among other things, minimizing costs and obtaining value for money. They further stated that, specialist contractors were not invited, because the title of the tender speaks for itself as it read **"CONSTRUCTION OF RITA TOWER**"; meaning that it was open to building contractors only. Further, they cited Items

1.2, 4.3 and 4.4 of the PITA which provide as follows:

"1.2 **Scope of Work**: ... The works comprises construction of a framed, Twenty (20) storey structure with 3 number basements with to be built along Makunganya/Simu street on Plot No. 727/11 in the heart of Dar es Salaam City. The building covers about 740 M^2 on plan.

4.3, 4.4 Subcontracting by Applicant: Not Applicable"

In their submissions, the Appellants contended that, the invitation was extended to all contractors registered in class one with CRB, as it was not stated anywhere that, only building contractors were eligible to apply. Had the intention been to pre-qualify building contractors only, why did the Respondent write to all applicants on 18th May, 2010, requesting them to confirm if they were still interested to be pre-qualified.

The Authority concurs with the Appellants for the following reasons:

(i) The Respondent invited all contractors registered by CRB in class one but later changed their mind following the advice given to them by the Consultant. This position is supported by the following:

- Firstly, the Invitation to Pre-qualify which did not specify the discipline of contractors that were eligible to apply.
- Secondly, during the opening of the applications on 18th November, 2009, the Respondent became aware of who the applicants were but neither acted on the matter nor informed the Appellants that they were not invited.
- Thirdly, the Respondent's letter to PPRA dated 8th March, 2011, proves that, the decision to exclude specialist contractors in the evaluation process arose during the evaluation process.

- Fourthly, the Respondent's letter which requested the applicants, the Appellants inclusive, to confirm that they were still interested in the pre-qualification exercise, connotes that, by 18th May, 2010, when that letter was written the decision not to pre-qualify specialist contractors was not yet made. An extract of the said letter quoted herein below reads in part as follows:

"... We understand that your organization/company was among the bidders who submitted their applications for Pre-Qualification of Contractors for Construction of RITA Tower. However, the evaluation process was not done yet due to unavoidable reasons. In view of the above, your organization/company is requested to confirm in writing if you are still interested with mentioned Bid No. AE/057/2009-2010/HQ/W/08 for

Pre-Qualification of Construction of RITA Tower. The confirmation in writing should be submitted on/before 28th May, 2010 during working hours in order to facilitate the evaluation process of bids." (Emphasis supplied)

(ii) Much as the Authority may agree with the Respondent that, while the title as well as the scope of works of the project in the PITA indicates that it involves construction of RITA Tower; Clause 4.2 of Part B of PITA specifies, in addition thereto, the other works to be executed in the following words:

"Nominated Subcontracting

The Procuring Entity intend (sic) to execute the following specialized elements of the Works by Nominated Subcontractors:

Electrical Installations;

Mechanical Installations (HVAC);

Structural Glazing;

Plumbing and Fire Fighting;

Vertical Transportation;

Security System; and Telecommunication."

(Emphasis added)

The Authority observes that, the above quoted clause does not indicate the said specialist works would be procured after the main contractor had been contracted as it was submitted by the Respondent. The Authority is of the view that, specialist contractors submitted their applications knowing well that both a building contractor as well as those qualified for the specialised works listed under Clause 4.2 of Part B of PITA were to be pre-qualified for nomination, by the Respondent, for execution of the works. This is supported by Clause 4.2 of the GITA which states as follows:

"If so listed in the PITA, the Procuring Entity intends to execute certain specialized elements of the Works by **Nominated Subcontractors** in accordance with the GCC of the Bidding

documents, and for which **Provisional Sums** will be included in the BOQ for the subject Works."

The Authority is of the firm view that, the above quoted clause is amplified by Clause 4.2 of Part B of PITA wherein the list of specialist works to be executed is provided.

(iii) Clauses 4.3 and 4.4 of GITA provide for subcontracting as well as specialist subcontracting in the following words:

"4.3 If an Applicant intends to subcontract part of the Works such that the total of subcontracting is more than the percentage stated in the PITA of the Applicant's approximated Bid Price, that intention shall be stated in the Letter of Application, together with a tentative listing of the elements of the Works to be subcontracted.

4.4 If an Applicant intends to subcontract any highly specialized elements of the Works to specialist subcontractors, such elements and the proposed subcontractors shall be clearly identified, and the experience and capacity of the subcontractors shall be described in the relevant information Forms."

The Authority noted that, the above quoted provisions were amplified by Clauses 4.3 and 4.4 of Part B of PITA where it was stated that, "**Subcontracting by Applicant: Not Applicable**". During the hearing, the Members of the Authority asked the Respondent to clarify what it meant. They submitted that, it meant that applications by specialist contractors who were referred to as subcontractors was not allowed. Upon being asked further who was referred therein as an **'Applicant'**, they replied that it was a firm that submitted an application.

The Authority is of the firm view that, it was a misconception on the part of the Respondent, in that, Clause 4.3 was intended for the Applicant to clearly show intention to subcontract and the tentative elements to be subcontracted. Furthermore, Clause 4.4 was intended for the Applicant to show the elements of highly specialist works which were to be subcontracted and the names of the subcontractors. These requirements were not indeed applicable by virtue of Clause 4.2 of Part B of PITA which indicated the nature of subcontract works and that the subcontractors were to be nominated by the Respondent.

(iv) The Respondent's letter to PPRA dated 8th March, 2011, misrepresented the facts, as they informed the latter that they had invited building contractors. The said letter reads in part as follows:

"...RITA **invited building Contractors** registered by Contractors' Registration Board (CRB) in Class One to apply for pre-qualification ..." (Emphasis added)

(v) The fact that **seven** out of the 20 applicants were specialist contractors indicates that the invitation was misleading.

(vi) With regard to the Respondent's submission that the decision to exclude specialist contractors in the evaluation of applications for pre-qualification, was in line with Section 45(b) and (c) read together with Section 58(2) of the Act, the Authority deemed it necessary to reproduce the said provisions herein below:

"S. 45 A procuring entity shall plan its procurement in a rational manner and in particular shall:-

(b) aggregate its requirements wherever possible, both within the

procuring entity and between procuring entities, to obtain value for money and reduce procurement costs;

(c) make use of framework contracts wherever appropriate to provide an efficient, cost effective and flexible means to procure works, services or supplies that are required continuously or repeatedly over a set period of time;

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)

The Authority noted that, the Respondent argued that, their decision not to pre-qualify specialist contractors was intended to minimize

costs and achieve value for money pursuant to the above quoted provisions. The Authority does not concur with the Respondent, because Section 45 of the Act provides for **'Procurement Planning'** whereby procuring entities are cautioned that in preparing their plans they should take into consideration, among other things, what is envisaged under the cited Section 45(b) and (c) of the Act. Moreover, the law does not allow violation of the Act under the pretext of minimizing costs.

As for Section 58(2) of the Act, the Authority noted that, it provides for basic principles of procurement and disposal, which includes, value for money. It is the view of the Authority that, this principle cannot be applied in contravention of the other provisions of the same law. Furthermore, the Respondent did not explain how the decision not to pre-qualify specialist contractors would ensure value for money is achieved.

Based on the above analysis, the Authority is of the settled view that, it was wrong for the Respondent to exclude the applicants for specialist works in the evaluation process as they were neither excluded by the invitation to pre-qualification nor the Pre-qualification Document.

Having analysed the circumstances leading to the exclusion of specialist contractors in the evaluation process, the Authority reviewed the evaluation itself in order to ascertain whether it was conducted in accordance with the Pre-qualification Document as well as the applicable law.

To start with, the Authority revisited Regulation 15(14) of GN. No. 97/2005 which provides guidance on how applications for pre-qualification should be evaluated. The said provision reads:

"Reg. 15(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 supplied)

It has already been pointed out that, the Invitation for Pre-qualification neither provided for evaluation criteria nor procedures thereof. However, the criteria were contained in the GITA and PITA. Indeed, Item 2.3 of the Evaluation Report, listed the criteria which were employed in the evaluation of the applications.

The Authority has the following observations regarding the criteria used as well as the manner in which the evaluation was conducted:

- It was wrong for the Respondent to evaluate only 13 out of the 20 applicants who were all contractors registered by CRB in class one. It is however noted that the pre-qualification

document did not provide for separate criteria for building contractors on one hand and specialist contractors on the other hand; much as some of the criteria could have been the same .The embodied criteria are considered to be of generic nature and mostly meant for building contractors. Thus evaluation criteria relevant for specialist works should have equally been provided for in compliance with the law particularly sub regulation (14) of Regulation 15. view of this Authority that, all 20 applicants should have been evaluated as the invitation required contractors registered in class one irrespective of their disciplines.

- While the Respondent submitted that, the invitation was only extended to building contractors, one would have expected that the evaluation criteria would have included **"building contractor registered in class one"**. However, this criterion was used to exclude specialist contractors from the evaluation process. In other words, specialist

contractors were disqualified because they were not building contractors.

The Authority is of the firm view that, this criterion was neither provided for in the invitation for Pre-qualification nor in the Prequalification document and it was also not approved by the Tender Board contrary to sub-Regulations (5)(b) and (8) of Regulation 15 of GN. No. 97/2005. As already observed, the said criterion was proposed by the Consultant who also formed part of the Evaluation Committee.

- Clause 4.7 of the GITA wrongly required **'civil works contractors'** as it states that:

"The Applicant shall provide evidence that:

(a) **it has been actively engaged in the civil works construction business** for at least the period stated in the PITA immediately prior to the date of submission of applications, in the role of prime contractor,

management contractor, partner in a joint venture, or subcontractor, and

(b) that the Applicant has generated an average annual construction turnover during, the above period greater that (sic) the amount in the PITA.

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

In view of the above findings, the Authority is of the considered view that, evaluation of the pre-qualification applications was not properly done.

The Authority noted that, having shortlisted five applicants, the Tender Board approved them on 24th September, 2010. Regulation 15(21) of GN. No. 97/2005 provides for the period within which the

pre-qualification results shall be communicated to unsuccessful applicants, in the following words:

> **"Applicants who are not successful in the pre-qualification shall be accordingly informed, by the procuring entity, within one week after receipt of all the required approvals to the pre-qualification. Only suppliers, contractors, service providers or buyers that have been pre-qualified are entitled to participate further in the procurement or disposal proceedings."** (Emphasis added)

The Authority observes that, the Pre-qualification Document should have provided for a period similar or less than that stated in the above quoted Regulation. In the tender under Appeal, Clause 10.1 of the GITA required the period within which the pre-qualification results to be communicated to all applicants to be stated in the PITA. However, no such period was provided for in the PITA. Furthermore, the said results were communicated to

the 1st Appellant on 9th March, 2011, that is more than 5 five months after the pre-qualified applicants had been approved by the Tender Board. This was a clear contravention of the law.

The Authority is concerned that, the Respondent did not respond to the two letters from the 1st Appellant and one by the 2nd Appellant on the outcome of the pre-qualification process. Moreover, up to the time of the hearing of this Appeal, the 2nd Appellant was yet to receive the pre-qualification results.

The Authority also considered the content of the notification letter, which reads in part as follows:

> **"...Please be informed that the evaluation exercise for pre-qualification of Contractors for Construction of RITA Tower was completed. We regret to inform you that your organization/company was not among the successful applicants..."** (Emphasis added)

The Authority is of the firm view that, the content above quoted is misleading as it connotes that the 1st Appellant was amongst the applicants who were subjected to evaluation, which was not the case. The Authority observes that, the Respondent was duty bound to inform the Specialist Contractors, including the Appellants, what actually happened.

The Authority also considered the 1st Appellant's claim that, according to the sign board at the site of the project, specialized works were awarded to various specialist Contractors. The 1st Appellant further stated that, Air Conditioning works were awarded to M/s Unicool (East Africa) Co. Ltd who firstly, did not participate in the pre-qualification process and secondly, at that time it was only four days after they had been registered. Hence, they did not have the requisite experience.

The Respondent conceded that, having excluded specialist contractors from the evaluation of the pre-

qualification, in preparing the tender document they conferred powers to procure specialist contractors to the main contractor. Hence, M/s Unicool (East Africa) Co. Ltd and other specialist contractors were contracted for the said works by the main contractor. The Authority is of the view that, it was wrong for the Respondent to grant such powers to the main contractor while knowing that they had already invited specialist contractors for the same specialized works.

The Authority also considered the 1st Appellant's contention that, M/s Unicool (E.A.) Co. Ltd was registered four days before the Pre-qualification applications were opened on 18th November, 2009. Having liaised with the Contractors Registration Board (CRB), the Authority confirmed that, the said contractor was registered as a specialist contractor Class 1 in November, 2009, which means they did not possess the requisite experience.

With regard to the 1st Appellant's contention that M/s Tan Pile Ltd was awarded the tender for piling works without participating in the pre-qualification stage, the Authority observes that, that particular area of specialist works is not contained under Clause 4.2 of Part B of PITA. Furthermore, during the hearing, the 1st appellant retracted their statement on this point and therefore the Authority does not have the mandate to pursue it.

In view of the above findings, the Authority's conclusion on the second issue is that, the 1st and 2nd Appellants were unfairly disqualified.

3. Whether undue influence and collusion were employed in the tender process

In their submissions, the 1st Appellant contended that, their disqualification was caused by collusion between the Consultant and some of the Respondent's officials and that undue influence was exerted on the latter which led into the

decision not to evaluate specialist contractors. That, this decision was made for personal gain and as a result, some specialist contractors, such as, M/s Unicool (E.A.) Co. Ltd were awarded contracts while they did not take part in the pre-qualification process and did not have the requisite experience.

To cement their arguments, the 1st Appellant relied on Section 87(1)(d) and (e) of the Act which provide as follows:

"87(1) A person commits an offence who:-

(d) contrary to this Act, interferes with or exerts undue influence on any officer or employee of the Authority or procuring entity or member of tender board in the performance of his functions or in the exercise of his power under this Act;

(e) connives or colludes to commit a fraudulent act of (sic) corrupt act

defined in section 3;" (Emphasis supplied)

In addition thereto, the 1st Appellant alleged that, there was circumstantial evidence that, corrupt practices were employed in reaching the said decision. Upon been asked why they were alleging existence of corruption before this Authority instead of submitting such complaints to specific bodies mandated to deal with them, the 1st Appellant replied that, they had already reported the matter to the Prevention and Combating of Corruption Bureau (PCCB).

In reply thereof, both the Respondent and the Consultant's representative who attended the hearing as part of the former, refuted those allegations and stated that, the decision not to pre-qualify specialist contractors was not only done in good faith but also in observance of the law.

Having revisited the arguments by parties on this issue, the Authority observes that, offences established under Section 87 of this Act are not within the mandate of this Authority by virtue of Section 82(4) of the Act. The Authority has neither powers to convict an offender nor order imprisonment or payment of fine as the concluding part of Section 87 states clearly that:

> **" ... and on conviction is liable to a fine not exceeding five hundred thousand shillings or to imprisonment for a term not exceeding three years or to both such fine and imprisonment."** (Emphasis added)

With regard to the allegation of prevalence of corruption in the procurement process, the Authority is of the settled view that, it has no jurisdiction to determine the same.

In view of the above findings, the Authority's conclusion on the third issue is that, the issue

whether undue influence and collusion were employed in the tender process is rejected for want of jurisdiction.

4. To what reliefs, if any, is the Appellant entitled to

Having resolved the issues in dispute, the Authority revisited prayers by parties and observes as follows:

(a) Prayers by the Appellants:

The Authority considered the 1st and 2nd Appellants' request that the Respondent be ordered to pre-qualify and evaluate specialist contractors whose applications were opened on 18th November, 2009.
In view of the findings and conclusion made in the second issue, the Authority orders the Respondent to restart the pre-qualification process in respect of the **specialist works provided for under Clause 4.2 of Part B of PITA** in accordance with the law.

As regards the Appellant's prayer for compensation for the cost of filing this Appeal, the Authority grants this prayer and orders the Respondent to pay the Appellants a sum of **Tshs. 120,000/=** each being Appeal filing fees.

(b) Prayers by the Respondent

With regard to the Respondent's prayer that, the Appeal be dismissed with costs for lack of merit, the Authority is satisfied that the Appeal has merit and therefore rejects the said prayers in their entirety.

Other matters that caught the attention of this Authority.

(a) The Authority noted that, while Clause 1.2 of Part B of PITA states that the project involves construction of a 20-storey structure, the Minutes of the Tender Board dated 15th

October, 2010, indicate that it is a 27-storey structure.

(b) The list of the firms whose applications were opened on 18th November, 2009, indicates that there were 14 applicants for the main works as opposed to the 13 who were actually evaluated.

(c) During the hearing, the Respondent was requested to clarify what was meant by Item 1.5 of Part B of PITA which reads: **"Type of contract: The Public Procurement Regulatory Authority"**. In reply thereof, they said it was an oversight.

(d) The Minutes of the Tender Board meetings contained typographical errors and were neither properly numbered nor explicit. It should be noted that, accurate and comprehensive minutes are a critical tool for

record of decisions and legitimacy thereof by the appropriate tender organs.

(e) The Authority noted that, the Respondent neither replied to the 1st Appellant's letters nor explained the reasons for such conduct. The Authority observes that, such conduct is against the principles of Good Governance and depicts lack of civility on their part.

Having considered all facts and evidence, the Authority concludes that, the Respondent's decision not to evaluate specialist contractors, including the Appellants, was not proper at law.

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

(a) Restart the Prequalification Process of specialist contractors listed under Clause 4.2 of Part B of PITA, in observance of the law.

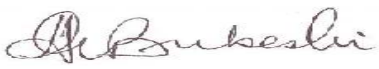
(b) Compensate the Appellants a total sum of Tshs. 240,000/= as per the following breakdown:

- **1st Appellant – Appeal Filing fees Tshs. 120,000/=**

- **2nd Appellant – Appeal Filing fees Tshs. 120,000/=.**

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

Decision delivered in the presence of the 1st Appellant and the Respondent this 29th June, 2011.



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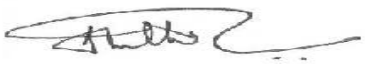
JUDGE (rtd) A. BUBESHI

CHAIRPERSON

MEMBERS:



1. MR. K.M. MSITA……

2. MR. F. T. MARMO……

3. MS. E. J. MANYESHA ……