

IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY
AT MBEYA

APPEAL CASE NO. 138 OF 2012

BETWEEN

M/S PANIC SYSTEMS GROUP

COMPANY LIMITED APPELLANT

AND

VOCATIONAL EDUCATION AND TRAINING

AUTHORITY – SOUTH WEST ZONE.....RESPONDENT

DECISION

CORAM

- | | |
|---------------------------------|----------------|
| 1. Hon. A. G. Bubeshi, J. (rtd) | -Chairperson |
| 2. Eng. F.T. Marmo | -Member |
| 3. Ms. E.J. Manyesha | -Member |
| 4. Ms. B.G. Malambugi | -Ag. Secretary |

SECRETARIAT

- | | |
|----------------------|-----------------|
| 1. Ms. F. R. Mapunda | – Legal Officer |
| 2. Mr. H. O. Tika | -Legal Officer |

FOR THE APPELLANT

1. Mr. Michael A. Ukwaya – Director General
2. Mr. Julius J. Mgonja – Assistant Director, Administration

FOR THE RESPONDENT

1. Mr. Lameck P. Kihinga – Ag. Regional Director
2. Mr. Amani L. Njeleka – Ag. Chairman Tender Board
3. Mr. Athuman Mgaya – Supplies Officer

This decision was scheduled for delivery today 18th January, 2013 and we proceed to deliver it.

The appeal at hand was lodged by M/s PANIC SYSTEMS GROUP COMPANY LIMITED (hereinafter referred to as "the Appellant") against the VOCATIONAL EDUCATION AND TRAINING AUTHORITY - SOUTH WEST ZONE commonly known by its acronym VETA-SOUTH WEST ZONE (hereinafter referred to as "the Respondent").

The said Appeal is in respect of Tender No. VSWZ/MBY/01-23/2012-13 for the Supply of Goods and Provision of Services. The said tender had twenty three (23) Lots, however, the Appeal at hand is confined to Lot 8 which was for provision of Security Services (hereinafter referred to as "the tender").

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

The Respondent vide Tender Notice dated 14th September, 2012, posted on their Notice Board, inviting tenderers to submit tenders and quotations in relation

to various services and goods to be supplied. The said invitations were also made vide telephone calls to prospective tenderers.

The deadline for the submission of tenders was scheduled for 8th October, 2012.

In the tender under Appeal, two tenderers namely, M/s Amazon 12 Group Co. Ltd and the Appellant submitted their tenders within the deadline set, that is 8th October, 2012. During the tender opening the following prices were read out;

S/N	TENDERER	QUOTED PRICE (PER MONTH)
1.	M/s Amazon 12 Group Co. Ltd	Tshs. 1,650,000/=
2.	M/s Panic Systems Company Group Limited	Tshs. 4,360,000/=

The tenders were thereafter subjected to evaluation which was done in two stages namely; Preliminary Evaluation and Detailed Evaluation.

During Preliminary Evaluation tenders were checked for compliance with the eligibility criteria as specified in the Tender Document. According to the Evaluation Report both tenders were found to be substantially responsive as they had met the terms and conditions set out in the Tender Document and therefore qualified for detailed evaluation.

At the Detailed Evaluation stage, the tenders were subjected to price comparison only on the basis of rates quoted per guard for the areas to be guarded, whereby it was established that the tender submitted by M/s Amazon 12 Group Co Ltd had quoted the lowest price. On that basis, the Evaluation Committee recommended a conditional award of Tender to M/s Amazon 12 Group Co. Ltd pending submission of staff employment contracts, list of company buyers and evidence of weapon ownership which were found to be missing during the Preliminary Evaluation stage.

The Tender Board at its meeting held on 23rd November, 2012, deliberated on the Evaluation Report and approved the recommendations made by the Evaluation Committee.

On 26th November, 2012, the Respondent vide a letter without reference number communicated the conditional award of Tender to M/s Amazon 12 Group Co. Ltd. On the same date, the Respondent vide a letter also without reference number notified the Appellant that their tender was unsuccessful. The same letter required them to hand over the premises by 30th November, 2012 as they had been the service providers during the preceding year.

On receiving the notification letter, the Appellant vide a letter referenced SE/PSG/CF/MB/1130 dated 29th November, 2012, requested the Respondent to explain whether there were other reasons for their disqualification apart from the price.

On 4th December, 2012, the Respondent vide a letter referenced VETA/SWRS/TND/VOL.3/11.9/60 informed the Appellant about the extension of their former contract for one month up to 31st December, 2012. On the same date, the Respondent vide a letter referenced VETA/SWRS/TND/VOL.3/11.9/59 confirmed the award of tender to M/s Amazon 12 Group Co Ltd following

submission of the documents needed to prove, amongst others, ownership of weapons. Additionally, the said letter required M/s Amazon 12 Group Co. Ltd to attend the contract signing on 3rd December, 2012 and that their services to the Respondent would commence on 31st December, 2012.

Having received no response from the Respondent on their request to be given additional grounds for their disqualification apart from price, the Appellant felt aggrieved and on 7th December, 2012, lodged their Appeal to the Public Procurement Appeals Authority (hereinafter referred to as "the Authority")

On receiving notification of the Appeal, the Respondent raised points of Preliminary Objection on the ground that the appeal had been improperly filed before this Authority.

As a matter of procedure, the Authority is obliged to resolve first the Preliminary Objections raised before addressing the merits of the Appeal.

THE RESPONDENT'S SUBMISSIONS ON THE PRELIMINARY OBJECTIONS

The Respondent's Preliminary Objections were that;

- a) The Appeal before this Authority had been submitted prematurely as the Appellant had failed to observe the review procedures enshrined under Regulation 112(3) of the Public Procurement (Goods, Works, Non Consultant Services and Disposal of Public Assets by Tender) Regulations (hereinafter referred to as "GN. NO 97 of 2005")

- b) The Appellant erred in law for submitting their complaints directly to this Authority prior to referring it to the Public Procurement Regulatory Authority (hereinafter referred to as "PPRA") as required by Regulation 113 of GN No. 97/2005 in case they were dissatisfied with the Respondent's decision.

- c) The Appeal to this Authority was based on new grounds which had not been raised previously by the Appellant when seeking for review to the Respondent.

In expounding on the reason for their first point of Preliminary Objection, the Respondent submitted as follows:

That, the Appellant had filed the Appeal to this Authority after seven (7) days from the date they had filed their application for review.

That, according to Regulation 112(3) of GN No. 97/2005, the Accounting Officer is required to entertain the dispute within 30 days from the date it was lodged. The Appellant had submitted their complaints to them on 29th November, 2012 and the Appeal to this Authority was lodged on 7th December, 2012. That means, before the expiry of the statutory thirty (30) days, the Appellant filed their Appeal to this Authority.

Accordingly, the Appellant's Appeal to this Authority has been filed prematurely.

In relation to the second point of Preliminary Objection the Respondent stated that, the Appellant's act of submitting their Appeal to this Authority had contravened Regulation 113 of GN No. 97/2005 which requires complaints to be submitted to PPRA if a tenderer is dissatisfied with the decision of the Accounting Officer or if the Accounting Officer failed to issue a decision within 30 days. The Respondent contended further that, the Appellant did not observe this review procedure as they neither waited for the reply from them nor submitted their complaint to PPRA prior to lodging their Appeal to this Authority. Thus, the Appellant erred in law for lodging their Appeal directly to this Authority.

With regard to the third point of Preliminary Objection, the Respondent submitted that, the Appellant's Appeal to this Authority was based on new grounds which had not been previously submitted to them when the Appellant sought for review. The only ground which was presented to the Respondent was on what reasons made their tender to be disqualified apart from the price, while the Appeal filed to this Authority included

other grounds which were not previously known to them. Thus, the Appellant's act of raising new grounds at the appellate level had contravened the principles of the law as the Appeal had to be based on the same grounds raised at the first instance when the complaint was lodged.

Thus, based on the three points of Preliminary Objection they prayed that the Appeal be struck out as it is improperly before this Authority.

THE APPELLANT'S REPLIES ON THE PRELIMINARY OBJECTIONS

The Appellant's replies on the Preliminary Objection may be summarized as follows;

The Appeal to this Authority was lodged after it was realized that the procurement contract was in force as per section 55(7) of the Public Procurement Act, Cap 410 of 2004 (hereinafter referred to as "the Act") because the Respondent had already communicated the award to M/s Amazon 12 Group Co Ltd and they had been informed that they were unsuccessful.

According to their understanding once an award has been communicated to the successful tenderer, they are required to lodge their Appeal directly to this Authority and not to any other institution. Therefore , their Appeal is properly before the Authority.

ANALYSIS BY THE AUTHORITY AND RULING ON THE PRELIMINARY OBJECTIONS

Having gone through the documents submitted and having heard the oral arguments by parties in relation to the Preliminary Objections, the Authority analysed the three points which sum up to the core issue of whether the Appeal is properly before it as follows;

(a) Whether the Appeal has been lodged to this Authority prematurely

In resolving this point, the Authority considered the first two points of Preliminary Objections. In so doing the Authority started by revisiting the first point of Preliminary Objection and noted that, in their submission the Respondent relied to a great extent on Regulation 112 (3) of GN No. 97/2005. For purposes of

clarity the Authority reproduces the said regulation as follows;

“An accounting officer shall, within thirty days after receipt of the complaint or dispute, deliver a written decision ...”

According to the Respondent the Appellant had lodged the Appeal to this Authority after seven days from the date the complaint was submitted to them. That is to say, the Appeal to this Authority was lodged before expiry of the thirty days within which the accounting officer is required to issue a decision. Thus, the Appellant had lodged their Appeal prematurely, hence, contravened the requirements of the law.

In ascertaining the validity of the Respondent's arguments on the first point of preliminary objection, the Authority revisited the facts of this Appeal and observed that, the Appellant received the notification of their tender being unsuccessful on 26th November, 2012. The said letter also informed them that their tender was disqualified for having quoted higher price than that of their competitor. Upon being dissatisfied with the reason given for their disqualification the

Appellant on 29th November, 2012, wrote a letter to the Respondent asking to be given other reasons which led to their disqualification apart from price. Having received no response from the Respondent in relation to their queries, on 7th December, 2012, the Appellant filed their Appeal to this Authority as this was the only avenue through which they could seek for their rights since the procurement contract was already in force as per Section 55(7) of the Act.

In considering the arguments by parties, the Authority revisited Section 82(2)(a) of the Act which provides for circumstances under which an appeal can be filed directly to this Authority without the need to go through the other review levels. The said Section 82(2)(a) provides as follows: -

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

a) if the complaint or dispute cannot be entertained under section 80 or 81 because of entry into force of the

procurement contract and provided that the complaint or dispute is submitted within fourteen days from the date when supplier, contractor or consultant submitting it became aware of the circumstances giving rise to the complaint or dispute or the time when supplier, contractor or consultant should have become aware of those circumstances." (Emphasis added)

According to Section 55(7) of the Act, a procurement contract enters into force once an award has been communicated to the successful tenderer. For purposes of clarity the Authority reproduces the said section as follows;

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

The above quoted provisions entails that, an appeal can be filed directly to this Authority once the

notification of award has been communicated to the successful tenderer, whereby the procurement contract is considered to have entered into force. In such a situation, this Authority has the sole original jurisdiction.

The facts of this Appeal show that, the Appeal to this Authority was lodged on 7th December, 2012, while the award to the successful tenderer was communicated on 26th November, 2012. That means, by the time this Appeal was lodged the procurement contract had already entered into force.

Based on the above findings, the Authority agrees with the Appellant that, at the material time this Authority was the only institution with the sole original jurisdiction to entertain the Appellant's complaint.

The Authority wishes to enlighten the Respondent that, Section 80(3) of the Act ousts the powers of the Accounting Officer to entertain complaints once a procurement contract has entered into force. The said section is reproduced as follows;

“The head of a procuring entity or of approving authority shall not entertain a complaint or dispute or continue to entertain a complaint or dispute after the procurement contract has entered into force”. (Emphasis supplied).

Based on the above quoted provision the Authority observes that, the Respondent’s powers to entertain the complaint were ousted after they had communicated the tender award to the Successful Tenderer. Thus, the Authority rejects the Respondent’s arguments that, the Appellant ought to have waited for replies from them before lodging their Appeal to this Authority as they had thirty days for making a decision.

Furthermore, the Authority considered the Respondent’s arguments on the second point of Preliminary Objection to wit; the Appellant had failed to exhaust the review procedures by lodging their Appeal directly to this Authority while they were required to file their Appeal to PPRA in case they were dissatisfied with the decision of the Respondent. Thus, the Appellant

erred in law for submitting their complaint directly to this Authority prior to referring it to PPRA contrary to Regulation 113 of GN No.97/2005.

In relation to the second point of preliminary objection the Authority observes that Section 82(2)(a) of the Act also ousts the jurisdiction of PPRA in entertaining procurement complaints once a procurement contract has entered into force. Therefore, the Authority rejects the second point of preliminary objection as the Appellant was not required to file their complaints to PPRA.

The Authority wishes to enlighten the Respondent that, procurement complaints which are required to invoke the three stages of review are the ones which arise before the procurement contract enters into force. In such a situation, a dissatisfied tenderer has to start the review procedures by invoking Section 80 of the Act which requires complaints to be first submitted to the accounting officer. Upon being dissatisfied with the accounting officer's decision or if the accounting officer fails to issue a decision within the prescribed time, the

tenderer has to file their complaint to PPRA pursuant to Section 81 of the Act. Upon being dissatisfied with PPRA's decision or if PPRA fails to issue a decision within the stipulated time, then, the tenderers has to file their Appeal to this Authority pursuant to Section 82 of the Act.

Accordingly, on the basis of the above findings the Authority overrules the first and second points of Preliminary Objection as the Appellant was right in lodging their Appeal directly to this Authority. Thus, the Appeal has not been prematurely lodged to this Authority.

(b) Whether the Appeal was based on new grounds which had not been raised when the complaint was first lodged before the Respondent.

The Authority revisited the Respondent's contentions that, the Appellant had raised new grounds of Appeal to this level which were not raised to them when their complaint was filed. The said grounds are as follows;

i) the bidders were only two,

- ii) the successful tenderer is not registered with GPSA,
- iii) the successful tenderer had not shown adequate financial capability,
- iv) the successful tenderer's company buyers performed contracts do not show experience required by the Tender Document,
- v) The successful tenderer's number of equipment were not suitable for the work as required by the Tender Document,
- vi) The successful tenderer failed to produce financial audited accounts of at least six months as required by the Tender Document,
- vii) The price quoted by the successful tenderer was lower because of exclusion of VAT while the Tender Document required a VAT registered company.

The Respondent contended further that, the Appellant's act of raising new grounds at the appellate level had intended to hide their claims from them.

In resolving this point of Preliminary Objection, the Authority took cognizance of its findings on the first and second points of Preliminary Objections that, the Respondent's powers to entertain the Appeal were ousted after communication of award to the Successful Tenderer. Thus, the Appellant had the right to file any grounds they had in relation to the tender under Appeal directly to this Authority.

Furthermore, the Authority revisited the documents submitted and noted that, the Appellant's letter to the Respondent dated 29th November, 2012, was not an application for administrative review, rather, it was a letter seeking for more clarification on the reasons which led to their disqualification. Thus, it is the considered view of the Authority that, the Respondent had misconstrued the meaning of that letter as they treated it as if it was an application for administrative review.

Accordingly, the Authority also rejects the third point of Preliminary Objection since no new grounds have been raised.

In view of the above findings and conclusions, the Authority's conclusion on the Preliminary Objections raised is that, the Appeal is properly before it.

Having overruled the Preliminary Objections raised by the Respondent, the Authority proceeded to consider merits of the Appeal as hereunder.

SUBMISSIONS BY THE APPELLANT ON THE MERITS OF THE APPEAL

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, the Appellant was among the two tenderers who were invited to participate in the tender under Appeal.

That, M/s Amazon 12 Group Co Ltd was not among the registered suppliers for Security Services with the Government Procurement Services Agency (hereinafter

referred to as "GPSA") Mbeya Region for the current Financial Year.

That, M/s Amazon 12 Group Co Ltd was not VAT registered as required by the Tender Document.

That, the price quoted by M/s Amazon 12 Group Co Ltd was lower compared to that of the Appellant because they had excluded VAT while the Tender Document required all taxes and levies to be included in the quoted price.

That, M/s Amazon 12 Group Co Ltd failed to comply with the requirement to show an adequate financial status as they had attached a Bank Statement only for proving their financial liquidity instead of submitting Audited Accounts of at least six months as required by the Tender Document under Part VII, namely, Statement of Requirements.

That, the list of the past performed contracts attached to the tender of M/s Amazon 12 Group Co Ltd did not show the experience required by the Tender Document.

That, the working equipment owned by M/s Amazon 12 Group Co Ltd, such as motor vehicles were not suitable for the work as required by the Tender Document. Additionally, there was no evidence that, the said equipment was owned or would be leased by them.

That, the Respondent failed to show the lowest price quoted by M/s Amazon 12 Group Co Ltd upon being requested by the Appellant, instead they extended the contract by one month.

That, M/s Amazon 12 Group Co Ltd did not meet the minimum criteria in terms of experience as required by the Tender Document because their security services had commenced in the year 2012, while the Appellant had enough experience in works of similar nature as they had worked with similar institutions such as CBE, IFM, TIA and many others.

Finally, the Appellant prayed for the following orders;

- The entire tender process to be reviewed.
- The award of tender to M/s Amazon 12 Group Company Limited to be nullified.

- Compensation to the tune of Tshs. 5,000,000/= being costs incurred in the disputed tender process.

REPLIES BY THE RESPONDENT ON THE MERITS OF THE APPEAL

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

That, the tender under Appeal was conducted through Restricted Tendering method due to the fact that, the estimated contract value was within the limit set to procuring entities. The estimated contract value for the tender under Appeal was Tshs. 39 million per year.

That, the tender under Appeal did not include the service providers short listed by GPSA due to the fact that their prices are normally higher compared to the prevailing market rates. Additionally, being registered with GPSA was not one of the criteria set out in the Tender Document.

That, the Tender Document required tenderers to submit TIN Certificate and submission of VAT certificates was an optional requirement for tenderers who have been registered for it.

That, it is not mandatory in our procurement law that all tenderers have to be VAT registered, as that kind of registration depends on their income per year.

That, with respect to financial status, the tenderer was required to show the minimum amount in their Bank Account by submitting a Bank Statement for a period of three months but the minimum amount was not stated in the Tender Document. Moreover, the tenderers were required to show their financial status that would prove that they would be able to commence services which was complied to by M/s Amazon 12 Group Co Ltd.

That, M/s Amazon 12 Group Co Ltd had complied with the previous experience requirement as they had attached to their tender evidence proving their experience by indicating different places where they

were currently offering security services like, Galilaya Pharmacy, Chananja Petrol Station and JPE Production Co Ltd.

That, there was no specific requirement for one to state the period of experience whether in months or in years as that was not among the criteria required for one to be considered for award of the tender. Thus, the Appellant's claim on this point was not valid.

That, the Tender Document required a tenderer to show the number of arms, guns and vehicles owned being the equipment needed for the security services. M/s Amazon 12 Group Co Ltd showed that, they had one Saloon car and three motorcycles in place for work. Also there was no provision in the Tender Document which required that a tenderer must own a pick up vehicle. Thus, according to the Respondent those were sufficient equipment to execute the intended work as other vehicles could be hired if the need arose.

Finally the Respondent prayed for the following orders;

- The tender process be reviewed so as to verify if it was conducted in accordance with the law.
- The order to re-tender should not be granted.
- The Appeal be dismissed.

THE AUTHORITY'S ANALYSIS ON THE MERITS OF THE APPEAL

Having gone through the documents and having heard the oral arguments by the parties, the Authority is of the view that the Appeal is centered on the following issues:

- Whether the tender process was conducted in accordance with the law;
- whether the disqualification of the Appellant was proper at law;
- whether the award of the tender to M/s Amazon 12 Group Co 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:

1.0 Whether the tender process was conducted in accordance with the law

In resolving this issue the Authority considered the Appellant's main contention that, the entire tender process was conducted in contravention of the law and that the Authority should review the whole tender process. The Authority also deemed it proper, when resolving the Appellant's main contention to consider the oral prayer made by the Respondent during the hearing that the whole tender process be reviewed so as to ascertain whether it was conducted in accordance with the law. Thus, in reviewing this tender process the Authority examined the oral and documentary evidence submitted vis-à-vis the applicable law and the Tender Document. In doing so, the Authority framed the following sub-issues:

- whether the restricted tendering method applied was conducted in accordance with the law;
- whether the evaluation process was conducted in accordance with the law

Having framed the sub-issues the Authority proceeded to resolve them as follows:

Sub issue (i): Whether the restricted tendering method applied was conducted in accordance with the law.

In considering this sub issue the Authority revisited the Respondent's submission that the tender under Appeal was conducted through restricted tendering method. In ascertaining whether the method applied was in accordance with the law, the Authority revisited Regulation 67 of GN No. 97/2005 which provides guidance on what has to be considered when a procuring entity decides to use such a procurement method. The said Regulation 67 provides as follows;

“A procuring entity may restrict the issue of tender documents to a limited number of specified suppliers, contractors, or service providers when:

- a. Such supplier, contractors, or service providers have already been pre-qualified further to Regulation 15 and 64 and the procedures set out in Regulation 15 of these Regulations; or
- b. The goods, works or services required are of a specialized nature or can be obtained from a limited number of specialized contractors, or service providers or reputable sources; or
- c. The estimated contract values are within the limit for restricted tendering prescribed in the second schedule to these Regulations; or
- d. There is an urgent need for the goods, works or services such that there would be insufficient time for a procuring entity to engage in open national or international tendering, provided that the circumstances giving rise to the urgency could not have been foreseen by a procuring entity and have not been caused by dilatory conduct on its part”.

Having observed the circumstances upon which the restricted competitive tendering method could be applied, the Authority considered the Appellant's contention that, they were only two tenderers who were invited to participate in the tender under Appeal. Thus, there was no adequate competition. In reply thereof the Respondent contended that, they had opted to use restricted tendering method because the estimated contract value of Tshs. 39 million was within the allowed threshold limit of Tshs. 200 million as stipulated under the Second Schedule to GN No. 97/2005. Further, they contended that, they had opted to use that methodology due to time constraint caused by delay in disbursement of funds from the Government.

During the hearing members of the Authority asked the Respondent to explain how the two invited tenderers were identified. In reply thereof, the Respondent explained that, the Appellant was invited because he was the current service provider and they also invited two other tenderers, namely, MAASAI MARA and M/s Amazon 12 Group Co Ltd so as to increase the

competition. However, only the Appellant and M/s Amazon 12 Group Co Ltd responded and submitted tenders.

Having noted that, the two tenderers were invited without observing the required procedure, the Authority revisited Regulation 67 of GN No 97/2005 and in particular sub regulation (3) thereof which provides guidance on how the prospective tenderers could be obtained when restrictive tendering method is applied. The said sub-regulation (3) provides as follows;

“Except where the suppliers contractors, or service providers have already pre-qualified, a procuring entity issuing a restricted tender shall seek tenders from a list of potential suppliers, contractors, or service providers broad enough to assure competitive prices” (emphasis added).

From the submission of the Respondent the Authority observes that, much as the Procuring Entity had the discretion of choosing the appropriate procurement method to their need, the Respondent conceded not to

have complied with Regulation 67(3) of GN No.97/2005 since they did not pre-qualify any suppliers for the said services.

The Authority finds the Respondent to have also contravened Regulation 19 (1)(b) and 67(2) of GN. No. 97/2005 which require procuring entities to maintain a record of the pre-qualified or selected suppliers, contractors, service providers and assets buyers before they are invited to tender under such a method.

The Authority is of the further view that, the Respondent's act had contravened the provision of Section 58(2) of the Act which require procuring entities, to amongst others, maximize competition in the tender process. For purposes of clarity the Authority reproduces the said provision as hereunder;

“Subject to this Act all procurement and disposal shall be conducted in a manner to maximize competition and achieve economy, efficiency, transparency and value for money”
(Emphasis supplied)

Moreover, the Authority considered the Appellant's contention that, M/s Amazon 12 Group Co Ltd was not among the short listed service providers for the current year by GPSA and yet was invited to participate in the disputed tender process. In resolving the Appellant's contention the Authority revisited Regulation 57 of GN No. 97/2005 which provides that, the procuring entities "may" procure from the Government Stores (GPSA) any item in their catalogue where such item is available at lower prices than the current market prices and observes that, the Respondent was not bound to use the list of the service providers under the GPSA.

In view of the above, the Authority's conclusion with regard to sub issue one is that, the restricted tendering method applied was not conducted in accordance with the law.

Sub-issue (ii):whether the Evaluation process was conducted in accordance with the law.

In resolving this sub issue the Authority decided to review the Tender Document so as to determine

whether it was in accordance with the law before embarking on analyzing how evaluation process was conducted since evaluation process depends on criteria provided for in the Tender Document. In examining the Tender Document, the Authority deems it necessary to revisit Section 63(2) of the Act and Regulation 83(1) of GN. No. 97 of 2005 which guide as to the contents of Tender Documents. For purposes of clarity the Authority reproduces the said provisions as hereunder;

“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 for the goods and works to be provided.”

As regards to Regulation 83(1) of GN No.97/2005 the Authority reproduces in part the relevant provisions thereof as hereunder;

“83(1) The solicitation documents shall include instruction to tenderers with at a minimum, the following information:

- (a) The criteria and procedures, in conformity with the provisions of Regulation 14, relative to the evaluation of the qualifications of contractors, suppliers, service providers or asset buyers and relative to the further demonstration of qualification pursuant to Regulation 90(18);
- (b) the requirements as to documentary evidence or other information that must be submitted by suppliers, contractors, service providers or asset buyers to demonstrate their qualifications;
- (c);
- (d) the criteria to be used by the procuring entity in determining the successful tender, including any margin of preference and any criteria other than price to be used pursuant to Regulation 90(15) and the relative weight of such criteria;
- (e)".

Having considered the above quoted provisions, the Authority reviewed the Tender Document issued by the

Respondent so as to ascertain if it had complied with the law. In course of so doing the Authority observed a number of shortfalls including the following;

1. The eligibility and award criteria were vague and not exhaustive contrary to Regulation 83 of GN. No.97/2005. For instance, the required number of guards was not stated, the period of previous experience was not specified, the type and number of equipment needed like vehicles, guns and other facilities were not stated.
2. Financial capability requirement was contrary to Regulation 10(3) and (4) of GN No. 97/2005 which guides on the documents to be submitted by a tenderer to prove financial capability. According to Regulation 10(4) of GN No.97/2005 financial status could be shown by Audited Accounts, financial statement, balance sheets and Auditors Report and not three months Bank Statement as it was stated in the Tender Document.
3. Financial capability requirement was contradictory, as under ITB and Bid Data Sheet (BDS) the requirement was to submit a Bank Statement of

not less than 'three recent months', while under part VII Statement of Requirement, tenderers were required to submit Bank Statement of not less than 'six recent months'.

4. The requirement of a Valid Business License was not clear, as it was not stated specifically that the license required was for provision of Security Services in Mbeya Region.
5. There was no provision for Post-qualification contrary to Section 48 of the Act read together with Regulation 94 of GN No. 97/2005.
6. The specific documents required to show legal capacity to enter into contract were not stated contrary to Regulation 14(1)(a) and (b) of GN. No. 97/2005.

From the above pointed shortfalls the Authority observes that, the Respondent's Tender Document had contravened Section 63(2) of the Act and Regulation 83 of GN. No. 97 of 2005.

Having identified the above shortfalls, the Authority proceeded to review the Evaluation Report so as to verify if the evaluation process was conducted in accordance with the law.

In so doing, the Authority revisited the Appellant's contention that, the award of tender has been made to a tenderer who failed to comply with the requirements of the Tender Document. The Authority also considered the Respondent's replies on this point that, the award of tender had been made to M/s Amazon 12 Group Co Ltd who was found to be substantially responsive to the requirements of the Tender Document.

In ascertaining the conflicting arguments by parties the Authority revisited the Evaluation Report in order to verify if the evaluation process was carried out in accordance with the law.

In so doing, the Authority deemed it pertinent to address each of the Appellant's grounds of Appeal as well as other criteria which were improperly evaluated. The Authority's analysis on some of the evaluation criteria is as follows:

a) VAT Registration

The Authority considered the Appellant's argument on this point that;

- i) M/s Amazon 12 Group Co Ltd was not VAT registered as required by the Tender Document, hence, they did not qualify for award of tender, thus the award of tender have been unfairly made to them.

- ii) The price quoted by M/s Amazon 12 Group Co Ltd was VAT exclusive and that is why their prices were regarded to be lower than that of the Appellant.

In reply thereof the Respondent submitted that;

- i) VAT registration was not a mandatory requirement of the Tender Document. Tenderers could be VAT registered or not, but non registration could not be the basis of the tenderers disqualification. Further, the

procurement law is silent on the issues of VAT, hence, it cannot be termed to be a mandatory requirement.

- ii) The price quoted by M/s Amazon 12 Group Co Ltd was VAT exclusive but it had included other taxes. Thus, it is not true that the said price is exclusive of taxes.

In ascertaining the validity of the parties' arguments, the Authority revisited the Tender Document and noted that Clause 1. 3 of the ITB provided for the requirement to submit a VAT certificate. The said Clause states as follows;

"The supplier shall attach the following to its quotation;

1.3 A valid VAT (if registered) and TIN Certificate". (Emphasis added)

From the above provision, the Authority concurs with the Respondent's arguments to the effect that the

Tender Document required tenderers to attach the VAT certificate only if they have been registered.

Moreover, the Authority considered the Appellant's argument that their price was higher because it was inclusive of VAT and observes that, it is true that the Appellant's prices were VAT inclusive and that of M/s Amazon 12 Group Co Ltd was VAT exclusive. During the hearing, members of the Authority asked the Respondent on how they managed to compare the price of the Appellant's tender which was VAT inclusive to that of M/s Amazon 12 Group Co Ltd which was VAT exclusive. The Respondent failed to substantiate how the said comparison was done.

From the above facts the Authority observes that, the Respondent ought to have either added VAT to the Successful Tenderer's quotation or deducted VAT from the Appellant's tender before they were compared in order to place them on a common base. The act of the Respondent comparing two tenders with unequal price had contravened Regulation 90(3) of GN 97/2005 which provides as follows;

“The tender evaluation committee shall evaluate on a common basis opened tenders in order to determine the cost or price to the procuring entity of each tender in a manner that permits a comparison to be made between the tenders on the basis of the evaluated costs or prices”. (Emphasis supplied)

The Authority is of the further view that, the Respondent’s act in this regard indicated clearly that they had intended to favour M/s Amazon 12 Group Co Ltd contrary to Section 43 of the Act which states 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; and
- (c) the need to obtain the best value for money in terms of price, quality and delivery having

regard to set specifications and criteria”
(Emphasis supplied)

That said, the Authority is satisfied that price comparison was not properly conducted, hence, the Appellant’s claim on the point of price comparison has justification.

b) Financial capability

In resolving the contentious argument of the Appellant that, M/s Amazon 12 Group Co Ltd does not have the required financial capability, the Authority deemed it prudent to revisit the Tender document in order to establish what was required in order to establish financial capability. In so doing it was observed that, Clause 1.4 of the ITB stated the financial requirements in the following words;

“The supplier shall attach the following to its quotation;

1.4 Bank Statements with financial status of not less than three recent months”.
(Emphasis supplied)

Having noted that the Tender Document required the submission of Bank Statement of three recent months and having perused the tender of M/s Amazon 12 Group Co Ltd and noted that it had complied with such requirement, the Authority asked the Respondent whether the three months Bank Statement was sufficient to prove financial capability. In reply thereof, the Respondent contended that, based on the nature of the tender under Appeal the three months Bank Statement was sufficient to prove the financial capability of a tenderer, since security services do not require a huge working capital.

The Authority rejects the Respondent's argument on this point on the basis of Regulation 10(4)(e) of GN No. 97/2005 which states as follows;

"All tenders submitted shall include the following information:

- (e) reports on the accounting and financial standing of the tenderer or of each party to a joint venture such as profit and loss statements, balance sheets and auditor's

reports, an estimated projection for the next two years and an authority from the tenderer or authorized representative of a joint venture to seek reference from the tenderer's bankers". (Emphasis added)

Based on the above quoted provision, the Authority concurs with the Appellant's argument that it is not possible to establish financial capability of a tenderer through a mere three months Bank Statement.

Accordingly, it is the considered view of the Authority that, had the Respondent been diligent they would have noted that the financial capability of M/s Amazon 12 Group Co Ltd was not sufficiently established in terms of Regulation 10(4)(e) above cited.

c) List of recent performed contracts

In considering this criterion the Authority revisited the Appellant's argument that, M/s Amazon 12 Group Co Ltd did not have the required experience as they were new in the security services field at the time the disputed tender was floated. In reply, the Respondent contended that the Tender Document did not specify

the period of experience required, hence, it can not be argued that M/s Amazon 12 Group Co Ltd failed to meet the minimum experience criteria. They contended further that, experience was not among the important criteria required for evaluating security services since equipment were more crucial.

In resolving the conflicting arguments by parties the Authority revisited Clause 1.6 of the ITB which provided for the experience requirement in the following words;

“The supplier shall attach the following to its quotation;

1.6 A list of recent company buyers performed contracts including the names and addresses of employers for verification”. (Emphasis supplied)

The above quotation entails that, tenderers were required to show recent experience in terms of the performed contracts. The Authority reviewed the tender submitted by M/s Amazon 12 Group Co Ltd and observed that, they had attached copies of the recent on going contracts only. Based on that fact, the

Authority is of the view that, even though the minimum required experience was not expressly stated in the Tender Document, M/s Amazon 12 Group Co Ltd was required to attach copies of the recent performed contracts and not on going contracts. Failure by M/s Amazon 12 Group Co Ltd to attach copies of the performed contracts indicated that they did not meet this requirement, hence, they ought to have been disqualified.

The Authority revisited further the Evaluation Report and observes that, even the evaluators had noted the said shortfall and hence recommended a conditional award of tender to M/s Amazon 12 Group Co Ltd subject to submission of, amongst others, previous experience.

The Authority noted with dismay the evaluator's recommendations in this regard as they ought to have disqualified M/s Amazon 12 Group Co Ltd for failure to comply with such a mandatory requirement.

Furthermore, the Authority noted that, the letter of award dated 26th November, 2012, communicated to M/s Amazon 12 Group Co Ltd required them to submit the said experience. The Authority finds the Respondent's act to have contravened Regulation 90(16) of GN No. 97/2005 which prohibits making a non responsive tender to be responsive. The said regulation provides as follows;

“If a tender is not responsive to the tender document, it shall be rejected by the procuring entity, and may not subsequently be made responsive by correction or withdrawal of the deviation or reservation”.
(Emphasis added)

Based on the above findings the Authority is satisfied that M/s Amazon 12 Group Co Ltd ought to have been disqualified at the Preliminary Evaluation stage for being substantially non responsive.

d) Equipment

In considering this point, the Authority reviewed the documents submitted in order to substantiate if M/s

Amazon 12 Group Co Ltd possessed the necessary equipment. In so doing the Authority noted that, M/s Amazon 12 Group Co Ltd did not attach any documents to show proof of ownership of firearms instead, they attached a letter from the Police Force which informed the Respondent that, M/s Amazon 12 Group Co Ltd had submitted an application for a license to own two SHORT GUNS 12 BORE so they should be assisted.

The Authority noted further that, during the evaluation process the same anomaly was noted by the evaluators; however, they did not disqualify the Successful Tenderer, instead, they recommended that proof of ownership be submitted. The Authority finds the evaluators' act in this regard to have contravened Regulation 90(16) of GN No. 97/2005 cited above.

Furthermore, the Authority considered the Appellant's arguments on the type of vehicles owned and observes that, the Tender Document did not specify the type of vehicles to be shown. The Authority regards it to be a shortfall of the Tender Document, hence, M/s Amazon

12 Group Co Ltd can not be condemned for showing the Saloon car and three motorcycles.

Having considered the Appellant's grounds of Appeal in relation to the evaluation process, the Authority reviewed further the Evaluation Report and noted the following anomalies in the said process;

- i) M/s Amazon 12 Group Co Ltd did not have the permit to operate security services in Mbeya Region; the only permit attached indicated that they had been permitted to offer the said services in Mpanda.
- ii) Apart from the anomalies pointed out by the Appellant in the tender of M/s Amazon 12 Group Co Ltd, the Authority noted further that, Table 8 of the Evaluation Report had indicated that the tender of M/s Amazon 12 Group Co Ltd lacked business license as they had only attached the application form.
- iii) During Preliminary Evaluation tenders were not only checked for compliance with the eligibility criteria but also were checked for

previous experience, financial status, equipment owned and list of employees available and their employment contracts. The Authority finds the Respondent to have contravened Regulation 90(6) of GN No. 97/2005 read together with Clause 9.1 of the ITB which stipulates what has to be checked during Preliminary Evaluation stage. The Respondent had also contravened Evaluation Guidelines for Quotation issued by PPRA in June, 2008, which provides clear guidance on what has to be done during the Preliminary Evaluation process.

- iv) During Detailed Evaluation the Respondent did the price comparison only while Evaluation Guidelines for Quotation requires technical specifications to be assessed before correction of arithmetic errors and price comparison at that stage of evaluation.

Based on the pointed weaknesses of the tender of M/s Amazon 12 Group Co Ltd, the Authority is satisfied that they had failed to comply with the requirements of the

Tender Document, hence, they ought to have been disqualified for being substantially non responsive. Thus, the Authority is of the settled view that the award made to them was a nullity in the eyes of the law.

From the above made findings the Authority's conclusion on sub issue two is that, the evaluation process was not conducted in accordance with the law.

Accordingly, the Authority's conclusion on the first main issue is that the tender process was not conducted in accordance with the law.

2.0 whether the disqualification of the Appellant was proper at law;

In resolving this issue the Authority took cognizance of its findings made on issue number one that, disqualification of the Appellant based on price was not justifiable as the price comparison analysis was not done in accordance with the law. The Authority's conclusion therefore is that the disqualification of the Appellant was not proper at law.

3.0 whether the award of the tender to M/s Amazon 12 Group Co Ltd was proper at law;

In resolving this issue the Authority relied on its findings in issue number one that, the award of tender to M/s Amazon 12 Group Co Ltd was not proper in the eyes of the law as their tender ought to have been disqualified for being substantially non responsive.

Additionally, the Authority observed the following;

- i) The validity period specified for the tender under Appeal was 45 days, the tender opening took place on 8th October, 2012 and the award to M/s Amazon 12 Group Co Ltd was communicated on 26th November, 2012 while the contract was signed on 31st December, 2012. Counting from the tender opening date that is 8th October, 2012, forty five (45) days expired on 22nd November, 2012. That is to say, communication of award to M/s Amazon 12 Group Co Ltd and the contract signing were done outside the tender validity period, contrary to Section 64 of the Act and Regulation 85(2) of GN No.

97/2005 which requires evaluation of tenders and signing of the contract to be completed within the tender validity period specified unless an extension has been requested and granted.

- ii) The value of the contract signed between M/s Amazon 12 Group Co Ltd and the Respondent differs significantly with the value tendered for as indicated in the Form of Bid as well as in the Evaluation Report. Whereas M/s Amazon 12 Group Co Ltd had tendered for Tshs. 1,650,000/- per month, the contract signed was for Tshs. 3,895,000/- per month. The Authority did not receive any plausible explanation in respect to the change in the said price. The Authority is appalled by such a discovery on the part of the Respondent.

Accordingly, the Authority is of the settled view that the award made to the M/s Amazon 12 Group Co Ltd was not proper at law.

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

Having resolved the contentious issues in dispute, the Authority revisited the prayers by parties and resolved them as hereunder:

(a) Prayers by the Appellant

The Appellant requested the Authority to review the entire tender process and satisfy itself as to whether the Respondent had complied with the law in awarding the tender to M/s Amazon 12 Group Co Ltd and order the Respondent to re-start the tender process afresh in observance of the law.

In determining this prayer, the Authority took cognizance of its findings and conclusions in the first and third issues above, that, the tender process was conducted in contravention of the law and that M/s Amazon 12 Group Co Ltd did not qualify for the award of the tender for failure to comply with the requirements of the Tender Document. The Authority therefore accepts the prayer by the Appellant and

orders the Respondent to re-start the tender process afresh in observance of the law.

The Appellant also prayed for costs to the tune of Tshs.5,000,000/- be awarded to them being costs for disturbance the Respondent had caused to them which included; Appeal filling fees, costs incurred in purchasing the Tender Document and costs to pay their staff who had been engaged previously by the Appellant but are now on leave due to the expiry of the contract with the Respondent. With regard to this prayer the Authority is of the view that, the Appellant deserves to be compensated only for the actual costs incurred as per the following breakdown;

1. Appeal filing fees Tshs. 120,000/=

2. Tender Document purchasing fees Tshs. 30,000/=

It should be noted that, the law requires the Appellant to be compensated only for the reasonable costs incurred in seeking their rights before the Authority and not otherwise. The Authority is therefore unable to order compensation for the other costs claimed by the Appellant for lack of documentary proof.

That said, the Authority orders the Respondent to compensate the Appellant a total of Tshs. 150,000/= only being actual costs they had incurred.

(b) Prayers by the Respondent:

The Authority considered the Respondent's prayer that tender process be reviewed and satisfy itself as to whether the same was conducted in accordance with the law and states that it has already been established under issues one and two that the whole tender process was not conducted in accordance with the law.

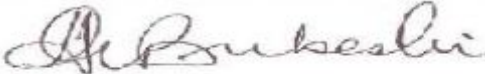
With regard to the Respondent's prayer that the Appeal be dismissed, the Authority rejects this prayer as the Appeal has merits.

On the basis of the aforesaid findings, the Authority upholds the Appeal and orders;

- the Respondent to re-start the tender process in observance of the law; and
- the Appellant be awarded costs to the tune of Tshs. 150,000/= only.


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

Decision delivered in the presence of the Appellant and the Respondent this 18th January, 2013.



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JUDGE (rtd) A. BUBESHI
CHAIRPERSON

MEMBERS:

- 1. Eng. F. T. MARMO.....
- 2. MS. E.J. MANYESHA.....