

IN THE  
PUBLIC PROCUREMENT APPEALS AUTHORITY  
AT DAR ES SALAAM

APPEAL CASE NO. 152 OF 2013

BETWEEN

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

AND

BOARD OF TRUSTEES OF THE  
PARASTATAL PENSIONS FUND.....RESPONDENT

DECISION

CORAM:

- |                                 |                |
|---------------------------------|----------------|
| 1. Hon. A. G. Bubeshi, J. (rtd) | -Chairperson   |
| 2. Mr. H. S. Madoffe            | -Member        |
| 3. Ms. E.J. Manyesha            | - Member       |
| 5. Ms. F.R. Mapunda             | - Ag.Secretary |

SECRETARIAT

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

FOR THE APPELLANT:

1. Mr. Frank A. Chandu – Advocate, Burton Law Chambers
2. Eng. Andrew Mwaisemba – Managing Director

FOR THE RESPONDENT:

1. Mr. Suleiman Msangi – Principal Legal Officer- PPF
2. Mr. Issa Sabuni – Secretary of the Tender Board- PPF

This Decision was scheduled for delivery today 9<sup>th</sup> of July, 2013, and we proceed to deliver it.

The Appeal at hand was lodged by M/s COOL CARE SERVICES LIMITED (hereinafter referred to as “the Appellant”) against the BOARD OF TRUSTEES OF THE PARASTATAL PENSIONS FUND commonly known by its acronym PPF (hereinafter referred to as “the Respondent”).

The said Appeal is in respect of Tender No. PA/038/HQ/2012/W/3AV for Air Conditioning and Ventilation Installation for the Proposed College of Informatics and Virtual Education for University of Dodoma for IT Laboratory Building (hereinafter referred to as “the tender”).

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

The Respondent vide the Guardian newspaper of 14<sup>th</sup> January, 2013, the Daily News of 16<sup>th</sup> January, 2013 and Mtanzania newspaper of 21<sup>st</sup> January, 2013, invited tenderers to submit their tenders for the tender under Appeal.

The deadline for submission of tenders was initially set for 12<sup>th</sup> February, 2013. However it was later on extended to 21<sup>st</sup> February, 2013, whereby nine tenders were received from the following firms;

S/NO	Tenderers' Name	Quoted Price in Tshs	Bid Security
1.	M/s Cool Care Services Ltd	527,273,560/-	Bid Securing Declaration
2.	M/s Remco (International) Ltd	580,505,130/-	I & M Bank 24.0 Million
3.	M/s M. R. Electrical Co. Ltd	796,148,832/-	Bid Securing Declaration
4.	M/s Mollel Electrical	717,593,459/-	Bid Securing Declaration
5.	M/s Ashrea, Air Conditioning Co. Ltd	576,945,660/-	Bid Securing Declaration

6.	M/s Electromechanical Agencies (EMA)	800,517,900/-	Bid Securing Declaration
7.	M/s Derm Electrics (T) Ltd	1,024,750,742/-	Bid Securing Declaration
8.	M/s UniCool East Africa Ltd	789,722,740/-	Bid Securing Declaration
9.	M/s M.A.K Engineering Co. Ltd	716,878,827/-	Bid Securing Declaration

The tenders were subjected to evaluation which was conducted in three stages namely; Preliminary evaluation, Detailed evaluation and Post qualification.

At the preliminary evaluation stage, tenders were examined to determine if they met the eligibility criteria, that is, they had been accompanied by the required security, they had been properly signed, they were generally in order and they were substantially responsive to the Tender Document. During that process of evaluation, eight tenders were found to be non responsive to the Tender Document on the reason that,

they submitted a Bid Securing Declaration instead of Bid Security. The said tenders were from; Cool Care Services Ltd, M.R. Electrical Co. Ltd, Mollel Electrical, Ashrea Air Conditioning Co. Ltd, Electromechanical Agencies (EMA), Derm Electrics (T) Ltd, UniCool East Africa and M.A.K Engineering Co. Ltd.

Only one tender submitted by M/s Remco International Ltd was found to be substantially responsive and subjected to detailed evaluation.

During detailed evaluation, the tender was checked for arithmetic errors and it was found to be free from any errors, thus subjected to the last stage of evaluation, that is, post qualification stage.

At the post qualification stage, the tender was checked to determine if the firm was capable to perform the contract in accordance with Clauses 12.5 and 33.3 of the Instructions To Bidders (hereinafter referred to as ITB).

Having completed the evaluation process the Evaluation Committee recommended the award of the tender to M/s

Remco (International) Ltd at a contract price of Tshs. 580,505,130/-.

The Respondent's Tender Board at its meeting held on 2<sup>nd</sup> May, 2013, approved the recommendation of the Evaluation Committee.

On 13<sup>th</sup> May, 2013, the Respondent vide a letter referenced PPF/AC.193/270/01C/13 communicated the award of the tender to the Successful Tenderer.

On 7<sup>th</sup> June, 2013, the Appellant vide a letter referenced CCSL/TA/31/13 requested the Respondent to inform them about the tender results. On the same date, the Respondent vide a letter referenced PPF/CD/186/02/142 informed the Appellant that their tender was unsuccessful because they submitted a Bid Securing Declaration instead of a Bid Security. The said letter was received by the Appellant on 17<sup>th</sup> June, 2013.

Being dissatisfied with the reason given for their disqualification, the Appellant on 20<sup>th</sup> June, 2013, lodged

their Appeal to the Public Procurement Appeals Authority (hereinafter referred to as "the Authority")

## SUBMISSIONS BY THE APPELLANT

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

That, they were among the tenderers who participated in the tender under Appeal.

That, they were dissatisfied with rejection of their tender because they submitted a Bid Securing Declaration instead of a Bid Security.

That, the reason for rejection of their tender contravened Sections 43 (b) and 46 (4) of the Public Procurement Act No. 21 of 2004 (hereinafter referred to as the Act) and Regulation 90 (4) of the Public Procurement (goods, works, non-consultant Services and disposal of public



assets by Tender Government Notice No. 97) (hereinafter referred to as GN. No. 97 of 2005).

Finally, the Appellant prayed for the following orders;

- a) Declaration that Bid Security and Bid Securing Declaration were both acceptable for the tender under appeal
- b) The Respondent to Re-evaluate the tender so as to arrive at a fair decision
- c) The Respondent to pay the Appellant a sum of Tshs. 3,120,000/- as per the following breakdown;
  - i. Appeal filing fees Tshs. 120,000/-
  - ii. Legal fee Tshs. 3,000,000/-
  - iii. Any other order the Authority deems necessary.

## SUBMISSION BY THE RESPONDENT

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

That, upon receipt of the Statement of Appeal they reviewed the matter and discovered that, the Appellant was mistakenly issued with a Tender Document that was not approved by the Tender Board, hence denying them competitive participation in the tender process.

That, the difference between the Tender Document issued to the Appellant and the one approved by the Tender Board was on the form of the security to be submitted. The former required a Bid Securing Declaration while the latter required a Bid Security of Tshs. 24,000,000/-.

That, the contravention of Sections 43 (b) and 46 (4) of the Act and Regulation 90 (4) of G.N No. 97/2005 was

not caused by rejection of tender but rather issuance of wrong document to the Appellant.

That, the evaluation process was fairly conducted based on the Tender Document that was approved by the Tender Board though the Appellant was issued with the wrong document.

That, the mistake of issuing a wrong document was a result of human error and was not intentional.

That, they are ready to correct the mistake made by issuing a correct tender document to all bidders for them to get an opportunity to competitively participate in the tender process.

That, they prefer a re-evaluation order to be issued by the Authority instead of a re-tendering order which may delay the project since they had an agreement with the Government to complete the project on time and that any delay will attract a penalty to them.

Finally, the Respondent prayed for the following orders:

- a) The Respondent be ordered to issue the Tender Document approved by the Tender Board to the other tenderers except the successful tenderer who had purchased the correct document.
- b) Nullify the award of tender to the successful tenderer so as to allow the tenderers to submit the Bid Security within two weeks or as the Authority deems fit.
- c) The Respondent to re-evaluate the tender after submission of the Bid Security
- d) The Appellant to be refunded their Appeal filing fees and each party to bear their own costs, and
- e) Any other relief the Authority deems fit to grant.

#### ANALYSIS BY THE AUTHORITY

Having gone through the documents submitted and having heard the oral submissions from parties, the Authority framed the following two issues:

- Whether the Appellant was unfairly disqualified;
- To what reliefs, if any, are the parties entitled to.

Having identified the issues in dispute, the Authority proceeded to resolve them as hereunder;

#### 1.0 Whether the Appellant was unfairly disqualified

In resolving this issue the Authority considered the Respondent's admission that the Appellant was issued with a Tender Document that had not been approved by the Tender Board. Consequently, they submitted a Bid Securing Declaration instead of a Bid Security as required by the approved Tender Document since the project is worth more than Tshs.1.3 billion. Furthermore, the Respondent conceded to have committed a serious omission on their part for issuing a Tender Document that was not approved by the Tender Board.

In order to substantiate the validity of the Respondent's argument, the Authority revisited the documents submitted to it and observed that, the Tender Document issued to the Appellant indicated that the required security was to be in the form of a Bid Securing Declaration while the approved Tender Document indicated that tenderers were required to attach a Bid Security of Tshs. 24,000,000/-.

Based on the Respondent's admission on the facts above, the Authority is of the settled view that, the Appellant had been unfairly disqualified as their tender was evaluated on the basis of a Tender Document that was not issued to them.

Accordingly, the Authority concludes that, the Appellant was unfairly disqualified.

2.0 To what reliefs, if any, are the parties entitled to.

Having resolved the issue in dispute the Authority considered the prayers by parties.

(a) Prayers by the Appellant:

The Authority revisited the Appellant's prayers, and observes as follows:

- i) The Authority does not accept the Appellant's prayer that both the Bid Security and Bid Securing Declaration be accepted by the Respondent because the project value of Tshs. 1.3 billion exceeds the limit of deploying the Bid Securing Declaration as a security.
- ii) As for the prayer to order the Respondent to re-evaluate the tenders in order to reach a lawful decision, the Authority observes that, having noted the admission by the Respondent the Authority orders the Respondent to re-evaluate the tenders on the basis of the approved Tender Document which clearly requires tenderers to submit Bid Security. This order is supported by Section 82(4)(d) of the Act.

iii) With respect to the prayer for compensation of Tshs. 3,120,000/= being the costs arising from this Appeal, the Authority orders the Respondent to compensate the Appellant a sum of Tshs. 1,620,000/= only as the Appeal has merit. The breakdown of Tshs. 1,620, 000/= is as follows;

- Appeal filling fees – Tshs. 120,000/-
- Legal fees – Tshs. 1,500,000/-

(b) Prayers by the Respondent:

The Authority also considered the Respondent's prayer that they be ordered to issue an approved Tender Document to all other tenderers save the successful tenderer and observes that, once all the tenderers are required to submit the Bid Security and proceed to evaluate them henceforth there is no need of issuing an entire Tender Document because an order to submit Bid Security would totally cure the defects complained of in this tender.



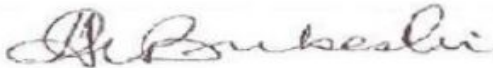
With regard to the Respondent's prayer that the award issued to the successful tenderer be nullified and tenderers be ordered to submit Bid Security within two weeks so as tenders could be re-evaluated, the Authority accepts this prayer of the Respondent.

Having considered all facts and evidence, the Authority upholds the Appeal and orders the Respondent to do the following:

- To nullify the award to the successful tenderer
- To let the eight tenderers who were disqualified to submit bid security within two weeks from the date of this decision so as to allow a fair re-evaluation of tenders
- Pay the Appellant a sum of Tshs. 1,620,000/- only being appeal filing fees and legal fees.


Right of Judicial Review as per Section 85 of the Act explained to parties.

Decision delivered in the presence of the Appellant and the Respondent this 9<sup>th</sup> day of July, 2013.



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

MEMBERS:

1. MR. H.S. MADOFFE  .....

2. MS. E. J. MANYESHA  .....