IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY

APPEAL CASE NO. 103 OF 2011

BETWEEN

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

AND

PUBLIC SERVICE
PENSIONS FUND .....RESPONDENT

DECISION

CORAM:

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

SECRETARIAT:

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

FOR THE APPELLANT:

Eng. Andrew R. Mwaisemba – Managing Director

FOR THE RESPONDENT

1. Mr. Adam H. Mayingu – Ag. Director General,
2. Mr. Gabriel Silayo – Director : Projects & Investments
3. Mrs. Jalia Mayanja –Head :Procurement Management Unit
4. Mr. K. Kitwala – Legal Officer
5. Mr. Temba Msemo – Engineer
6. Eng. George H. Alliy – Project Engineer
7. Arch. Huba M. Nguluma – Project Architect
8. QS. Adonis M. Kamala – Consultant
9. Mr. Erasto Lyamuya – Project Consultant

This decision was scheduled for delivery today 8th July, 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 Appellant")** against the **PUBLIC SERVICE PENSIONS FUND** commonly known by its acronym **PSPF** (hereinafter to be referred to as **"the Respondent")**.

The said Appeal is in respect of the Pre-qualification for Construction of the Proposed PSPF Commercial Building - Tender No. PA/005/2010-11/W/03 (hereinafter to be referred to as **"the Tender"**)

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

On 31st May, 2010, the Respondent invited applications from class one building contractors registered by the Contractors Registration Board (hereinafter to be referred to as **"CRB"**) for pre-

qualification of the disputed tender vide the Daily news.

On the same day, the Appellant vide letter referenced CCSL/TA/15/10 submitted their application to the Respondent together with Tshs. 200,000/= for purchase of the Pre-qualification Document. However, neither the application nor the money were accepted by the Respondent as the invitation was said to be intended for building contractors only.

On 17th June, 2010, a coordination meeting attended by various technical experts from M/s TANconsult, M/s Electriplan, Ardhi University as well as PSPF was convened. The said meeting resolved, among other things, that subcontractors were to be procured as domestic sub-contractors by the main contractor and that the consultant would provide guidance by giving a list of names of recommended specialists from which the main contractors could select and include them as sub contractors in their bids.

Another Coordination meeting was held on 21st July, 2010, whereby the issue of subcontractors was also discussed and M/s Electriplan (T) Ltd (hereinafter to be referred to as **"the Consultant"**) was required to identify six firms from each discipline and submit a performance report for consideration by the client. Further that, the Tender Document was to include a list of the final selected sub-contractors from which, the main contractors would be required to pick their partners. In addition, all tenderers were to submit letters of association with their chosen domestic subcontractors.

On 22nd July, 2010, the Consultant vide letter referenced EP/PSPF/10/2010 invited seven air conditioning subcontractors, including the Appellant, to submit information, among other things, of their qualifications so that they could be considered for short-listing for the air conditioning subcontract. The said letter required the invitees to submit the said information within four days not later than Monday 26th July, 2010.

On 23rd July, 2010, the Appellant submitted the requested information to the Consultant, except for letters of recommendation which were not submitted due to the short notice. The documents submitted by the air conditioning subcontractors were opened on 26th July, 2010, whereby the following six out of the seven contractors submitted the required information:

- M/s Daikin Tanzania Ltd;
- M/s Electro Mechanic Agencies;
- M/s Ashrea Air Conditioning Co. Ltd;
- M/s REMCO (International) Ltd;
- M/s Berkeley Electrical Ltd; and
- M/s Cool Care Services Ltd.

The above listed contractors were evaluated by the Consultant whereby three of them, namely, M/s Berkeley Electrical Ltd, M/s REMCO (International) Ltd and M/s Ashrea Air Conditioning Co. Ltd were recommended to be pre-qualified. The other three contractors, including the Appellant, did not qualify

for short-listing for "**having undertaken a few projects of less comparable magnitude and nature to the envisaged works".**

The Appellant inquired on the pre-qualification results from the Consultant vide letter referenced CCSL/TA/41/10 dated 11th October, 2010.

On 11th November, 2010, the Appellant vide letter referenced CCSL/TA/47/10 informed the Respondent, amongst others that, their inquiries to the Consultant on the pre-qualification results were not responded to. They therefore requested information on the same from the Respondent.

On 6th December, 2010, a reminder letter was sent to the Respondent giving them 14 days within which to respond to their request failure of which would force the Appellant to seek administrative review. They further reminded the Respondent that, they were obliged to provide the pre-qualification results under Regulation 15(19) and (21) of GN. No. 97/2005. This letter was copied to the Public

Procurement Regulatory Authority (hereinafter to be referred to as **"PPRA"**).

On 15th December, 2010, the Respondent wrote to the Consultant vide letter referenced PB19/303/09/319, which was copied to the Appellant and received on 17th December, 2010,informing him that they had received the Appellant's letter dated 6th December, 2010, inquiring on the pre-qualification results. They further stated that, they could not respond to the said letter as they were not involved in the said pre-qualification process and therefore forwarded the Appellant's letter to the Consultant to provide a response.

Having received a copy of the Appellant's letter sent to them, on 16th December, 2010, PPRA wrote a letter to the Respondent with a copy to the Appellant, reiterating the obligation imposed on them to respond to the Appellant's request pursuant to Regulation 15(19) and (21) of GN. No. 97/2005.

On the same day, the Consultant responded vide letter referenced EP/P.392/04/2010 informing the Appellant that their application was not successful.

Having received the two letters referred to in the preceding paragraphs, on 20th December, 2010, the Appellant wrote to the Respondent's Accounting Officer, claiming that the information contained in the said two letters was contradictory. While the first letter stated that the Respondent had not done any pre-qualification, the second one confirmed that pre-qualification was conducted and that the Appellant was unsuccessful. Furthermore, the Appellant requested to be informed on the reasons for their disqualification, as well as the names of the successful firms.

Having received no feedback from the Respondent, on 24th February, 2011, the Appellant submitted an application for review to the Respondent's Accounting Officer.

On 8th March, 2011, the Respondent replied to the Appellant's request for review vide letter referenced PSPF/PB19/303/10/101 stating, inter alia, that:

- The Appellant had misconceived the invitation to pre-qualify to be meant for all class one contractors, including the sub-contractors.

- Under the project, specialist contractors were to be domestic sub-contractors. The Consultant was assigned to assist the main contractor in identifying capable sub-contractors.

- The Appellant was advised to contact the Consultant for further details.

Being dissatisfied with the Respondent's decision, the Appellant sought for review from PPRA on 18th March, 2011, vide letter referenced CCSL/TA/18/11.

PPRA responded to the Appellant's request on 19th April, 2011, vide letter referenced

PPRA/PA/005/"A"/55 advising them to lodge an appeal to the Public Procurement Appeals Authority (hereinafter to be referred to as **"the Authority"**) as the procurement contract had already entered into force.

On 28th April, 2011, the Appellant lodged an appeal to this Authority.

SUBMISSIONS BY THE 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, on 31st July, 2010, the Respondent invited applications for the prequalification of contractors from all contractors registered with CRB in class one.

That, on the same day they sent their Officer with an application letter accompanied with Tshs. 200,000/=

for the purchase of the Pre-qualification Document. At the Respondent offices, the said Officer was directed to meet a lady from the Respondent's Procurement Management Unit (hereinafter to be referred to as **"PMU"**). The latter was holding a list of names, and refused to accept the Appellant's letter and application fees on the grounds that their name was not on the said list. She further informed the Appellant's representative that, the advertisement had invited building contractors only and that other contractors would be invited later.

That, on 23rd July, 2010, they received a phone call from the Consultant, namely, M/s Electriplan (T) Ltd, requesting them to collect a letter from their office, which they did on the same day.

That, in the said letter dated 22nd July, 2010, the Consultant, on behalf of the Respondent, invited the Appellant to submit information on their qualifications to be considered for short-listing for air conditioning. The deadline for submission of the said information was set for Monday, 26th July, 2010; just

four days after receiving the notification. They submitted the information on 26th July 2010 which they were able to prepare within that short notice.

That, they wrote several letters to the Respondent including the one of 11th October, 2010, as indicated in the facts of this Appeal, but they did not receive any reply.

That, on 25th February, 2011, they sought for administrative review to the Respondent's Accounting Officer, whereby their request was rejected by virtue of the Respondent's decision dated 8th March, 2011. The reasons given for the said decision were stated as follows:

(i) the advertisement was intended for building contractors only;

(ii) the invitation was not for air conditioning subcontractors; and

(iii) the service consultant for the project was requested to assist the prospective main contractor to identify capable subcontractors;

That, they believe that, estimates for the whole project including service works were approved by the Tender Board before the notice for the prequalification of contractors was advertised. They contend that, if the Respondent was interested to know there would be subcontractors in this project; why were air conditioning and other service contractors excluded in the advertisement for pre-qualification.

That, the magnitude of air conditioning and other specialist works in the disputed project required an international competitive tender. They therefore questioned the rationale for the Respondent to opt for domestic subcontracting in the procurement of service works as such a process is neither competitive nor transparent. They further questioned the legal basis of choosing such an arrangement.

That, failure by both the Respondent and the Consultant to respond in time to their inquiries on the outcome of the pre-qualification process contravened Regulation 15(19) and (22) of GN. No.97 of 2005.

That, they believe the tender process was intended to favour some contractors at the expense of discriminating other contractors contrary to Section 43(a) and (b) of the Public Procurement Act (hereinafter to be referred to as **"the Act"**). As a result, competition against the promised contractors was minimized and the process lacked transparency contrary to Section 58(2) read together with Regulation 100(1) of GN. No. 97/2005.

Accordingly, they prayed for nullification of the tender process and the Respondent be ordered to re-tender. In addition, they requested for refund of the Appeal filing fees of Tshs. 120,000/=.

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:

That, their invitation to pre-qualify was extended to building contractors only and was not intended for specialist contractors. Furthermore, they engaged the consultants to design and supervise construction of the proposed PSPF Commercial Building.

That, the Terms of reference for the consultants included, preparation of bid document for selection of the main contractor. During preparation of the bid document, the Consultant found it necessary to provide guidance to the main contractor by providing a list of qualified sub-contractors (who were deemed to possess the necessary resources and competence)

so as to assist bidders in the selection of capable sub-contractors.

That, this was aimed at assisting prospective bidders for the main works in appointing domestic subcontractors who are capable for service works and not otherwise.

That, according to the Consultant (Electriplan (T) Ltd), the Appellant did not meet the minimum required resources and competence. They were therefore not among the recommended air-conditioning subcontractors.

That, they refute the Appellant's contention that their application was rejected on biased grounds.

That, the air conditioning and other service contractors were excluded so that the main contractor would come up with his subcontractors. The said subcontractors would be referred to as domestic subcontractors. Furthermore, such an

arrangement is permitted under the law **and does not provide a limit of the value involved. Furthermore, whereas there is guidance provided on how to deal with nominated subcontractors under Regulation 98 of GN 97, no guidelines have been issued by the Authority with respect to domestic sub contractors**.

That, the Appellant was informed that they were unsuccessful on 16th December, 2010.

That, they acknowledge receiving the Appellant's application for review but argue that it was time barred pursuant to Section 80(2) of the Act.

That, the current status for this tender is that, the Respondent has already signed the contract with the main contractor. Moreover, the main contractor has already signed the contracts with sub-contractors (all are domestic) including the air conditioning sub-contractor.

Finally, they requested the Authority to dismiss the Appeal for lack of merit.

ANALYSIS BY THE AUTHORITY

The Authority wishes to point out at the outset that, in their submissions the Appellant had claimed, inter alia, that the Invitation for Pre-qualification did not specify that it was for building contractors only but it was open to all contractors registered by CRB in class one. However, during the hearing the Appellant was requested by the Members of the Authority to read the Title of the said invitation, to wit,

"PRE-QUALIFICATION NOTICE TO BUILDING CONTRACTORS FOR CONSTRUCTION OF THE PROPOSED PSPF COMMERCIAL BUILDING ON PLOT NO. 120/121 SOKOINE DRIVE/MISSION STREET – DAR ES SALAAM".

Having read the said title, the Appellant did not pursue the matter further.

The Authority's analysis will therefore be confined to air conditioning works since the Appellant was involved in that area of specialization. That said, and having gone through the documents submitted and having heard the oral submissions from parties, the Authority is of the view that, this Appeal is centred on the following issues;

- **Whether the procedure applied by the Respondent in pre-qualifying subcontractors for air conditioning works was proper at law;**

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

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

1. **Whether the procedure applied by the Respondent in pre-qualifying subcontractors for air conditioning works was proper at law.**

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 General Instructions to Applicants (hereinafter to be referred to as **"GITA"**) which they complement, amend or supplement, for avoidance of doubt , the Authority will refer to the GITA clauses as specified in the PITA.

According to the facts of this Appeal, the Consultant was assigned to, amongst others, conduct the short-listing of sub-contractors; including air conditioning works. However, during the hearing, the Respondent

contended that, the process conducted by the said Consultant was not pre-qualification as claimed by the Appellant but rather short-listing. To support their argument they submitted further that, the word pre-qualification appearing on the cover page of the Evaluation Report titled **"PRE-QUALIFICATION REPORT FOR AIR-CONDITIONING CONTRACTORS"** was a mere typographical error as the Consultant's invitation letter indicated that the said information was required for short-listing.

The Authority therefore deems it necessary to address first, the question of which term befits the process undertaken by the Consultant. In resolving this particular point, the Authority revisited the definition of pre-qualification as provided for under Section 3(1) of the Act read together with Regulation 64 of GN. No. 97/2005 which read as follows:

"S. 3(1) "pre-qualification" means a formal procedure applied whereby suppliers, contractors or consultants are invited to

submit details of their resources, and capabilities which are screened prior to invitation to tender on the basis of meeting the minimum criteria on experience, capability and financial standing;" (Emphasis supplied)

"Reg. 64 Before inviting open tenders a procuring entity shall consider pre-qualifying suppliers, contractors or service providers further to Regulation 15 so as to identify those who possess the necessary resources and competence for completion of the eventual contract." (Emphasis added)

Having revisited the above quoted provisions, the Authority reviewed the Consultant's invitation letter to the Appellant in order to ascertain whether the process was intended to screen the applicants as envisaged in the cited provisions. The said letter reads in part, as follows:

"... It is the Client (sic) desire that the Subcontractors be handled under Domestic Subcontracting arrangement with the Main Contractor to reduce project management bureaucracy. In order for us to short list your company for these works, we would like to receive as soon as possible the following information from you so that it is received not later than Monday 26th July, 2010 at the close of business (copies of):-

1) **Certificate of Registration and Class**
2) **TIN and VAT Registration Particulars**
3) **Name of Directors and their share holding**
4) **Projects carried out over the last five (5) years**
5) **Annual turn-over and book orders**
6) **Largest Project undertaken (Value in US Dollars)**
7) **Recommendations from at least three names e.g. Clients, Consultants or**

otherwise on your performance." (Emphasis supplied)

The Authority is of the considered view that, the intent envisaged in the above quoted letter clearly indicate that, it was for screening of the subcontractors **"prior to invitation to tender on the basis of meeting the minimum criteria on experience, capability and financial standing"**. The Authority wishes to enlighten the Respondent that, pre-qualification and short-listing are synonymous and may be used interchangeably. This position is supported by Regulation 15(16) of GN. No. 97/2005 which states as follows:

"Pre-qualification shall not be used to limit the number of suppliers, contractors, service providers on a **shortlist or pre-qualification list** so that all firm found capable of performing the contract satisfactorily in accordance with the approved pre-qualification criteria shall be pre-qualified." (Emphasis added)

Having said that, the Authority reviewed submission by parties vis-à-vis the Pre-qualification Document as well as the applicable law. To start with, the Authority revisited the Pre-qualification Document wherein Clauses 4.3 and 4.4 of General Instructions to Applicants (hereinafter to be referred to as "GITA") provides for **'subcontracting'** as well as **'specialist subcontracting'** as follows:

"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." (Emphasis supplied)

The Authority noted that, the above quoted provisions were amplified under Clauses 4.3 and 4.4 of Part A of PITA which read as follows:

"4.3 A limit of the value of works to be subcontracted: Ten percent (10%)

4.4 Main Contractor shall be responsible for all works including the following:-

(i) Lifts Installations

(ii) Security Installations

(iii) Plumbing and Drainage Works

(iv) Voice, Data and Telecommunication cabling

(v) Fire fighting Installation

(vi) Pilling

(vii) Electrical

- **If the Main Contractor is incapable of undertaking the above works, then should include in the Application, profiles and members of joint venture or specialist subcontractors (domestic) for the works."** (Emphasis supplied)

Based on the above quoted provisions, the Authority is of the view that, the duty to execute specialist works was vested in the main contractor and in the event of being unable to do so, they were required to include the profiles of such specialist subcontractors in their application for Pre-qualification. In ascertaining whether that procedure was observed in the procurement of service contractors in the tender under Appeal, the Authority revisited documents availed to this Authority by parties as well as their oral submissions.

According to the Minutes of the Coordination meeting dated 17th June, 2010, procurement of sub-contractors was to be done as follows:

"Procurement of contractors – the issue of sub-contractors was discussed extensively and it was unanimously agreed that all sub-contractors will be DOMESTIC procured by main contractors; consultants shall provide names of recommended specialists whom contractors **may** select for inclusion in their bids." (Emphasis added)

The above unanimous decision entailed that, the Consultant was empowered to recommend the names of sub-contractors from whom the main contractors could choose. That is to say, the Consultant was to pre-qualify sub-contractors, amongst other, for air conditioning works on behalf of the employer, so that the pre-qualified subcontractors could be given to the prospective main contractors.

However, this position was altered by the Coordination meeting held on 21st July, 2010, whereby it was resolved as follows:

"Procurement of contractors – regarding domestic subcontractors, Electriplan to submit a performance report of at least six firms for each discipline for consideration by Client. Bidding documents shall include a list of the final selected sub-contractors and **main contractors will be required to pick their partners from the lists given.** All bidders shall be required to submit letters of association with their chosen domestic subcontractors. Electriplan has already contacted Contractors Registration Board, Report will be submitted on 30th July 2010." (Emphasis added)

This meant that, the prospective main contractors had to choose the subcontractors from the lists prepared by the Consultant on behalf of the employer.

The Authority observes that, the *modus operandi* stated under Clause 4.4 of Part B of PITA vests the procurement of service contractors solely in the

hands of main contractors without involving the Consultant. The Authority is of the firm view that, what was done by the Coordination Meeting was contrary to the Pre-qualification Document which had been approved by the Tender Board. Furthermore, during the hearing, the Respondent failed to show that, the above decisions made by the Coordination Meetings were approved by the Tender Board. The Authority equally observes that, the Coordination Meetings neither had the mandate to change the provisions of the Pre-qualification Document nor order the Consultant to pre-qualify service sub-contractors because such an entity is not recognized under the Act. Hence, the need for their decisions to be approved by the Tender Board.

The Authority noted that, the procedure applied by the Respondent in short-listing subcontractors for the main contractor, is contrary to the way domestic subcontractors are procured. Where domestic subcontracting is envisaged, the main contractor is the one who procures the subcontractor.

During the hearing, the Appellant argued that, M/s Electriplan (T) Ltd is one of the Managing Consultant in the Project and in addition thereto, they conducted pre-qualification of the service contractors. The Appellant argued further that, by contracting out both the procurement function and the contract management function to the Consultant the Respondent contravened Regulation 36(3) of GN. No. 97/2005 which states as follows:

"A procuring entity **shall not contract out** both the procurement and disposal by tender functions and the contract management functions to the same procurement agent." (Emphasis supplied)

[REG 46(12) – CONSULTANTS MAY BE ENGAGED TO MANAGE THE CONTRACT BUT CANNOT PROCURE or can procure but should not manage the contract - ije kwenye analysis za Authority]

- **REG. 77(1) hata kama angekuwa engaged kama procurement agent, which was not the case, he should have adhered to Regulation77(1) –**

  [REG. 98 APPELLANT ARGUED THAT HAD THEY PROCURED SUBCONTRACTORS AS NOMINATED THE SAID SUBCONTRACTORS SHOULD HAVE BEEN PROCURED AFTER THE MAIN CONTRACTORS HAD BEEN PROCURED -]

In their replies the Respondent conceded that, the Consultant was assigned to prepare the Tender Document as well as short-list service contractors in various disciplines which were thereafter included in the said document. They further stated that, this method is cost effective and that Regulation 98(3) of GN. No. 97/2005 provides for procurement of nominated sub-contractors, but it is silent on how domestic sub-contractors should be obtained. The said Regulation 98(3) provides as follows:

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

In analyzing the validity of arguments by parties, the Authority revisited sub-Regulation 12 of Regulation 46(12) of GN. No. 97/2005 which provides as follows:

"A procuring entities (sic) may engage the services of consultants to prepare tender documents, evaluate tenders and make recommendations to the tender board, where the capability of its inhouse professional services department is inadequate."

The Authority observes that, much as the above quoted provision allows procuring entities to engage consultants to perform the procurement function but

it does not allow the same consultant to manage the contract as well. Additionally, had the Consultant in the tender under Appeal been engaged as a procurement agent, which was not the case, then Regulation 77 of GN. No. 97/2005 should have been observed. For purposes of clarity, the Authority reproduces Regulation 77(1) and (2) hereunder:

"Reg. 77(1) A procuring entity may procure the services of a procurement agent to undertake any or all of those procurement functions which would otherwise be carried out by that entity provided that all such procurement functions are carried out in conformity with the Act and in accordance with these Regulations.

(2) A procuring entity shall procure the services of a procurement agent by competitive selection in accordance with the Public Procurement (Selection

and Employment of Consultants) Regulations, 2005." (Emphasis added)

The Authority therefore observes that, it is not expected that the consultant who is engaged to procure subcontractors, would subsequently be involved in the management of the works; since that would be in contravention of Regulation 36(3) of GN. No. 97/2005. The Authority's stand is corroborated by the following evidence:

- The Respondent's reply to the Appellant's request for review dated 8th March, 2011, partly states as follows:

  "… Please be informed that the Fund did not invite pre-qualification for Air-conditioning subcontractors for the above project. **The specialist works were handled under domestic subcontract. Therefore the Service consultant for this project was asked to assist the prospective main**

contractor to identify capable subcontractors to join with in submitting their bids…However, if you need further details you are advised to contact Electriplan (T) Ltd who communicated to you early (sic) to ask for your profile. (Emphasis added)

- The Consultant's letter to the Appellant dated 16th December, 2010, states as follows:

  "… **On behalf of our client, PSPF**, we regret to inform you that your submission was not successful…"

The Authority revisited the Appellant's counter arguments to the Respondent's replies on procurement of domestic subcontractors which are as summarized herein below:

- Domestic subcontracting contravenes Section 46(2) of the Act, in that, the application by the

main contractor includes specialist works in which the said contractor does not possess the requisite CRB registrations thereof. The said provision states as follows:

"Local suppliers, contractors and consultants wishing to participate in any procurement proceedings shall satisfy all relevant requirements for registration with appropriate current professional statutory bodies in Tanzania." (Emphasis supplied)

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

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

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

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

- By allowing the main contractor to pick a specialist contractor of his own choice, minimizes competition and also the procuring entity's ability to ensure quality is maintained and value for money is achieved are eroded, in that, the sub-contractors are not responsible to the respective procuring entity. This is contrary to the basic procurement principles provided for under Sections 43(a) and (b) as well as 58(2) of the Act. The latter provision is reproduced herein below:

"Subject to this Act all procurement and disposal shall be conducted in a manner to maximize competition and achieve

economy, efficiency transparency and value for money." (Emphasis added)

Having summarized arguments by parties on this point, the Authority's observations are as hereunder:

- While the Respondent claimed that, by conferring powers to procure service contractors upon the main contractor, there is reduction of supervisory responsibilities and costs. The Authority partially agrees with them. The Authority's stand is derived from the fact that, the Respondent's assertion is not wholly correct as the main contractor, who in this tender acts as a middleman, employs the sub-contractors and in so doing, the former adds a profit 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.

- According to the Addendum issued by the Respondent on 8th October, 2010, it was indicated that in the event the main contractor chose an un-approved subcontractor for specialist works, the said subcontractor would be subjected to post-qualification. During the hearing the Respondents were requested to clarify how the un-approved sub-contractors would be post-qualified as neither the qualifications required nor the criteria or manner of evaluation thereof, were stated in the solicitation documents. The Respondent could not provide a satisfactory response to the question.

- The Authority concurs with the Appellant that, such an arrangement is neither competitive nor does it accord equality of opportunity to sub-contractors contrary to Sections 43 and 58(2) of the Act as quoted above. Furthermore, the said process is not transparent as the basis of selecting a sub-contractor is left in the hands of

the main contractor who would normally choose the ones he is used to associate with or who are convenient to him. This was evident during the hearing that, the Successful Tenderer in the tender under Appeal, namely, M/s Estim Construction Co. Ltd, selected a service subcontractor from South Africa whom they are working with in another project.

Assuming that the pre-qualification of air conditioning contractors conducted by the Consultant was valid, the Authority noted that, invitation for pre-qualification and the evaluation criteria as stated in the Consultant's letter to the sub-contractors, including the Appellant, were vague and did not comply with Regulations 14 and 15 in the following regard:

- The invitation letter did not indicate the nature and quantity of the of the works to be effected contrary to Regulation 15(5)(b) of GN. No. 97/2005, which states as follows:

"15(5) An invitation to pre-qualify shall contain at the minimum, the following information:

(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;" (Emphasis supplied)

- The said invitation letter did not indicate the procedures which will be used in evaluating the pre-qualification documents submitted by the air conditioning subcontractors, contrary to Regulation 15(5)(d) of GN. No. 97/2005 which provides as follows:

"15(5) An invitation to pre-qualify shall contain at the minimum, the following information:

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

contractors in conformity with Regulation 14;" (Emphasis added)

- The law requires a pre-qualification document to be approved by the respective tender board and thereafter to be issued to the invitees. This was not done for the specialist subcontractors in the tender under dispute, as no such document was prepared, approved or issued contrary to Regulation 15(4) and (8) of GN. No. 97/2005 which provide as follows:

"15(4) If a procuring entity engages in pre-qualification proceedings, **it shall provide a set of pre-qualification documents to each** supplier, **contractor**, service provider or buyer that requests them in accordance with the invitation to pre-qualify upon paying the price, if any, charged for those documents." (Emphasis supplied)

(8) The pre-qualification documents **shall be approved** by an appropriate tender board." (Emphasis added)

- No evidence was availed to the Authority to indicate that, the invitation to pre-qualify the air conditioning subcontractors was approved by the Tender Board contrary to Regulation 15(9) of GN. No. 97/2005 which states categorically that:

  "Invitations to pre-qualify which are issued without prior approval by a tender board and which do not satisfy these Regulations will not be considered valid." (Emphasis supplied)

- In the absence of pre-qualification document, the Respondent equally contravened Regulations 15(10) which provides for minimum information to be contained in such documents.

- Failure to adhere to sub-Regulations (5(d) and (10) of Regulation 15 of GN. No. 97/2005, resulted into breach of sub-regulation 14 thereof which requires the evaluation to be conducted using the criteria and procedures stated in the invitation to pre-qualify.

The Authority noted that, the criteria contained in the said invitation were vague and could not enable the applicant's capability and resources to execute the contract be determined pursuant to Regulation 15(11) of GN. No. 97/2005. A further analysis therefore will be made in the subsequent paragraphs herein.

The Authority emphasizes that, once a decision to pre-qualify has been made all mandatory requirements under the law, including the above quoted, must be fully complied with as they are not discretionary.

The Authority also noted that, the evaluation of the pre-qualification information submitted by air conditioning subcontractors was supposed to be done in light of Regulation 15(14) of GN. No. 97/2005 which provides as follows:

> **"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)

According to the Consultant's invitation letter to the air conditioning subcontractors, the criteria for assessing the subcontractor's experience as follows:

- **Projects carried out over the last five (5) years**
- **Largest Project undertaken (Value in US Dollars)**

The Authority noted that, the first two bullets were intended to show the contractor's experience whereby the Appellant and two other contractors were disqualified for what was termed by the Evaluators as **"having undertaken some few projects of less comparable magnitude and nature to the envisaged works"**. The Authority observes that, such a criterion was non-existent in the invitation letter. Had the Consultant been diligent they should have required the contractors to show their **"experience in projects of similar nature and complexity"**.

In view of the above observations and findings, the Authority's conclusion on the first issue is that, the procedure applied by the Respondent in pre-qualifying the air conditioning subcontractors was not proper at law.

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

As it has been established in the first issue that, the procurement of air conditioning sub-contractors was not proper at law, the Authority is of the settled view that, the Appellant is entitled to refund of Tshs. 120,000/= being Appeal filing fees. In addition thereto, the Authority orders the Respondent to restart the procurement process for subcontractors of air conditioning in observance of the law.

Other matters which caught the attention of the Authority

The Respondent's failure to respond to the inquiries made by the Appellant in writing, not only depicted lack of civility on the part of the Respondent but also contravened Regulation 15(21) and (22) of GN. No. 97/2005, which provides as follows:

"15(21) 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)

(22) A procuring entity **shall make available to any member of the general public, upon request**, the names of all suppliers, contractors, service providers or buyers that have not been pre-qualified. (Emphasis supplied)

The Authority observes that, the disclosure of the pre-qualification results is not limited to

unsuccessful applicants but the Respondent has a duty to relay such information to any member of the public upon request.

The Authority appreciated the physical presence of the Respondent's Acting Director General at the hearing. This is an indication of commitment and seriousness on his part. The Authority believes that his attendance provided an opportunity for him to know the shortfalls detected in the procurement process and therefore expects that, the said anomalies will not recur in future .

Having considered all facts and evidence, the Authority concludes that, the Appeal has merit as the pre-qualification of air conditioning subcontractors was not proper at law.

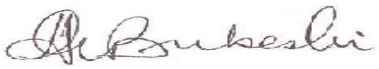
On the basis of the aforesaid findings, the Authority upholds the Appeal and orders the Respondent to:

(a) start afresh the procurement of subcontractors for air conditioning in observance with the law; and

(b) compensate the Appellant a sum of Tshs. 120,000/= being Appeal filing fees.

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

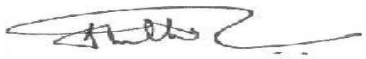
Decision delivered in the presence of the Appellant and the Respondent this 8th July, 2011.



……

JUDGE (rtd) A. BUBESHI
CHAIRPERSON

MEMBERS:



1. MR. K.M. MSITA……

2. MR. F. T. MARMO……

3. MRS. N.S.N. INYANGETE……