

**IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY**

APPEAL CASE NO. 107 OF 2011

BETWEEN

M/S DAR ESSENTIALS LTD.....APPELLANT

AND

**NATIONAL INSTITUTE OF
TRANSPORT.....RESPONDENT**

DECISION

CORAM:

- 1. Hon. A.G. Bubeshi, J. (rtd) – Chairperson**
- 2. Mr. H.S. Madoffe - Member**
- 3. Mr. K.M. Msita - Member**
- 4. Ms Esther Manyesha - Member**
- 5. Ms. B.G. Malambuigi - Secretary**

SECRETARIAT:

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

FOR THE APPELLANT:

1. Mr. Crispin T. Meela – Advocate, Amicus Attorney
2. Mr. Ronald Urio – Managing Director, Dar Essentials Ltd
3. Mr. Stanley Mbuya – Operations Manager, Dar Essentials Ltd
4. Eng. Andrew Mwaisemba – (Witness for the Appellant) Managing Director of Cool Care Services Ltd and Chairman of the Association of Citizen Contractors of Tanzania (ACCT)

FOR THE RESPONDENT

1. Mr. Joseph Matara – Head, Procurement Management Unit
2. Mr. Mosses S. Magere – Procurement Officer
3. Mr. Yassin Makange – Estates Manager

This decision was scheduled for delivery today 18th July, 2011 and we proceed to deliver it.

This appeal was lodged by **M/s DAR ESSENTIALS LTD** (hereinafter to be referred to as "**the Appellant**") against the **NATIONAL INSTITUTE OF TRANSPORT** popularly known by its acronym **NIT** (hereinafter to be referred to as "**the Respondent**").

The said Appeal is in respect of Tender No.PA/028/2010/2011/NC/T3/001/1 for the Proposed Construction of Library – Phase III - for the National Institute of Transport, at Ubungo, Dar es Salaam – Air Conditioning and Ventilation Installation (hereinafter to be referred to as "**the Tender**").

According to the documents submitted to the Authority, the facts of the Appeal may be summarized as follows:

The Respondent invited tenders vide Mwananchi newspaper of 11th April, 2011 and the Daily News dated 13th April, 2011.

The tender opening took place on 6th May, 2011, whereby the following five out of the eight firms which purchased tender documents, submitted tenders:

S/ No	TENDERER	TENDER PRICE TSHS.
1.	M/s Mollel Electrical Constructors Ltd	1,144,804,774.84
2.	M/s Chigo Air Conditioning Tanzania Ltd	1,249,583,774.00
3.	M/s Dar Essentials Ltd	997,697,776.00
4.	M/s Remco International Ltd	1,338,150,219.80
5.	M/s M.A.K Engineering Co. Ltd & Softnet Ltd (JV)	1,175,614,219.00

The tenders were evaluated whereby the tender submitted by M/s Mollel Electrical Contractors Ltd was disqualified at the first stage of preliminary evaluation for not attaching an Anti Bribery policy as well as failure to sign and initial their tender.

The other four tenders were subjected to the second stage of preliminary evaluation, namely technical responsiveness, whereby two of them, including that of

the Appellant, were disqualified for reasons indicated herein below:

- **M/s Dar Essentials Ltd** – for failure to indicate annual turnover of Shillings 5 billion in any of the last two years;
- **M/s M.A.K Engineering Co. Ltd & M/s Softnet Ltd J.V** – for failure to show the annual turnover of Shillings 5 billion, the required experience as well as the essential equipment to be used.

The remaining two tenders submitted by, M/s Remco International Ltd and M/s Chigo Air Conditioning Tanzania Ltd were considered to be substantially responsive. Thus, they were subjected to detailed evaluation and price comparison. Thereafter, the Evaluation Committee recommended the award to be made to M/s Chigo Air Conditioning Tanzania Ltd at a contract price of Tshs. 1,248,226,774.00 as they ranked number one.

On 14th May, 2011, Chigo Air Conditioning Tanzania Ltd, communicated to the Respondent *vide* letter referenced CHIGO/CONF/T/1/B/VOL.2 acceptance of the price adjustment made to their quoted price whereby the corrected price became **Tshs, 1,248,226,774.00** instead of the original price of **Tshs. 1,249,583,774.00**.

On 26th May, 2011, the Tender Board approved award of the tender as recommended by the Evaluation Committee and the matter was forwarded to the Accounting Officer for approval or comments. The Accounting Officer granted approval for the award of the tender. On the same date, the Appellant inquired about the tender results from the Respondent *vide* letter referenced DEL/NIT/05/2011/79.

On 31st May, 2011, the Respondent *vide* letter referenced NIT/C/32/VOL.2/45 communicated the award of the tender to M/s Chigo Air Conditioning Tanzania Ltd which was acknowledged by the said tenderer on 1st June, 2011, *vide* letter referenced CHIGO/C/32/VOL.02.

On 2nd June, 2011, the Respondent notified the Appellant *vide* letter referenced NIT/C/32/VOL.2/55 that, their tender was not successful and that the tender had been awarded to M/s Central Electricals International Ltd at a contract price of Tshs. 1,248,226,774.00.

The Appellant being dissatisfied with the tender results, wrote a letter dated 6th June, 2011, to the Respondent seeking to know the reasons for their disqualification. On 10th June, 2011, the Respondent sent a reply informing the Appellant that, their tender was disqualified for failure to show annual turnover of Shillings 5 billion pursuant to Clause 12.3 of the Instructions to Bidders (hereinafter to be referred to as "**ITB**") and Item 13 of the Bid Data Sheet.

The Appellant was aggrieved by the Respondent's reply and on 16th June, 2011, lodged their Appeal to the Public Procurement Appeals Authority (hereinafter to be referred to as "**the Authority**").

The Appellant later received a letter from the Respondent referenced NIT/C/32/VOL.2/89 dated 17th June, 2011, informing them that the successful tenderer for the tender was M/s Chigo Air Conditioning Tanzania Ltd at a corrected contract sum of Tshs. 1,248,226,774.00 and not M/s Central Electrical International Ltd as it was erroneously communicated earlier on.

SUBMISSIONS BY THE APPELLANT

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

That, on 23rd June, 2011, they received the Respondent's letter informing them that the tender in dispute was awarded to M/s Chigo Air Conditioning Tanzania Ltd.

That, they were among the tenderers who submitted tenders whereby their price as corrected by the Respondent was Tshs. 999,697,776.00 (VAT inclusive).

Furthermore, their price was the lowest compared to the prices quoted by the other tenderers as read out during the tender opening.

That, sometime in May 2011, they received unconfirmed information that the Respondent had concluded the tender process and that the successful tenderer had already been notified. Thus, on 26th May, 2011, they inquired about the tender results from the Respondent.

That, on 2nd June, 2011, they received a response from the Respondent *vide* letter referenced NIT/C/32/VOL.2/55 informing them that, their tender had been rejected and that the award was made to M/s Central Electricals International Ltd. However, on 23rd June, 2011, the Respondent clarified that, the award was made in favour of M/s Chigo Air Conditioning Tanzania Ltd (hereinafter to be referred to as "**the Successful Tenderer**") instead of Central Electricals International Ltd who was mistakenly named in their earlier communication.

That, on 6th June, 2011, they inquired from the Respondent on the reasons for their failure to win the tender vide letter referenced DEL/NIT/06/11/83.

That, on 14th June, 2011, the Respondent informed the Appellant that, they were disqualified for failure to indicate an annual turnover of Shillings 5 billion for any of the last two years.

That, the reason for their disqualification is disputed due to the following reasons:

- (i) They have a long experience in air conditioning and ventilation systems.
- (ii) They have executed several projects of similar nature.
- (iii) They have sound financial capability in the form of stocks, cash and Bank credits as evidenced in the Bank Reference letter dated 2nd May, 2011, which was contained in their tender. The said letter indicated their working capital and sources of financing the project in dispute.

(iv) In the decision of this Authority in Appeal Case No. 76 of 2010, between **M/s Cool Care Services Ltd and Others against the Local Authorities Pensions Fund** (hereinafter to be referred to as "**Appeal Case No. 76**"), the matter pertaining to annual construction volume of Tshs. 5,000,000,000.00 in any two years was ruled out in favour of the Appellant to be unrealistic and contrary to Regulation 14(6) of GN. No. 97/2005.

That, they wonder if M/s Chigo Air Conditioning Tanzania Ltd has ever executed any project with similar nature as the project under Appeal. According to the records of the Contractors Registration Board (hereinafter to be referred to as "**CRB**"), the said firm was registered as a Class I air conditioning contractor in 2010.

That, circumstantial evidence indicates that, the rejection of the Appellant's tender in favour of the Successful Tenderer was motivated by acts which are prohibited under Section 87(1)(e) of the Public Procurement Act (hereinafter to be referred to as "**the Act**").

That, based on the above submissions, the Respondent contravened Sections 43(a) and (b) as well as 46(2) and (4) of the Act.

Accordingly, they prayed for the following:

- Annulment of the award of the tender made in favour of M/s Chigo Air Conditioning Tanzania Ltd;
- The Respondent be ordered to award the tender to the Appellant;
- The Respondent be ordered to pay the Appellant a total sum of Tshs 3,005,000.00 being costs for the following:

Item	Tshs.
Legal consultation fees	2,600,000.00
Appeal filing fees - PPAA	120,000.00
Stationery and secretarial costs	65,000.00
Costs in terms of time, telephone, fax, emails and transport	220,000.00
Total	3,005,000.00

- Any other relief as deemed fit by the Authority.

SUBMISSION'S BY ENG. MWAISEMBA - A WITNESS FOR THE APPELLANT

During the hearing, the Appellant was accompanied by Eng. Andrew Mwaitemba the Managing Director and Chairman of the Association of Citizen Contractors of Tanzania (hereinafter to be referred to as "**ACCT**"), as their witness, whose submissions may be summarized as follows:

That, in April 2011, the Respondent called for tenders for air conditioning works. Item 13(b) of the Bid Data Sheet required the tenderers to have an annual turnover of Shillings 5 billion in any of the last two years, as a necessary criterion for them to participate in the tender under Appeal. In the tender for building works invited by the Respondent, Item 13(a) of the Bid Data Sheet states categorically that "The minimum required annual volume of construction work for the successful Tenderer in any of the last 2 years shall be: **Tshs. N/A.**" meaning not applicable. This proves that the Respondent intended to discriminate and treat HVAC (Heat, Ventilation and Air

Conditioning) contractors unfairly contrary to Sections 43(b) and 46(4) of the Act.

That, this Authority has previously issued a decision on the issue of annual turnover, it is the duty of procuring entities to abide by them.

That, the Respondent intended to marginalize the opportunity for local contractors to win this tender while maximizing the said opportunity in favour of a pre-destined foreign tenderer.

That, the Appellant has executed many similar projects, for instance, the High Court at Bukoba which was supervised by TBA, who is also the consultant for the disputed project.

That, in the tender for building works, specialist works were also included therein, meaning the contract sum awarded to the building contractor includes costs for other specialist works, such as air conditioning. This means the contractor awarded the contract for building

works shall therefore be paid the money intended for air conditioning while those works will be executed by the Successful Tenderer in this tender who will equally be paid.

In the Bill of Quantities (BOQ) a total of Tshs. 2,597,000,000/= VAT exclusive (that is Tshs. 3,064,460,000/= VAT inclusive) was provisional sums. That, out of this amount, Tshs. 595,000,000/= was set aside to cater for “unforeseen costs” and that the said Tshs. 595,000,000/= was to be spent at the discretion of that Architect. That, Tshs. 200,000,000/= was to take care for the so-called contingency. It follows therefore that:

- (i) the Tender Board approved a Tender Document containing a large amount of money set aside to cater for ghost costs;
- (ii) the Respondent’s Chief Executive Officer certified the availability of funds to support the procurement of ghost works; and

- (iii) the Chief Executive Officer/Tender Board delegated power for approval of the expenditure of public money to a Project Architect.

That, based on the tender results, the witness's observations are as follows:

- (a) that the Respondent set aside 62% of the project value as provisional sum;
- (b) that the contract value of the building works was Tshs. 1,1211,143,842 less amount for plumbing works;
- (c) that since the Head contractor is supposed to be that with the largest contract sum, it follows that either HVAC or Electrical contractor was supposed to be the Head contractor;
- (d) that pursuant to Regulation 98, provisional sum was supposed to be for the building works instead of HVAC and electrical works; and

(e) that according to the magnitude of building works stated in paragraph (b) above, if the provisions of Sections 43(a), 58(2) and 59(1) of the Act had been adhered to, the Respondent should have invited all building contractors registered in Class IV and above to participate in the tender and probably the local contractors should have enjoyed the advantage stated under Section 49(3) of the Act.

That, apart from the irregularities stated above, the following acts, constitute a conflict of interest:

- (a) TBA being the project Manager for the disputed tender, has been given powers stated under Regulation 98(1) of GN. No. 97/2005;
- (b) By virtue of being the Government architect, TBA exercises powers stipulated under Regulation 98(7) of GN. No. 97/2005;

- (c) The architect stated on page 8/2/1 of the building works BOQ, who has been given power to decide on how to spend a huge amount of public money stated above, is a person who is an employee of TBA;

- (d) The persons who evaluated the bidding documents are employees of TBA.

That, he had appeared several times before this Authority disputing the irregularities committed in the public procurement processes, most of which arise from deficiencies occasioned by Regulation 98 of GN. No. 97 of 2005. The Public Procurement Regulatory Authority (PPRA) should have issued guidelines on the applicability of the said provision. He, on behalf of the ACCT members, requested the Authority to advice PPRA to take remedial measures to ensure procuring entities do not use this provision as an excuse to violate the law.

RESPONDENT'S REPLIES

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

That, they started by raising a Preliminary Objection on two points, to wit:

- (i) The Statement of Appeal and Notice of Intention to appeal were lodged out of time contrary to Rules 6(1) and 7 of the Public Procurement Appeals, Rules, GN. No. 205 of 2005 (hereinafter to be referred to as "**Appeals Rules**").
- (ii) The Statement of Appeal is bad in law as it contravenes the requirements of Rule 8(c) of the Appeals Rules.

That, there was a typographical error in the notification letter dated 2nd June, 2011, where the name of the successful tenderer read **“M/s Central Electrical International”** Ltd instead of **“M/s Chigo Air Conditioning Tanzania Ltd”**. However, the contract price stated therein was Tshs. 1,248,226,774.00 which was quoted by the latter. The said error was rectified on 17th June, 2011, as already indicated under the facts of this Appeal.

That, the requirement of annual turnover of Shillings 5 billion in any of the last two years was imposed on all tenderers as per Clause 12.3(b) of the ITB. The Successful Tenderer met all the requirements, including this one.

That, the Appellant’s claim that the Successful Tenderer lacked the required experience and had not executed similar projects, are unfounded as these were not the only criteria.

That, the Tender Document contained criteria for evaluating a tenderer's financial capability as evidenced under Clause 12.3(b) of the ITB, which the Appellant did not comply with. Hence, their complaint is baseless.

That, the criterion relating to annual turnover of Shillings 5 billion, was not exaggerated but rather was intended to assess the tenderer's capability to finance the project smoothly hand in hand with other ongoing projects, if they have any. Furthermore, they did not contravene Regulation 14(4) of GN. No. 97/2005 which sets out such criteria, including financial resources but has not indicated the minimum thereof.

That, they did not breach any provision of the law as contended by the Appellant, to the contrary, the law was strictly observed.

Finally, they prayed for dismissal of the Appeal with costs for lack of merit.

ANALYSIS BY THE AUTHORITY

The Authority wishes to point out at the outset that, in their Written Replies the Respondent had raised a Preliminary Objection on two points which were withdrawn during the hearing. The Authority's analysis therefore will not address them as they are not before it. That said, the Authority is of the view that, this Appeal is based on the following issues:

- **Whether the Requirements of Clause 13(b) of the Bid Data Sheet contravened the law, and if so, whether the disqualification of the Appellant was justified;**
- **Whether the award of the tender to M/s Chigo Air Conditioning Tanzania Ltd was proper at law; and**
- **To what reliefs, if any, are the parties entitled to.**

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

1. Whether the Requirements of Clause 13(b) of the Bid Data Sheet contravened the law, and if so, whether the disqualification of the Appellant was justified

In resolving this issue, the Authority revisited submissions by parties vis-à-vis the Tender Document, applicable law as well as the decision of this Authority in Appeal Case No. 76 which was relied upon by the Appellant. To start with, the Authority summarizes submissions by the Appellant as herein below:

- The criterion imposed under Item 13(b) of the Bid Data Sheet is not among the qualification criteria provided for under Regulation 14(1) of GN. No. 97/2005.
- The Respondent acted *ultra vires* in imposing criteria which were not envisaged under Regulation 14(1) of

GN. No. 97/2005. Moreover, annual turnover does not enable the Respondent to measure a tenderer's financial capability pursuant to Section 4 of the Finance Act of 2001 and it contravenes Regulation 14(6) of GN. No. 97/2005. This position is cemented by the decision of this Authority in Appeal Case No. 76 where a criterion of annual construction works of Shillings 5 billion was held not to be a measure of a tenderer's financial capacity.

- They are financially sound as all documents to that effect formed part of their tender.
- The said criterion was only imposed to the tender for air conditioning works while it did not apply to the tender for building works. This is evidenced by Item 13(a) of the Bid Data Sheet for the tender for building works which states clearly as follows:

“The minimum required annual volume of construction work for the successful tenderer in any of the last 2 years shall be: Tshs. N/A”
(Emphasis added)

In this case therefore, the air conditioning contractors were not only discriminated against but they were also unfairly treated contrary to Section 43(a) and (b) of the Act.

- The Respondent intended to favour a pre-arranged contractor of their own choice to the detriment of local contractors who are marginalized.

In reply thereof, the Respondent submitted as follows:

- The said criterion was set by the Project Consultant, namely, Tanzania Building Agency (hereinafter to be referred to as **"TBA"- move to the submissions by the witness**) as they are the ones who prepared the solicitation documents pertaining to both the tender under Appeal as well as the tender for building works. TBA are qualified and experienced in construction works that is why they were assigned to oversee the project.

- Conceded that the criterion in dispute was not imposed on building contractors but claimed that it could have been a mere oversight on the part of TBA as it was supposed to apply to that tender as well.
- With regard to the intent of annual turnover, paragraph 11 of the Respondent's Written Replies, reads as follows:

"... the requirement of 5billion turnover for the past two years is not an exaggeration, rather than to see the appellant (sic) capability to finance our project smoothly and other ongoing projects if any, further more the Respondent has not contravened Regulation 14(4) of GN. No. 97 of 2005, the Respondent further would wish to cite Regulation 14(1)(a), which set out criteria's (sic) including financial resources but has not set the minimum,..." (Emphasis supplied)

Having summarized submissions by parties on this issue, the Authority analyzed their validity in the light of the Tender Document and the applicable law. To start with,

the Authority deemed it necessary to reproduce the disputed provision which reads:

“Item 13. Other information or materials required to be completed and submitted by Bidders: (b) The minimum required annual volume of construction work for the successful Bidder in any of the last 2 years shall be: Tshs. 5,000,000,000 (Tanzania Shillings Five Billion).” (Emphasis supplied)

The Authority upholds its previous decision in Appeal No. 76 of 2010 on a similar criterion and concurs with the Appellant for the following reasons:

- (i) The formulation of the above quoted clause is ambiguous and could operate in favour of contractors who are registered in multiple disciplines and be disadvantageous to contractors who are registered for specialist works such as in HVAC only.

(ii) The Respondent conceded during the hearing that, this requirement was equally important to the tender for building works, where it was not included in the evaluation criteria as its application was waived. The Authority observes that, both tenders were floated by the Respondent in respect of the same project. Therefore, by imposing the disputed criterion to air conditioning contractors alone, the Respondent failed to treat the tenderers equally and fairly. This contravened sub-Sections (a) and (b) of Section 43 of the Act which state 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 supplied)

- (iii) The circumstances in Appeal Case No. 76, were similar to the Appeal at hand, in that, the value of the air conditioning works was estimated at Shillings 2.5 billion while the tenderers were required to have an annual volume of construction works of Shillings 5 billion. In that Appeal, the Authority held that, the figure was not objectively justifiable. Similarly, in the Appeal at hand, the value of air conditioning works was estimated at Shillings 1.2 billion while the tenderers were required to have an annual turnover of Shillings 5 billion in any of the last two years. The Authority is of the considered view that, the said figure was not, by any standard, proportionate to the pre-tender estimate and therefore not objectively justifiable pursuant to Regulation 14(6) of GN. No. 97/2005 which states as follows:

“Subject to Regulation 16(1) and Regulation 25(1) **the procuring entity shall establish no criterion**, requirement or procedure with respect to the qualification of suppliers or contractors **that discriminates against** or among suppliers, **contractors**, service providers, buyers or against categories thereof on the basis of nationality, or **that is not objectively justifiable.**” (Emphasis added)

- (iv) By being unrealistic and not objectively justifiable, the said criterion was, not only discriminatory in nature, but also limited competition contrary to Section 63(2) of the Act and Regulation 9(b) of GN. 97/2005. The above cited provisions are quoted herein below:

“S. 63(2) The tender documents shall be worded so as to permit and encourage competition and such documents shall set forth clearly and precisely all the information

necessary for a prospective tenderer to prepare tender for the goods and works to be provided.

Reg. 9. To ensure the widest possible participation by suppliers, **contractors**, service providers or buyers **on equal terms** in invitations to tender for goods, works, services or disposal of assets, as appropriate, **procuring entities** and approving authorities **shall take the necessary measures to:**

(b) eliminate discriminatory practices or technical specifications which might stand in the way of widespread participation on equal terms;" (Emphasis supplied)

- (v) Annual turnover alone does not allow one to assess the financial capability of a tenderer, in that, a tenderer may meet that criteria while servicing huge debts which cannot be disclosed through the turnover. For instance, the Financial Statements submitted by the Successful Tenderer indicated that, they had incurred a loss

of Tshs. 33,813,559/= for the year 2009 and a profit of Tshs. 6,422,209/= for the year 2010. Moreover, the financial resources required for purposes of servicing project requirements, are represented by working capital which could be in the form of cash in hand or even a tenderer's ability to secure loans. It is the firm view of this Authority that, a tenderer's financial resources envisaged under Regulation 14(1) of GN. No. 97/2005 cannot be adequately measured by looking at a tenderer's annual volume of construction works *per se*. Therefore, this criterion contravenes the law. The said Regulation is reproduced herein below:

"14(1) To qualify to participate in procurement or disposal proceedings, suppliers, **contractors, service providers or asset buyers **shall meet the following criteria:****

(a) That they possess the necessary professional and technical

qualifications, professional and technical competence, **financial resources**, equipment and other physical facilities, managerial capability, reliability, experience and reputation, and the personnel to perform the procurement or disposal contract;" (Emphasis supplied)

In view of the above findings, the Authority is satisfied that, the criterion of annual volume of construction works of Shillings 5 billion contravened the law.

Having analyzed the validity of the requirement of Item 13(b) of the Bid Data Sheet, the Authority proceeded to examine whether the disqualification of the Appellant was justified. It is not disputed that, the Appellant was disqualified for failure to comply with the requirements of Item 13(b) of the Bid Data Sheet. It was evident during the hearing that, they had an annual volume of construction works of about Shillings 3.2 billion instead of

5 billion which was required. Since this was the only criterion which they allegedly failed to meet, the Authority is of the settled view that, the disqualification of the Appellant was unjustified.

We hasten to say that, assuming the said criterion was proper, the Authority discovered that, even the Successful Tenderer, namely, M/s Chigo Air Condition Tanzania Ltd did not meet the said criterion as it will be shown later under the second issue.

Accordingly, the Authority's conclusion in respect of the first issue is that, the requirements of Clause 13(b) of the Bid Data Sheet contravened the law and the disqualification of the Appellant was not justified.

2. Whether the award of the tender to M/s Chigo Air Conditioning Tanzania Ltd was proper at law

In resolving this issue, the Authority revisited the Appellant's grounds of Appeal where they disputed the

award made in favour of the Successful Tenderer for the following three reasons. Firstly, that the Successful Tenderer was registered in the year 2010 and therefore lacks the requisite experience to execute such contracts. Secondly, that the said tenderer, does not have an annual volume of construction works of Shillings 5 billion. Thirdly, that the Appellant's quoted tender price was lower compared to that offered by the Successful Tenderer.

In reply thereof, the Respondent submitted that, the Successful Tenderer had met all the requirements, including the disputed Item 13(b) of the Bid Data Sheet. In addition, they claimed that, the said tenderer was experienced in that area of specialization.

In order to ascertain whether the Successful Tenderer had complied with the requirements of the Tender Document as it was claimed by the Respondent, the Authority reviewed the evaluation process. To start with, the Authority revisited Clauses 28 to 34 of the Tender Document which guides on the manner in which the

evaluation was to be conducted. According to the said clauses, evaluation of tenders involved preliminary evaluation for determination of substantially responsive tenders, correction of errors, comparison of bids, determination of the lowest evaluated tenderer and post-qualification.

The Authority revisited the Evaluation Report to ascertain if the evaluation was conducted in accordance with the Respondent's own Tender Document. It was noted that, at the preliminary stage, the Evaluators were supposed to check compliance to the requirements of the Tender Document, that is, if the requested documents or information were provided by the tenderers. However, according to the Evaluation Report, preliminary evaluation was sub-divided into two stages, namely '**Commercial Responsiveness**' and '**technical responsiveness**' which though not indicated in the Tender Document are contained in the Tender Evaluation Guidelines for Procurement of Works or Goods issued in February, 2007 by the Public Procurement Regulatory

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

The Authority noted that, the first stage of Preliminary Evaluation which required verification of submitted documents was not done properly as some of the documents which were supposed to be confirmed that they were attached, at that particular stage, were not checked. These included documents showing the tenderer's experience, annual turnover, essential equipment, adequate working capital and the qualifications and experience of the Site Manager. The Authority noted that, the Successful Tenderer only provided a list showing turnover values for the years 2005 to 2009; they also gave a list indicating the projects that they had executed internationally in China, Greece, Azerbaijan and Mauritius without any supporting documents to substantiate that what they had listed was actually true as neither the nature of the projects nor their role therein was stated. The Authority noted further that, the said the projects had been executed before M/s

Chigo Air Conditioning Tanzania Ltd was registered in Tanzania as HVAC contractor on 4th January, 2010.

As for the financial Reports they supplied Financial Reports for only one year ended 31st December, 2010, instead of Audited Reports for three years as required under Item 13(b) of the Bid Data Sheet. Furthermore, Item 19 of the Bid Data Sheet required them to provide Bid Security of 2.5% of the tender sum but this was also not checked as the Successful Tenderer had instead submitted a Bid Securing Declaration. The Authority is of the view that such requirements should have been verified at the first stage of preliminary evaluation.

In the second stage of preliminary evaluation, the tenders' technical responsiveness was evaluated. The Authority observes that, the criteria used at this stage were proper, save for, annual turnover of Shillings 5 billion. The Authority noted that, it was at this stage of evaluation that the Appellant and M/s M.A.K. Engineering Co. Ltd and Softnet (J.V) were disqualified. As it has already been observed under the first issue, the

Appellant's disqualification on the basis of having an annual turnover of less than the required Shillings 5 billion was wrong as that particular criterion contravened the law.

The Authority also considered the disqualification of M/s M.A.K. Engineering Co. Ltd and M/s Softnet (J.V) whose tender, in addition to not complying with the annual turnover criterion, neither indicated the essential equipment nor presented their experience in undertaking projects of similar nature. The Authority observes that, had they been disqualified for only the same reason as the Appellant, their disqualification would have been unfair. However, failure to show the equipment required and experience on projects of similar nature was a material omission by virtue of Clause 28.2 of the ITB leading to justifiable rejection of their tender pursuant to Clause 28.3 of the ITB. The said provisions state as follows:

"28.2 A substantially responsive bid is one which conforms to all the terms, conditions, and

specifications of the bidding documents, without material deviation or reservation. A material deviation or reservation is one that:-

- (a) affects in any substantial way the scope, quality, or execution of the works;**
- (b) limits in any way, inconsistent with the bidding documents, the Procuring Entity's rights or the Bidder's obligations under the Contract; or**
- (c) if rectified, would affect unfairly the competitive position of other Bidders presenting substantially responsive bids.**

28.3 The Procuring Entity will confirm that the documents and information specified under ITB Clause 11 and ITB Clause 12 have been provided in the Bid. If any of these documents or information is missing, or is not provided in accordance with the Instructions to Bidders, the Bid shall be rejected.” (Emphasis added)

The Authority noted that, during this particular stage of evaluation, the tender submitted by the Successful

Tenderer was found to be substantially responsive hence qualified for detailed evaluation. However, the Authority is of the considered view that, the said tenderer should have also been disqualified at the preliminary stage for the following reasons:

- (i) According to the qualification information contained in the tender submitted by M/s Chigo Air Conditioning Tanzania Ltd, they were registered under the Companies Act, Cap. 212, on 13th July, 2007 and as Class 1 specialist contractors (Foreign Category) on 4th January, 2010. The Authority noted that, the two Business licenses issued by the Ministry of Trade & Industries and Kinondoni Municipal Council to the said tenderer on 11th December, 2007, and 20th October, 2010, respectively, were in respect of **“import and sale of all types of air condition and electronic equipment”**. This means, the nature of business conducted by the said tenderer prior to their registration as specialist contractors was clearly different and that their previous experience of

selling air conditioning and electronic equipment cannot be relevant in a tender for air conditioning and ventilation installations.

The Authority further noted that, the said tenderer's experience was substantiated through listing five projects, two of which were executed prior to their registration as Class I specialist contractors. This raises questions, as to how they were able to execute such projects when their license was for sale of air conditioners and electronic equipment. Moreover, the information given in their tender does not show their role in the said projects, as they only listed the names of the main contractors without any verifiable evidence of the said assignments. The Authority wonders, as to how the Evaluators were able to satisfy themselves that, the Successful Tenderer had actually executed the works listed and obtained the required experience as neither the nature of works nor their role in the projects was not mentioned.

The Authority also noted that, even if one were to consider the information provided on the overseas projects executed by **M/s Guangdong Chigo Air Conditioning Co. Ltd** of China this indicated that, they had only supplied the air conditioners and not engaged in installation works.

- (ii) The turnover indicated was for the period from year 2005 to year 2009, that is, before the said tenderer became eligible for the tender in dispute. Moreover, the said information belonged to **M/s Guangdong Chigo Air Conditioning Co. Ltd** of China, who did not participate in this tender. The Authority also discovered that, the turnover for the five years listed by the Successful Tenderer did not add up to Shillings 5 billion as required under Clause 13(b) of the Bid Data Sheet.
- (iii) Item 13(a) of the Bid Data Sheet required the tenderers to submit, amongst others, Audited Reports for the last three years. The Successful

Tenderer attached Audited Report for the year 2010 only.

- (iv) They submitted a Bid Securing Declaration instead of a Bid Security pursuant to Item 19 of the Bid Data Sheet which required a deposit of 2.5% of the contract value.

The Authority finds it inconceivable how the Evaluation Committee, the PMU and indeed the Tender Board could have missed or ignored so many shortfalls and proceeded to award the tender to a tenderer who manifestly did not meet the benchmarks set by the Procuring Entity. The Authority is inclined to believe that only unbecoming business practice can allow such blindness. No wonder the Appellant in their submissions suspect so.

Based on the above reasons, the Authority is satisfied that, the Successful Tenderer did not meet the required criteria and therefore should have been disqualified at the preliminary stage.

The Authority noted that, the next stage of evaluation involved price correction of errors which was done. This stage was followed by comparison of bids whereby the Evaluators were required to, among other things, evaluate the bids after removing provisional sums pursuant to Clause 31.2(b) of the ITB which states as follows:

“In evaluating the bids, the Procuring Entity will determine for each bid the evaluated bid price by adjusting the bid price as follows:

(b) **excluding provisional sums and the provision, if any for contingencies in the Bill of Quantities, but including Day works, where priced competitively;**” (Emphasis supplied)

The Authority noted that, this was not done and when the Respondent was requested to clarify that omission, during the hearing, they failed to do so.

The Authority noted further that, Item 30 of the Bid Data Sheet indicated that post-qualification **“may be**

undertaken” which contravened Section 48(1) of the Act, in that, the tenderers in this tender were not pre-qualified. The said section reads as follows:

“If tenderers have not been pre-qualified, the procuring entity and the tender board **shall determine** whether the tenderer whose tender or proposal **has been determined to offer the lowest evaluated tender,** in the case of procurement or the highest evaluated tender in the case of disposal of public assets by tender, **has the capability and resources to carry out effectively the contract as offered in the tender.”** (Emphasis added)

The above position is further emphasized in PPRA’s Guidelines which states categorically that, **“where pre-qualification has not occurred, the prospective award be subjected to post-qualification”**. The Authority observes that, the Respondent’s failure to post-qualify the Successful Tenderer contravened the law.

Having pointed out the shortfalls pertaining to the tender submitted by the Successful Tenderer and having observed that they should have been disqualified at the preliminary stage, the Authority is of the firm view that, the award made to them was not proper, thus a nullity in the eyes of the law.

In view of the above findings, the Authority's conclusion in respect of the second issue is that, the award of the tender to M/s Chigo Air Conditioning Tanzania Ltd was not proper at law.

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

Having disposed the contentious issues, the Authority considered prayers by parties. The Appellant requested this Authority to, first of all, annul the award of the tender. The Authority is of the view that, since the award of the tender to M/s Chigo Air Conditioning Tanzania Ltd contravened the law, there is nothing to be annulled. With regard to the Appellant's second prayer that, the Respondent be ordered to award the tender to the

Appellant, the Authority cannot grant it for want of jurisdiction. Furthermore, even if the Authority have such powers it would not have granted such prayer considering the evaluation process was not conducted in accordance with law. The Authority therefore orders the Respondent to re-evaluate the tenders for air conditioning works using the criteria set, save for Item 13(b) of the Bid Data Sheet, and accordingly proceed with the tender process in compliance with the law.

The Authority also considered the Appellant's third prayer, to wit, compensation of Tshs. 3,005,000.00 for costs incurred in pursuit of this Appeal. The Authority is of the firm view that, the Appellant is entitled to compensation for the costs incurred to the tune of **Tshs. 3,005,000.00** as per the following breakdown:

Item	Tshs.
Legal consultation fees	2,600,000.00
Appeal filing fees - PPAA	120,000.00
Stationery and secretarial costs	65,000.00
Costs in terms of time, telephone, fax, emails and transport	220,000.00
Total	3,005,000.00

With regard to the Respondent prayer that the Appeal be dismissed with costs, the Authority rejects it in its entirety, as the Appeal has merit.

Other matters that caught the attention of the Authority

In addition to the shortfalls pointed out in this decision, the Authority detected the following anomalies which are pointed out herein below to enable the Respondent to take note of them and ensure that they do not recur in future:

- (a) According to the particulars of the Successful Tenderer's local staff contained in their tender, the said company started to execute construction works before it was registered by CRB on 4th January, 2010. The extracts thereof showing the experience of some of their staff are reproduced herein below:

- **Site Engineer has “Worked for CHIGO Air-conditioning Tanzania Limited for Proposed Land Mark Hotel at Ubungo area and Lunch Time Hotel in Magomeni area”.** Their list of completed projects indicate that this project was finalized in December, 2009.

- The Site Foreman has worked for them from 2008 to-date – **“Worked with CHIGO Air-conditioning Tanzania Limited for Proposed Mbezi Beach High School at Mbezi Beach Area”.** This project was completed in February, 2008.

(b) Item 7 of the Bid Data Sheet indicates that pre-bid meeting is not applicable while Item 8 thereof requires the minutes of the pre-bid meeting to be submitted within seven days. The former provision therefore contradicts the latter.

(c) The contract sum, in respect of the tender for building works (main works) was estimated at

Shillings 1 billion, out of which about 55% was for **'unforeseen expenses'**. The Authority is concerned that, the **'unforeseen'** expenses included **'foreseen'** expenses as well as contingency, some of which were mentioned therein, meaning that they were known. The Authority concurs with the Appellant's witness that, it was wrong to allow for such a large amount to be spent at the sole discretion of the Project Architect. Considering further the involvement of TBA in the tender process and subsequently in the contract administration, we equally agree with the Appellant's witness that, Regulation 98 of GN. No 97/2005 requires to be reviewed so as to enhance transparency, limit the discretionary powers vested unto the contract /project supervisor and iron out conflicting roles thereof.

- (d) During the hearing the Respondent submitted that, the Tender Document was prepared by TBA. This means the criterion of annual volume of construction of Shillings 5 billion in any of the last

two years was their creation. The Authority observes that, TBA being a body conversant with the construction industry should have known better that, the said criterion was unrealistic.

- (e) During the hearing the Respondent submitted that, the tender for air conditioning works was a subcontract under the main contractor. The Authority concurs with the Appellant that, this assertion is not correct as the air conditioning contractor would contract directly with the Respondent who is the employer in this project as opposed to the main contractor.

- (f) According to the minutes of the Tender Board held on 18th April, 2011, post-qualification of the main contractor was conducted, partly through physically visiting the main contractor, after the award had been approved by the Tender Board. The Authority wonders how the approval was granted before the tenderer's capability to execute the contract satisfactorily had been ascertained pursuant to Clause 35.1 of the ITB.

(g) According to the documents availed to this Authority, it was noted that, the award of the disputed tender was submitted to the Respondent's Rector for 'approval' which was granted. The Respondent conceded during the hearing that, this is a general practice to them. The Authority is of the firm view that, the power to approve award of contracts is solely vested unto tender boards by virtue of sub-Sections (1)(b) and (2) of Section 31 of the Act which state as follows:

S. 31(1) Notwithstanding any other enactment, no public body shall:-

(b) award any contract **unless the award has been approved by the appropriate tender board.**

(2) No person or firm shall sign a contract with any public body **unless the award has been approved by the appropriate tender board.** (Emphasis supplied)

The Authority observes further that, the Rector's **'approval'** of award contravened the law, as it does not fall within the functions of an accounting officer provided for under Section 33 of the Act. According to Section 33(f) of the Act, the accounting officer is obliged to communicate an award decision made by a respective tender board. It is the view of the Authority that, the Respondent's conduct in this regard contravened Section 38 of the Act which emphasizes on independence of functions in the following words:

"Subject to the provisions of this Act, the Accounting Officer or Chief Executive, the Tender Board, the Procurement Management Unit, the User Department and the Evaluation Committee shall act independently in relation to their respective functions and powers."

(Emphasis supplied)

- (h) The Authority was not impressed by the performance exhibited by the Respondent's officers, who appeared before it for failure to

articulate their defence. They could not, for example, defend or explain the Preliminary Objection raised in their own Written Statement of Reply. Seriousness of purpose would have dictated that, they appear before the Authority with the lawyer who drafted the said document on their behalf.

Last but not least, the Authority commends Eng. Andrew Mwaisemba of M/s Cool Care Services Ltd and Chairman of the Association of Citizen Contractors of Tanzania, who appeared in this case as a witness for the Appellant, for repeatedly being courageous to exercise his statutory rights and encouraging others to do so, in pursuit of justice. The Authority appreciates his efforts to ensure procuring entities conduct their procurements in accordance with the law, as he has initiated review applications whenever he sees that the law is not adhered to. The Authority urges other tenderers who participate in public procurements to emulate Eng. Mwaisemba, as the review process under the Public Procurement Act, Cap. 410 is intended to, among other

things, to correct mistakes made by both procuring entities and tenderers and in the course of doing so ensure judicious use of public funds.

Having considered all facts and evidence, the Authority concludes that, the evaluation of the tenders was not properly conducted and the subsequent disqualification of the Appellant as well as the award of the tender to M/s Chigo Air Conditioning Tanzania Ltd were equally a nullity.

On the basis of the aforesaid findings, the Authority upholds the Appeal as it has merit and orders the Respondent to do the following:

- **Re-evaluate the tenders for air conditioning works using the criteria set, save for Item 13(b) of the Bid Data Sheet, and accordingly proceed with the tender process in accordance with the law; and**
- **Compensate the Appellant a sum of Tshs. 3,005,000.00 for some of the costs incurred.**

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

Decision delivered in the presence of the Appellants and Respondents this 18th July, 2011.



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JUDGE (rtd) A. BUBESHI
CHAIRPERSON

MEMBERS:

1. ENG. K.M. MSITA.....


2. MS. E.J. MANYESHA


3. MR. H. S. MADOFFE.....
