

**IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY
AT DODOMA**

APPEAL CASE NO. 76 OF 2010

BETWEEN

**M/s COOL CARE SERVICES LIMITED1ST APPELLANT
M/s DAIKIN TANZANIA LIMITED2ND APPELLANT
M/s REMCO (INTERNATIONAL) LTD3RD APPELLANT**

AND

LOCAL AUTHORITIES PENSIONS FUND....RESPONDENT

DECISION

CORAM:

- | | |
|--------------------------------|---------------|
| 1. Hon. A.G. Bubeshi, J. (rtd) | - Chairperson |
| 2. Hon. V.K. Mwambalasa(MP) | - Member |
| 3. Mr. M. R. Naburi | - Member |
| 4. Mr. K.M. Msita | - Member |
| 5. Ms. E.J. Manyesha | - Member |
| 6. Ms. B.G. Malambugi | - Secretary |

SECRETARIAT:

- | | |
|-----------------------|---------------------------------|
| 1. Ms. E.V.A. Nyagawa | - Principal Legal Officer, PPAA |
| 2. Ms. F. Mapunda | - Legal Officer, PPAA |

FOR THE 1ST APPELLANT:

1. Eng. Andrew R. Mwaisemba – Managing Director
2. Mr. Korduni T. Lende - Finance and Administrative Manager

FOR THE 2ND APPELLANT:

Mr. Allen Bosinney – Project Manager

FOR THE 3RD APPELLANT:

1. Eng. Thobius Thambikeni – Engineer
2. Mr. Ismail Safraz - Logistics

FOR THE RESPONDENT

1. Mr. Eliad E. Mndeme – Principal Legal Officer
2. Mr. Steven Biko - Legal Officer
3. Mr. Abdallah Khamis - Senior Supplies Officer
4. Eng. Jamal Mruma - Project and Estates Manager

This decision was scheduled for delivery today 17th September, 2010, and we proceed to deliver it.

The appeal at hand was lodged by **M/s COOL CARE SERVICES LIMITED** (hereinafter to be referred to as **“the 1st Appellant”**) against **LOCAL AUTHORITIES PENSIONS FUND** commonly known by its acronym **LAPF** (hereinafter to be referred to as **“the Respondent”**). Following notification of the tender results two other tenderes, namely, **M/s DAIKIN TANZANIA LIMITED** and **M/s REMCO (INTERNATIONAL) LTD** opted to join as parties to this Appeal (hereinafter to be referred to as **“the 2nd and 3rd Appellants”** respectively).

The said Appeal is in respect of Tender No. PA 095/2008/09/W/24 for Installation of Air Conditioning and Ventilation for the Proposed Office Accommodation Building on Plot Nos. 11 & 12, Block “D” Makumbusho Area, Dar es Salaam (hereinafter to be referred to as **“the Tender”**).

The Appeal basically concerns two distinct stages of the procurement proceedings, namely, appeal based on pre-tender concerns and appeal disputing the award of the

tender. Accordingly, this decision is equally structured to cover each of the two aspects of the Appeal.

The First Part of this decision deals with the Appeal by the 1st Appellant who disputes some of the participation conditions embodied in the Tender Document and the Second Part of this decision deals with Appeals submitted by the 2nd and 3rd Appellants who dispute the award of the tender under appeal.

THE FIRST PART OF THE DECISION

According to the documents submitted to the Authority as well as oral submissions by the 1st Appellant and the Respondent, the facts of the First Part of the Appeal may be summarized as follows:

The Respondent invited tenders for Installation of Air Conditioning and Ventilation for the Proposed Office Accommodation Building on Plot Nos. 11 & 12, Block "D" Makumbusho Area, Dar es Salaam *vide* the Daily News, Nipashe and The Guardian newspapers of 30th April,

2010. The deadline for submission of tenders was set for 28th May, 2010, at 14:30 hours.

On 3rd May, 2010, the 1st Appellant wrote to the Respondent vide letter referenced CCSL/TA/08/10 seeking review of Clause 13(a) of the Bid Data Sheet which required the annual volume of construction works for the tenderers in any of the past two years to be Tshs. 5,000,000,000/-. The same letter was copied to the Public Procurement Regulatory Authority (hereinafter to be referred to as "**PPRA**").

On 6th May, 2010, PPRA wrote to the Respondent a letter referenced PPRA/PA/095/80 requiring the latter to address the issues raised by the 1st Appellant before further processes are made on the said procurement and issue a decision within the time frame.

On 14th May, 2010, the Respondent convened a Pre-bid meeting whereby several issues were discussed and clarifications made, amongst them, was the issue of

Clause 13(a) of the Bid Data Sheet and non availability of drawings.

Following the clarifications made at the Pre-bid meeting the tender opening date was extended to 11th June, 2010. On 10th June, 2010, the 1st Appellant vide letter referenced CCSL/TA/17/10 applied for administrative review to PPRA.

On 6th July, 2010, PPRA wrote to the 1st Appellant *vide* letter referenced PPRA/PA/095/87 informing them that, their application for administrative review had been rejected due to the fact that the same was not an application for administrative review at that point as they were required to seek for clarification of the Tender Document. Also the remedy sought to remove Clause 13(a) from the Bid Data Sheet was not justified.

Being dissatisfied with the decision of PPRA, on 16th July, 2010, the 1st Appellant lodged an appeal to the Public Procurement Appeals Authority (hereinafter to be referred to as "**the Authority**").

SUBMISSIONS BY THE 1st APPELLANT

The 1st 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, the Respondent had erred in law when they failed to entertain the 1st Appellant's application for review as per Section 80(1)-(4) of the Public Procurement Act, Cap 410 (hereinafter to be referred to as "**the Act**")

That, the Respondent erred in imposing a condition stated in Clause 13(a) of the Bid Data Sheet regarding minimum annual volume of construction works knowing that;

- (i) The legally stated criteria are as provided in Regulation 14(1)(a)-(e) of the Public Procurement (Goods, Works, Non consultant Services and Disposal of Public Assets by Tender) Regulations,

2005 of GN No 97 of 2005 (hereinafter to be referred to as "**GN. No. 97/2005**").

(ii) It is contrary to Regulation 14(4) of GN. No. 97/2005.

(iii) The criteria cannot be used to determine the financial capability of a tenderer.

That, the Respondent's submission that the annual volume of construction works was in accordance with the PPRA guidelines is disputed on the reasons that, Clause 1.2 (purpose of the User Guide) of the User Guide for Procurement of Medium and Large Works issued by PPRA in July, 2007, provides that the User Guide is not legally binding but procuring entities must comply with the Act.

That, the Respondent changed Clause 18.3 of the Bid Data Sheet relating to Bid Security during the Pre-bid meeting held on 14th May, 2010, of which required the tenderers to submit a Bid Security in form of an Unconditional Bank Guarantee contrary to the

requirements of Regulation 88(3) of GN No.97/2005. The same Clause 18.3 of the Bid Data Sheet was changed because of the following reasons;

- (i) To limit competition and scare some of the bidders by imposing conditions which could not be easily complied by all the tenderers.
- (ii) To prepare an environment which will benefit some of the tenderers in the tender process.
- (iii) To deny some of the tenderers an opportunity to participate in the tender process.

That, there is circumstantial evidence showing that the said criterion was deliberately imposed to discourage participation of some contractors but at the same time ensure that a conducive environment was provided for one of the tenderers to qualify.

That, Item 13(b) of the Bid Data Sheet required tenderers to have completed at least one project to the extent of 70% instead of 100%. Thus, the Appellant wondered how the Respondent could assess the financial

capacity and experience of the tenderers in the related field considering that purchase of related equipment and tools account for between 65% to 70% of the total cost of the entire project.

That, the Respondent has a record of unlawful acts in public procurement as shown in the following examples;

- The Respondent favoured one of the companies in a previous tender which after review by this Authority the same was annulled and had to be started afresh.
- The re-advertisement of this tender was delayed purposely so as to provide opportunity for the intended tenderer to acquire the relevant experience in the field so as to fit in the competition.
- The Respondent awarded the tender for plumbing to M/s China Railway Jiang Chang Engineering Ltd (CRJE) by using single source method as they were the only tenderer who were given the Tender Document for plumbing and main works. Also the tender for electrical works was awarded to M/s

Derm Electrics Ltd while they did not participate in the Pre-qualification process.

- The Respondent split the project for the proposed College of Health Sciences, University of Dodoma into three lots for the main works which were awarded to three different tenderers through competition; while the tender for air conditioning and electrical works for the three lots was awarded to one tenderer.
- The tender under Appeal has been awarded to a tenderer whose annual volume of construction works was not as per the requirement of the Bid Data Sheet. Also the Bid Security submitted by the successful tenderer was in the form of an Insurance Bond instead of an Unconditional Bank Guarantee as required.
- The Respondent has awarded the tender to the tenderer whose price is more expensive by Tshs. 600,000,000/- compared to that of **other** experienced tenderers in the field of air conditioning.

The 1st Appellant therefore prayed for the following reliefs to be granted by the Authority:

- (i) Declare that Clause 13(a) of the Bid Data Sheet as illegal

- (ii) Order the Respondent to omit the said criterion and re-start the Tender process afresh in observance of the law;

- (iii) Prohibit the Respondent from acting unlawfully;

- (iv) Order the Respondent to compensate the 1st Appellant the sum of **Tshs. 3,670,000/-** as per the following breakdown:

| S/ No. | Expenditure | Tshs. |
|-------------------|--------------------|--------------|
|-------------------|--------------------|--------------|

| | | |
|--------------|---|--------------------|
| 1 | Legal consultation fees | 2,000,000/- |
| 2 | Complaint registration fees to PPRA | 10,000/- |
| 3 | Appeal registration fees - PPAA | 120,000/- |
| 4 | Purchase of the Tender Document | 250,000/- |
| 5 | Cost for transport for one officer sent to Dodoma to purchase Tender Document | 90,000/- |
| 6 | Cost for various publications and secretarial services used in this Appeal | 100,000/- |
| 7 | General cost for disturbance and time used by officers while pursuing this Appeal | 500,000/- |
| 8 | Expenses for two staff for attending the hearing and delivery of decision for this Appeal | 600,000/- |
| TOTAL | | 3,670,000/- |

(v) To take any other action deemed necessary.

THE RESPONDENT'S REPLIES TO THE 1ST APPELLANT

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:

To start with, the Respondent raised two points of Preliminary Objection on points of law as follows;

- **Firstly, the 1st Appellant had never been a tenderer to the procurement proceedings under the Tender. Thus he has no right to seek review or Appeal.**

Section 79 of the Act which has been relied upon by the 1st Appellant is not applicable as he was not a tenderer. Instead, he was required to seek for clarification in terms of Regulation 85 of the GN No. 97/2005. PPRA in their letter to the 1st Appellant dated 6th July, 2010, confirmed that they ought to have sought for clarification as that was not an application for administrative review.

- **Secondly, the amendments and additional information to the Statement of Appeal and prayers are improperly lodged before the Authority as there was no leave to file the same.**

To elaborate the Respondent argued that, Rule 11 of the Public Procurement Appeal Rules (hereinafter to be referred to as "**GN No. 205/2005**") provides for the procedure to be followed in filing additional information as the same has to be by leave of the Authority or by the Authority's own motion. Since the 1st Appellant did not follow the proper procedure, the additional information is not properly before the Authority.

Accordingly, the Respondent prayed that, the Appeal filed be dismissed with costs.

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

That, the 1st Appellant being a participant in the Pre-bid meeting, requested for omission or review of Clause 13(a) of the Bid Data Sheet whereupon the Respondent clarified the same in the said meeting that the requirement of the said clause is in accordance with

PPRA's Standard Bidding Documents which entails the annual turnover to be of at least Tshs.5,000,000,000/-.

That, the reasons for requiring the annual volume of construction works in any of the last two years, was for assessing the financial capability of a tenderer before being awarded the contract.

That, the 1st Appellant has tarnished the Respondent's image in claiming that they had intended to favour one of the tenderers without showing the evidence to that effect. Thus the allegations are more vexatious and they are without merit.

Therefore the Respondent prayed for the following:

- (i) Dismissal of the Appeal with costs
- (ii) Any other relief the Authority deems fit to grant.

ANALYSIS BY THE AUTHORITY

During the hearing it was evident and the Respondent conceded that, Clause 13 of the Bid Data Sheet had two sub-clauses (a). In order to avoid confusion the Authority re-numbered all the sub-clauses under Clause 13 whereby the second sub-clause (a) becomes (b) and (e) becomes (f) respectively.

Having gone through the documents submitted and having heard the oral submissions from parties, the Authority is of the view that, the first part of the Appeal is centred on the following three main issues;

- **Whether the Appeal by the 1st Appellant is properly before the Authority**
- **Whether the Tender requirements set under Clause 18.3 of the ITB as amended and Item 13(b) of the Bid Data Sheet contravened the law**

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

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

1.0 Whether the Appeal by the 1st Appellant is properly before the Authority

At the commencement of the hearing, the Respondent raised two points of Preliminary Objections namely;

- That, the 1st Appellant had never been a tenderer to the procurement proceedings under the tender; thus he has no right to seek review or Appeal.
- That, the amendments and additional information to the Statement of Appeal and prayers are improperly lodged before the Authority as there was no leave to file the same.

With regard to the first objection, the Authority revisited the Respondent's submission on this point that, the 1st Appellant had never been a tenderer as he had not submitted any bid in relation to this tender process. Thus he had no right to seek administrative review, instead he should have sought for clarification. In responding to the Respondent's contentions, the 1st Appellant stated that, his application for review was brought under Section 80(1)-(4) of the Act, after discovering that Clause 13(b) of the Bid Data Sheet limits participation of tenderers as it required the annual volume of construction works in any of the last two years to be Tshs. 5,000,000,000/-

In order to ascertain the validity of the parties' arguments the Authority revisited the documents submitted before it and noted that, the 1st Appellant wrote his first application for review to the Accounting Officer on 3rd May, 2010, and copied same to PPRA. PPRA advised the Respondent vide its letter of 6th May, 2010, to resolve the matter in accordance with Section 80 of the Act, before further steps are taken in the procurement process. However, the Respondent did not

respond until 14th May, 2010, when they clarified the 1st Appellant's concerns during the pre bid meeting.

According to the Respondent, upon receipt of the Appellant's letter titled "**Application for Review**" they treated it as a "**request for clarification**" and their position was also supported by PPRA's decision on the 1st Appellant's complaints. The 1st Appellant on the other hand, maintained that, they had applied for administrative review and not otherwise. The Authority is of the view that, had the Respondent felt that the title to the 1st Appellant's letter was not proper, they should have clarified the matter with them instead of making an assumption as they deemed fit. However, the Authority proceeded to ascertain whether the Respondent's actions after receipt of the said letter adhered to the law relating to request for clarification and the replies thereof.

The Authority revisited Regulation 85 of GN No.97/2005 in order to establish whether the Respondent had adhered to the said Regulation in providing clarifications to the 1st Appellant. For purposes of clarity, the Authority

reproduces the relevant provisions of Regulation 85(2) of GN No. 97/2005 as hereunder;

“Reg. 85(2)The procuring entity shall respond to any request by a supplier, service provider, contractor or asset buyer for clarification of the solicitation documents that is received by the procuring entity **at least two weeks prior to the deadline for submission of tenders**”.

Based on the provision above, the Authority is of the view that the 1st Appellant had submitted the application for review almost three weeks before deadline for submission of tenders, which was in compliance with Regulation 85(2) of GN No.97/2005.

The Authority further noted that, the Respondent’s replies of 14th May, 2010, were outside of the three days period as stipulated by Regulation 85(3) of GN No. 97/2005 as reproduced herein below;

“Reg. 85(3) **The procuring entity shall respond within three working days of receipt of the query** so as to enable the supplier, service provider, contractor or asset buyer to take into account the clarification received...” (Emphasis added)

The Authority also noted that, Clause 11 of the Bid Data Sheet contravened Regulation 85(3) of GN No.97/2005 which requires the reply to be made within three days. The said Clause 11 provides that;

“Period to respond to the request for clarification by the Procuring Entity is Seven Days” (Emphasis added)

That means even if the Respondent treated the application for review as a request for clarification, the same should have been dealt with in accordance with Regulation 85(3) of GN No.97/2005. Moreover, the Authority noted that, upon receipt of the requests for clarification from tenderers, instead of responding to

them in accordance with Regulation 83(3) of GN. No. 97/2005, the Respondent collected the queries and responded to all during the Pre-bid meeting which took place on 14th May, 2010, as evidenced in the written clarifications circulated to the tenderers after the said meeting.

The Authority went further and reviewed the provisions of the law in order to determine if the 1st Appellant was entitled to seek review under the disputed tender process even though he did not submit a bid. In so doing the Authority revisited Section 79 of the Act which is reproduced as hereunder:

“S. 79 any supplier, contractor or consultant who claimed to have suffered or **that may suffer any loss as a result of a breach of duty imposed on a procuring entity or approving authority by this Act may seek a review in accordance with Section 81 and 82 of this Act**, provided that, the application for review is received by the procuring entity or

approving authority within twenty-eight days of the supplier, contractor or consultant becoming aware of the circumstances giving rise to the complaint..." (Emphasis supplied)

Based on the above provision the Authority is of the view that, the 1st Appellant was entitled to file an application for review as the same can be done by a tenderer who has been affected by the decision or prospective tenderer who wishes to participate in the tender process but feels he may suffer a loss as a result of breach of duty by the Procuring Entity. In the appeal at hand, the 1st Appellant felt that Clause 13(b) discriminates participation of the tenderers and as a result he applied for administrative review so that justice can be done in the said procurement process.

The Authority further deemed it prudent to reproduce Rule 5 of GN. No. 205/2005 which states as follows:

"Except for a decision, matter or act or omission arising from the provision of subsection (2) of

section 72 and subject to sections 79, 81 and 85 of the Act, **an appeal shall lie from the following matters:**

(a)...

(b)...

(c) Inclusion of unacceptable provision on the tender documents;

(d) Unacceptable tender process; ...”

(Emphasis supplied)

The Authority is of the view that, the above quoted Rule provides tenderers or prospective tenderers with an opportunity of filing an appeal disputing the inclusion of unacceptable provisions of the tender document and unacceptable tender process. Thus, the 1st Appellant had the right to seek for administrative review in accordance with Rule 5(c) and (d) of GN. No.205 of 2005 above quoted.

Furthermore, according to the documents submitted before this Authority, the 1st Appellant being dissatisfied with the clarification made by the Respondent during the

Pre-bid meeting, applied for administrative review to PPRA on 10th June, 2010, whereby the decision thereof was made on 6th July, 2010. The 1st Appellant was aggrieved with the decision of PPRA and lodged an appeal to this Authority. In view of the steps taken by the 1st Appellant in filing their application for administrative review, the Authority is satisfied that, the procedures provided for under Sections 80, 81 and 82 of the Act were complied with. Thus, the Authority finds the Appeal to be properly before it.

With regard to the second objection, the Authority revisited the Respondent's submission on this point that, the amendments and additional information had to be filed in accordance with Rule 11 of GN. No 205/2005. The said Rule 11 allows the Authority to instruct a party to amend their Statement of Appeal or submit additional information based on its own motion or upon application of the party to the proceedings.

In order to establish the validity of the Respondent's objection, the Authority reviewed the additional

information submitted by the 1st Appellant and noted that, the same was filed so as to prove that the Respondent had a record of unlawful acts in public procurement. The Authority finds that the additional information is not relevant to the Appeal at hand and the information filed is accordingly rejected and the Authority upholds the Respondent's objection.

In view of the findings in respect of the first objection, the Authority concludes that the Appeal is properly before it.

Having ruled on the Preliminary Objections, the Authority proceeded to consider the merits of the Appeal as hereunder;

2.0 Whether the Tender requirements set under Clause 18.3 of the ITB as amended and Clause 13(b) of the Bid Data Sheet contravened the law

In resolving this issue, the Authority's will start by analyzing Clause 13(b) of the Bid Data Sheet and thereafter review Clause 18.3 of the Instructions to Bidders (hereinafter to be referred to as "**ITB**").

In its endeavour to ascertain whether the Requirement of Clause 13(b) of the Bid Data Sheet contravened the law, the Authority revisited the 1st Appellant's contentions which in summary are as follows;

- The criterion of annual volume of construction works is not covered under the law. The acceptable criterion is "**financial resources**" as provided under Regulation 14(1)(a) of GN No. 97/2005. Even if the annual volume of construction works was intended to be the measure of required necessary

financial resources or financial capacity, as PPRA's decision indicated, the amount should not have been Tshs. 5,000,000,000/-, instead the required working capital to cover the initial four months operations should have been Tshs. 960,000,000,-.

- The annual volume of construction works has no bearing on financial capacity as per Clause 13(b) of the Bid Data Sheet.
- The criterion of annual volume of construction works has been inserted in the Bid Data Sheet in order to limit competition, discourage other contractors, create a conducive environment for a certain tenderer to win and to deny opportunity for some tenderers to participate in the bidding process.
- The criterion is contrary to Regulation 14(4) of GN. No 97/2005 and is against the requirements of Section 43(a) and (b) of the Act.

Having summarised the 1st Appellant's contentions, the Authority revisited the Respondent's replies thereof which are;

- The requirements of Clause 13(b) of the Bid Data Sheet is in accordance with PPRA's Standard Bidding Document and therefore there was no need of reviewing or deleting the same.
- The amount of Tshs. 5,000,000,000/- was a cumulative figure meant for two years; and it should not be interpreted to mean an amount for each year. The amount was estimated based on Best Practices whereby the annual volume of construction works was supposed to be Tshs.2,600,000,000/-.
- The amount of annual volume of construction works was equally endorsed by PPRA's decision in their letter dated 6th July, 2010.

In view of the controversy surrounding Clause 13(b) of the Bid Data Sheet, the Authority reproduces the said Clause as hereunder;

“13. Other information or materials required to be completed and submitted by the bidder:

(b) **The minimum required annual volume of construction works for the successful Bidder in any of the last 2 years shall be: Tshs. 5,000,000,000/- or equivalent freely convertible currencies in case of foreign Bidders.”**

(Emphasis added)

The Authority revisited the wording of Clause 13(b) of the Bid Data Sheet and noted that the tenderers were required to submit the Annual Volume of Construction Works **“in any of the last two years”**. According to the interpretation of the Authority, the wording connotes that annual volume of construction works required had to be for one of the two years. It was evident during the hearing from the submissions by all the Appellants that,

an HVAC Class One Contractor could hardly have the annual volume of construction works per year of Tshs. 5,000,000,000/-. **Thus, none of the HVAC Class One Contractors could have an annual volume of construction works of Tshs. 5,000,000,000/- per year.**

The Authority noted that, according to the Evaluation Report none of the tenderers met this requirement.

Furthermore, the Authority does not accept the Respondent's argument that the annual volume of construction works could measure the financial capability of a tenderer. This is so because the requirements for financial capability are provided for in Clause 13(f) of the Bid Data Sheet as contended by the Appellants.

The Authority further observes that, Regulation 14(4) of GN No. 97/2005; require Procuring Entities not to impose criteria, requirements or procedure with respect to qualification of contractors. However, the Authority observes that the requirement of annual volume of

construction works is not one of the requirements under Regulation 14 GN No. 97/2005 as contended by the Appellant; thus it was contrary to the law.

Based on the above findings the Authority is of the view that the requirement of Tshs. 5,000,000,000/ as annual volume of construction works was unrealistic and contrary to Regulation 14(6) of GN No. 97/2005, as the figure is not objectively justifiable. The Authority is equally in agreement with the 1st Appellant that the provision limited competition and was discriminatory in nature contrary to Sections 46(4) and 63(2) of the Act and Regulations 9 (b) and 14(6) of GN No. 97/2005

The Authority further revisited the 1st Appellant's contentions that, the Respondent changed Clause 18.3 of the ITB relating to Bid Security during the pre-bid meeting whereby the tenderers were required to submit the Bid Security in the form of an Unconditional Bank Guarantee contrary to the requirements of Regulation 88(3) of GN No.97/2005. In the reply the Respondent conceded that they had erred in law by imposing

conditions which contradict the provisions of the Act. However they added that none of the tenderers was disqualified based on that criterion.

Before considering the contentions by parties the Authority deems it prudent to reproduce Regulation 88(3) of GN No.97/2005 which state as follows;

“The tender security at the tenderer’s option, shall be in the form of a certified cheque, a letter of credit, a bank guarantee from a reputable bank, an insurance bond from a reputable insurance firm.” (Emphasis supplied)

The Authority is of the view that, the above quoted provision provides option to tenderers to choose the form in which they would like to submit their Bid Security, thus the Authority accepts the 1st Appellant’s contention that it was wrong for the Respondent to specify that the Bid Security was to be an Unconditional Bank Guarantee.

In the light of the above findings, the Authority's conclusion on the second issue is that the requirements of Clause 18.3 of the ITB, as amended and Clause 13(b) of the Bid Data Sheet contravened the law.

3.0 To What reliefs, if any, are the parties entitled to.

Having analyzed the contentious issues in dispute, the Authority finds it prudent to consider prayers by parties. To start with the Authority considered the Appellant's prayers which were as follows:

- (i) Declare that Clause 13(b) of the Bid Data Sheet is illegal;
- (ii) Order the Respondent to remove the said clause and re-start the Tender process afresh in observance of the law;
- (iii) Prohibit the Respondent from acting unlawfully;

(iv) Order the Respondent to compensate the Appellant the sum of Tshs. 3,670,000/-

In the light of the findings and conclusions in the first and second issues the Authority observation as regards to the Appellant's prayers are as follows:

- The 1st Appellant's prayer is granted as it has already been established that the said Clause 13(b) of the Bid Data Sheet contravened the requirements of the law.
- With regards to the second prayer, the Authority orders the Respondent to remove the offensive clause and re-start the tender process afresh.
- The third prayer is rejects as it was not relevant to this Appeal.
- The Authority orders the Respondent to compensate the Appellant a sum of **Tshs. 3,170,000/-** as it had

already been established that the Respondent's acts had prevented the 1st Appellants from participating in this process. As regards to the claim for general costs, the Authority finds this to be too remote and this prayer is therefore is rejected.

The Authority also considered the prayer by the Respondent that the Appeal be dismissed in its entirety with costs; and observes that, the Appeal has merit and therefore the Respondent's prayer is rejected.

THE SECOND PART OF THE DECISION

Since the facts of the First Part of this decision covered the process from advertisement of the tender up to the time immediately before the tender opening, this second part addresses the process from the time of tender opening to the point of submission of complaints by the 2nd and 3rd Appellants. The said facts are as summarized herein below:

The tender opening took place on 11th June, 2010, whereby the following six tenders were opened;

| S.N O | Tenderer's Name | Price Quoted (VAT Exclusive) Tshs. |
|------------------|--------------------------------------|---|
| 1. | M/s Unicool East Africa Ltd | 6,481,866,058/- |
| 2. | M/s Berkely (T) Ltd | 5,924,348,810/- |
| 3. | M/s Mollel Electrical Contractors | 5,585,919,624/36 |
| 4. | M/s Remco International | 5,280,313,733/- |
| 5. | M/s Derm Electrics | 4,942,466,898/- |
| 6. | M/s Daikin (T) Ltd | 4,744,001,624/30 |

Having completed evaluation of the tenders, the award was made to M/s Mollel Electrical Contractors Ltd at a corrected contract price of Tshs. 5,586,804,349/66.

On 31st August, 2010, the 2nd Appellant received a letter from the Respondent referenced LAPF/T.53/05/36 was informing them that their tender not successful. On the same day the 2nd Appellant inquired from the Respondent *vide* letter referenced DAI/PJD0102/15P08/495/2010 the reasons for their failure to win the tender.

On 2nd September, 2010, the 2nd Appellant wrote a reminder letter to the Respondent referenced DAI/PJD0103/15P09/499/2010 on the same subject matter which also requested to be informed of the name of the successful tenderer and the contract price. On the same day the 2nd Appellant received a reply to their first letter from the Respondent referenced LAPF/T.53/05/43 indicating that their bid was found to be non responsive due to non submission of Financial Statements.

Being dissatisfied with the tender results the 2nd Appellant opted to join in this Appeal as a party on 8th September, 2010.

On the 9th of September, 2010, the 3rd Appellant joined in the Appeal as a party thereto.

SUBMISSIONS BY THE 2nd APPELLANT

The 2nd 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 hereunder:

That, the Respondent had conducted a biased evaluation as they failed to disclose who has been awarded the said tender and at what value, despite several requests for the information.

That, they dispute the reason given for their disqualification as being non submission of Financial Statements since this was not a pre-requisite as per the Tender Document. They had submitted adequate evidence of working capital for the contract in accordance with Clause 13(f) of the Bid Data sheet.

That, they adhered to the pre-requisites of the Tender Document as they submitted a Certificate of Registration as Class one Contractor as evidence of their capability in undertaking large projects.

That, in compliance with other requirements set forth in the Tender Document, they submitted a Bid Bond

amounting to Tshs. 150,000,000/- along with evidence of a turnover of over Tshs. 5,000,000,000/-.

That, they were the lowest tenderer among all as it was evidenced during the Tender opening, although that does not necessarily mean that they were to be awarded the tender.

That, their company is well recognized in the field of air conditioning and ventilation systems in Tanzania for over 35 years and has been providing the Tanzanian market with expertise from a team of well equipped senior technicians.

That, the Respondent was required to look for assurance of not only the highest quality product in the country, but also for comprehensive after sales service packages which may include preventive maintenance services, and repair and supply of genuine spare parts.

That, the main types of units that the Respondent's building has been designed for are based on technology

developed by their principal Daikin Industries Limited of the UK and the first installation of such units in Eastern-Central Southern Africa was carried out by them and the units are still in operation. Thus they were the most appropriate candidate for undertaking the disputed works.

That, the decision made by the Respondent was not based on well founded merits. They therefore requested the Authority to investigate the disputed tender and re-assess the evaluation. They further requested the Authority to order the Respondent to compensate them a total of Tshs. 3,500,000/- for costs incurred as hereunder:

| S/ No. | EXPENSE ITEM | Tshs. |
|-------------------|---|--------------------|
| 1. | Purchase of tender documents | 250,000/- |
| 2. | Time used in communicating with various manufacturers of equipment and materials, days consumed – 16 days @63,000/= per day | 1,008,000/- |
| 3. | Preparation of tender documents which involved compilation of all necessary copies | 687,000/- |
| 4. | Costs of submitting tender documents including allowances for | 400,000/- |

| | | |
|--------------|---|--------------------|
| | accommodation, transportation and meals including man hours used to prepare the appeal | |
| 5. | Costs of lodging the Appeal and man hours used to argue the appeal and cost of attending the hearing staying in Dodoma for 4 days | 900,000/- |
| 6. | Costs of attending the delivery of the decision on 17 th September, 2010 at Dodoma and number of man hours including accommodation, transport and meal allowance | 255,000/- |
| TOTAL | | 3,500,000/- |

THE RESPONDENT'S REPLIES TO THE 2ND APPELLANT

The Respondent's replies as deduced from the documents submitted to the Authority as well as their oral submissions and responses to questions by the Members of the Authority may be as summarized as follows:

The Respondent raised Preliminary Objections to wit,

- That, there is no legally filled Appeal before the Authority.

- That, the purported Appeal is not properly before the Authority.

The Respondent elaborated on the Preliminary Objections that, the 2nd Appellant did not fill in the required appeal forms and their letter dated 8th September, 2010, does not satisfy the requirements of Rule 8 of GN. No. 205 of 2005. Hence, there is no Appeal before the Authority.

That, the dispute settlement procedures under the Act requires complaints to be made first to the accounting officer, then to PPRA and thereafter to the Authority. For an appeal to be valid it has to originate from a decision made by the accounting officer or failure to make such a decision. The 2nd Appellant did not submit their complaints to the Accounting Officer as required by the law.

That, the 2nd Appellant submitted their complaints directly to the Authority while the law requires such complaints to be lodged after the coming into force of a

procurement contract. Since the Respondent has not yet signed any contract with the Successful Tenderer the contract has not as yet come into force. The Appeal is therefore not properly before the Authority and should be dismissed with costs.

Arguing on the merits, the Respondent stated that, the tenderers were required to submit Financial Statements to show their liquidity and not experience. Other tenderers had complied with this requirement. The 2nd Appellant did not submit any document to prove that they had adequate working capital.

That, they expected tenderers to submit Financial Statements as proof of adequate working capital and letters from previously executed contracts as proof of annual turnover.

That, the change made in the Tender Document which required tenderers to submit an Unconditional Bank Guarantee as Bid Security did not prejudice any tenderer.

Thus, the Respondent prayed for the Appeal lodged by the 2nd Appellant to be dismissed with costs.

SUBMISSIONS BY THE 3RD APPELLANT

The 3rd Appellant's documentary, oral submissions as well as responses from questions raised by the Members of the Authority during the hearing may be as summarized below:

That, according to the Tender Document, the requirements were amongst others, submission of a power of Attorney, Post-Qualification documents and an Unconditional Bank Guarantee.

That, at the time of tender opening it was evident that, M/s Unicool East Africa, M/s Derm Electrics Ltd and the 3rd Appellant had submitted all relevant documents. Moreover, M/s Daikin (T) Ltd and M/s Mollel Electrical Contractors Ltd did not submit Bank Guarantees and the

tender submitted by M/s Berkeley (T) Ltd did not submit the power of Attorney.

That, submission of Financial Statements was not amongst the requirements as per the Tender Documents.

That, the Respondent did not inform them as to who had won the tender and the contract price and that they became aware of that fact during the hearing of this Appeal. Moreover, the Respondent did not provide the reasons for their disqualification.

That, if the requirement of the annual volume of construction works was intended to be Tshs. 5,000,000,000/- , then it cannot be reached by any HVAC contractor in Tanzania.

Thus, the 3rd Appellant requested the Authority to investigate whether the tender was open and fair. It should also be established under which criteria M/s Mollel Electrical Contractors Ltd was awarded the tender.

Finally, the tender should be re-evaluated instead of re-tendering as that would not be competitive since the tender has been floated two times and the tenderers' prices are now known.

THE RESPONDENT'S REPLIES TO THE 3RD APPELLANT

The Respondent's arguments as deduced from the documents submitted to the Authority, oral submissions as well as responses to questions raised by the Members of the Authority during the hearing of the Appeal may be summarized as follows:

That, the Respondent adopted the position that the Preliminary Objections raised for the 2nd Appellant as equally applicable for the 3rd Appellant.

That, the requirement to submit an Unconditional Bank Guarantee was clearly stipulated in the ITB but none of the tenderers who opted to submit Insurance Bonds was disqualified on the basis of this requirement.

That, the tender results were not communicated to the tenderers as they did not request for them.

Thus, the Respondent requested the Authority to dismiss the 3rd Appellant's claims with costs.

ANALYSIS BY THE AUTHORITY

Having gone through the documents submitted and having heard the oral submissions from parties, the Authority is of the view that the Second Part of the Appeal centres on the following four issues:

- **Whether the Appeals filed by the 2nd and 3rd Appellants are properly before the Authority;**
- **Whether the 2nd and 3rd Appellants were unfairly disqualified;**
- **Whether the award of the tender to M/s Mollel Electrical Contractors Ltd was justified; and**
- **To what reliefs, if any, are the parties entitled to.**

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

4.0 Whether the Appeals by the 2nd and 3rd Appellants are properly before the Authority

In their submissions the Respondent contended that **“the purported Appeals are improperly before this Authority”**. The Respondent’s reasoning was that, the said Appellants did not observe the dispute settlement procedures provided under Sections 79(1), 80(1), 81(1) and 82(1) of the Act as they were supposed to direct their complaints first to the Accounting Officer, then to PPRA and thereafter to this Authority. They further contended that, the Appellants could not have invoked the provisions of Section 82(2) of the Act which requires complaints to be lodged directly to the Authority as the procurement contract has not come into force.

Since the dispute settlement procedures under Sections 79(1), 80(1), 81(1) and 82(1) have already been

covered in the First Part of the decision and the fact that, the Appeal at hand was brought under Section 82(2)(a) of the Act, read together with Clause 51.1 of the ITB, the Authority will confine its analysis to the said provisions which state as hereunder:

“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 submitted or 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 the supplier, contractor or consultant submitting it became aware of the circumstances giving rise to the complaint or dispute or the time when that supplier, contractor or

consultant should have become aware of those circumstances;

Clause 51.1 The Bidder who is not satisfied with the decision of the PPRA or whose complaint cannot be entertained by the Head of the Procuring Entity or the PPRA shall appeal to the Public Procurement Appeals Authority (PPAA)” (Emphasis added)

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

“S. 55(7) The procurement contract shall enter into force when a written acceptance of a tender has been communicated to the

successful supplier, contractor or consultant” (Emphasis added)

The Authority found that the Respondent communicated their acceptance to the Successful Tenderer on 24th August, 2010, *vide* letter referenced LAPF/T.53/05/29. Thus, the procurement contract entered into force on 24th August, 2010. Accordingly, when the Appeals were lodged by the Appellants the procurement contract had already entered into force by virtue of Section 55(7) of the Act.

Moreover, once a procurement contract enters into force, the accounting officer ceases to have jurisdiction to entertain such a complaint as per Section 80(3) of the Act read together with Clause 47.3 of the ITB which state as hereunder:

“S. 80(3) **The Accounting Officer shall not entertain** a complaint or dispute or continue to do so **after the procurement** or disposal **contract has entered into force.**”

Clause 47.3 **The head of a procuring entity shall not entertain** a complaint or dispute or continue to do so **after the procurement contract has entered into force.** (Emphasis added)

The Authority therefore does not accept the Respondent's contention that a procurement contract enters into force after the signing of the contract, as such interpretation is not only improper but also contradicts the above quoted Clause 47.3 contained in the Respondent's Tender Document.

The Authority is of the view that, given the facts of this Appeal, the Appellants could neither submit their complaints to the Accounting Officer nor to PPRA as the only recourse open for them was to appeal directly to this Authority in accordance with Section 82(2)(a) of the Act and Clause 51.1 of the ITB.

With regard to the Respondent's contention that, the 2nd Appellant's letter dated 8th September, 2010, was not a

Statement of Appeal by virtue of Rule 8 of GN. No. 205/2005 and that they did not fill the required forms; the Authority observes that, the Respondent's claims are unfounded as the 2nd Appellant had duly filled the prescribed Forms.

In the light of the above findings, the Authority rejects the Preliminary Objection raised and concludes that, these Appeals are properly before it.

5.0 Whether the 2nd and 3rd Appellants were unfairly disqualified

In its endeavour to ascertain whether the disqualification of the 2nd and 3rd Appellants was justified, the Authority, reviewed the documents submitted and the contesting oral submissions by parties *vis-a-vis* the applicable law. In so doing the Authority examined the tender process in its entirety to establish whether the procedural requirements were adhered to in accordance with the Act and the Tender Document. In the course of doing so the Authority reviewed the Tender Document which sets

forth tender requirements, the evaluation criteria and the modality for evaluating the said tenders *vis-a-vis* the submitted Evaluation Report for purposes of ascertaining whether the disqualification of the 2nd and 3rd Appellants was justified.

The Authority started by examining whether the Tender Document had provided for the requisite evaluation criteria and the methodology to be used in conducting evaluation of the tender under Appeal; and thereafter embarked on establishing whether the Evaluators applied the said provisions accordingly.

The Authority observes that, to a great extent the Tender Document complied with the applicable law. However, in addition to the shortfalls relating to Clauses 13(b) and (f) of the Bid Data Sheet as analyzed in the First Part of this decision, the Authority noted some additional shortfalls in the Tender Document which shall be addressed in the course of reviewing the evaluation process which forms the basis of the Appellants' complaints.

The Authority noted that, according to the ITB the evaluation was to be conducted through three stages, namely, Preliminary Evaluation, Detailed Evaluation and Post-qualification. The Authority deemed it necessary to review the Evaluation Report so as to ascertain whether the said evaluation was conducted in accordance with the applicable law as well as the Tender Document.

Having gone through the Evaluation Report and reviewed the submissions by parties, the Authority noted that, on Page 7 of the Evaluation Report Item No 1 shows that none of the tenderers had complied with Clause 13(b) of the Bid Data Sheet in that they did not meet the minimum of Tshs. 5,000,000,000/= annual volume of construction works. The Authority noted that, in addition to the analysis made under the First Part of this decision on the said item, it does not specify that the said annual volume of construction works should be confined to specialist works in HVAC as it states in general terms as hereunder:

“The minimum required **annual volume of construction work** for the successful Bidder in any of the last two years shall be Tshs. 5,000,000,000 or equivalent freely convertible currencies in case of foreign Bidders.” (Emphasis supplied)

The Authority observes that, such formulation is ambiguous and could operate in favour of contractors who are registered in multiple disciplines and be disadvantageous to contractors who specialize in HVAC only.

The Authority further noted that during Preliminary Evaluation three out of the six tenderers, were disqualified for failure to attach Financial Statements. In addition to that, one of them did not attach an Anti-bribery Form. The 2nd and 3rd Appellants are among those disqualified at the Preliminary stage.

During the hearing it was evident that, both the 2nd and 3rd Appellants claimed that attachment of Financial Statements was not a requirement. The Respondent, on

the other hand, submitted that it was a mandatory requirement as per Clause 13(f) of the Bid Data Sheet which required tenderers to submit **“evidence of adequate working capital”**. Upon being asked which documents did they require to be submitted by the tenderers to show the adequacy of working capital as per Clause 13(f) and annual volume of construction works as per Clause 13(b) of the Bid Data Sheet, the Respondent stated that, for the former they expected Financial Statements and for the latter they expected letters from previous contracts they had executed.

The Authority is of the view that, Financial Statements alone cannot adequately portray evidence of adequacy working capital because they are historical in nature and only show what happened in the past. No wonder the Evaluation Committee found this criterion to be inadequate to gauge the adequacy of working capital and looked at additional factors. The Authority noted that, paragraph 3.1 on page 4 of the Evaluation Report contains a matrix showing how the tenderers were evaluated during this stage. Item 3 of the said matrix

indicates that the tenderers were checked for the following:

“Financial capability, cash in hand, name contact addresses of banks, audited financial statements for 2007 and 2008 including balance sheet, cash flow statements which are signed by Directors.” (Emphasis added)

Furthermore, the Authority observes that, the requirement stated under Clause 13(f) of the Bid Data Sheet is different from the above quoted criteria which were used by the Evaluators. Had the Respondent intended that the said criteria be used in the evaluation they should have explicitly stated so in the Tender Document. The Authority observes that, this contravened Section 63(2) of the Act which is in *pari materia* with Regulation 83(2) of GN. No. 97 of 2005 and Section 65 and Regulation 14(5) of GN. No. 97 of 2005. Some of the aforesaid provisions are reproduced hereunder:

“Reg. 83(2) The solicitation documents shall be worded so as to permit and encourage competition and **such documents shall set forth clearly and precisely all information necessary for a prospective tenderer to prepare a tender** for the goods, works or services to be provided or executed, or assets to be disposed of.”

“S. 65(1) The basis for tender evaluation and Selection of the lowest evaluated tender **shall be clearly specified in the instruction to tenderers or in the specifications to the required goods or works.**

(2) The tender documents **shall specify any factor in addition to price, which may taken into account in evaluating a tender and how such factors may be quantified or otherwise evaluated.**”

“Reg. 14(5) The procuring entity **shall evaluate the qualifications of** suppliers, **contractors,** service providers or buyers

in accordance with qualification criteria and procedures set forth in the pre-qualification documents, if any, and in the **solicitation documents or other documents for solicitation of proposals, offers or quotations.”** (Emphasis supplied)

In addition, the difference between the wording of Clause 13(f) of the Bid Data Sheet and Item 3 of the Table on page 4 of the Evaluation Report connotes contravention of Regulation 90(4) of GN. No. 97 of 2005 which states as follows:

“The tender evaluation shall be consistent with the terms and conditions set forth in the tender documents and **such evaluation shall be carried out using the criteria explicitly stated in the tender documents.**” (Emphasis added)

For the benefit of parties, the Authority wishes to emphasize that, the requirement to submit documents showing the tenderer’s financial capability is a

mandatory requirement under Regulation 14(1)(a) of GN. No. 97 of 2005, which provides as hereunder:

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)**

The Authority re-emphasizes that, the need to specify the participation requirements and criteria must be stated in the tender document as prescribed under

Regulation 14(3) of GN. No. 97/2005 as reproduced below:

“Reg. 14(3) Any requirement established pursuant to this regulation shall be set forth in the pre-qualification documents, if any, and in the solicitation documents or other documents for solicitation of proposal, offers or quotations, shall apply equally to all suppliers, contractors service providers or buyers.” (Emphasis added)

The Authority observes further that, Regulation 14(a) of GN. No. 97/2005 requires tenderers to show their **“financial resources”** while Regulations 10(3) and 10(4) (e) of GN. No. 97/2005 requires them to include **“reports on their accounting and financial standing”**. The Respondent’s Tender Document was therefore supposed to contain the said requirement in an explicit way for the tenderers to understand which documents they were supposed to submit. In view of the foregoing, the Authority observes that, the Respondent

erred in evaluating the tenders using criteria that were not contained in the Tender Document. Accordingly, the Authority finds that, the 2nd and 3rd Appellants' disqualification on the basis of failure to submit Financial Statements was wrong.

The Authority noted that, during Preliminary evaluation tenderers were checked to see whether they had submitted Tender Securities. Moreover, on 14th May, 2010, the Respondent circulated responses to clarifications sought by tenderers whereby it was indicated that the **"acceptable form of Bid Security is: Unconditional Bank Guarantee"**. However, a perusal of the documents submitted by the tenderers as well as the Evaluation Report, it indicated that the 2nd Appellant and the Successful Tenderer attached Insurance Bonds. Upon being questioned by Members of the Authority as to why they submitted Insurance Bonds when the Respondent's instructions were very clear, the 2nd Appellant stated that they submitted the said document on the basis of Regulation 88(3) of GN. No. 97 of 2005 which stipulates that:

“The tender security, at the tenderer’s option, shall be in the form of a certified cheque, a letter of credit, a bank guarantee from a reputable bank, an insurance bond from a reputable insurance firm.” (Emphasis added)

In reply to the 2nd Appellant’s reasons and the questions asked by the Members of the Authority on the rationale behind the change on the form of tender security to be submitted, the Respondent stated that the said change did not prejudice any tenderer as none of them was disqualified on that ground. Accordingly, the Authority agrees with the 2nd Appellant that, the change effected by the Respondent contravened Regulation 88(3) of GN. No. 97 of 2005 which specifies the documents that may be submitted as tender securities.

The Authority also noted some inconsistencies in that, while the Table on page 4 of the Evaluation Report indicates that the shortfalls detected in the tender submitted by the 3rd Appellant lacked Financial

Statements and the Anti-bribery Form. In the summary appearing on page 5 of the Evaluation Report it shows that the failure to attach Financial Statements was their only omission. Moreover, the Evaluators did not see the Anti-bribery Form attached in the 2nd Appellant's tender while the members of the PMU saw it and reported so to the Tender Board. The Authority does not accept the Respondent's account of the above mentioned inconsistencies that they were innocent human errors, as the resultant effect of the second error was likely to result in an injustice assuming the tender did not have any other omission.

In view of the above findings the Authority concludes that Preliminary Evaluation was not properly done, accordingly, the disqualification of the 2nd and 3rd Appellants which was based on the said evaluation was not justifiable.

The Authority noted that the second stage of evaluation was **Technical Evaluation** in which only three tenders qualified, namely, M/s Derm Electrics (T) Ltd, M/s

Unicool East Africa Ltd and M/s Mollel Electrical Contractors Ltd. This stage of evaluation was twofold, namely, Technical Responsiveness and Technical capability. The Authority observes that, the manner in which Detailed Evaluation was done is contrary to the requirements of the Tender Document as provided under ITB Clauses 29, 31 and 33. Furthermore, the Evaluation contravened the Section 67(2) of the Act and Regulation 90(4), (5), (7), (11) and (15) of GN. No. 97/2005. The Authority wishes to reproduce Regulations 90(4), (5), (12) and (15) as hereunder:

Reg. 90(4) The tender shall be consistent with the terms and conditions set forth in the tender documents and such evaluation shall be carried out using the criteria explicitly stated in the tender documents.

Reg. 90(5) Tenders shall be comparable among themselves in order to determine the lowest evaluated cost for procurement of goods, works or

services or the highest evaluated price for disposal of assets by tender

Reg. 90(12) any factors other than price that may be used in determining the lowest evaluated tender, shall as far as practicable be expressed in monetary terms.

Reg. 90(15) the procuring entity's determination of a tender's responsiveness shall be based on the contents of the tender itself without recourse to extrinsic evidence

The Authority further noted that, the Successful Tenderer was recommended for award without being Post-qualified contrary to Section 48(1) of the Act read together with Regulation 90(22) of GN. No. 97 of 2005. The said sub-section reiterates the need for Post-qualification in the following words:

“If tenderers have not been Pre-qualified, the procuring entity and **the tender board shall determine whether the tenderer whose tender or disposal 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 Authority observes that much as Post-qualification is mandatory in situations where Pre-qualification was not undertaken as observed above, the Bid Data Sheet under Clause 30 downplayed it as optional by indicating that **“Post-qualification may be undertaken”**.

The Authority is satisfied that, by not subjecting the Successful Tenderer to Post-qualification, the Respondent did not ascertain whether the said tenderer had the requisite capability and resources to

carry out effectively the contract in accordance with Section 48 of the Act.

The Authority also revisited the unconfirmed minutes of the Tender Board dated 23rd August, 2010, whereby the Tender Board wanted assurance from the Procurement Management Unit (PMU) whether M/s Mollel Electrical Contractors Ltd had the requisite adequate experience. The Authority noted that, the PMU knowing that the said tenderer was not Post-qualified, confirmed the tenderers capability in the following words:

“... the contractor fulfilled the requirement for annual volume of work, as the submitted bid document indicated that the volume exceeded in both of the last two years, noting that the volume of works required measured all the works undertaken by the particular contractor during the specified period. In addition, it was reported that the contractor is class I (CLASS ONE) registered in HVAC and **possesses the required experience and capability as has**

also teamed up with reputable HVAC experts from Dubai, UAE.” (Emphasis supplied)

The Authority is of the considered view that, in the absence of Post-qualification, it was not possible for the PMU to confirm the said tenderer’s capability to execute the contract effectively. During the hearing it was evident that there was no proof whatsoever of the purported ‘teaming up’ between the said tenderer and the firm where the said experts from the United Arab Emirates (UAE) were based or any commitment to that effect. Moreover, neither were the said experts nor was their firm evaluated as required by law .

In view of the above findings the Authority concludes that, the evaluation was not properly conducted and equally the outcome of such evaluation is defective.

The Authority also considered the contentions by the 2nd and 3rd Appellants that the Respondent only informed them that they were unsuccessful but they did not know who had won the tender and the contract sum. The 2nd

Appellant further stated that despite inquiring in writing to the Respondent the name of the winner and the contract sum, the Respondent did not respond, but they learnt about the winner during the hearing. The Authority revisited Clause 39.3 of the ITB which guides on notification of tender results as follows:

“Upon the successful Tenderer’s furnishing of the performance security pursuant to ITT Clause 42, the Procuring Entity will promptly notify each unsuccessful Tenderer, **the name of the successful Tenderer and the Contract amount** and will discharge the tender security or tender securing declaration of the Tenderers pursuant to sub-Clause 18.7.” (Emphasis supplied)

The Authority noted that, on 30th August, 2010, the Respondent vide letter referenced LAPF/T.53/05/36 informed the Appellants that their tenders were not successful but neither disclosed the winner nor the contract amount contrary to ITB Clause 39.3. The Authority further noted that, the Respondent erred in

communicating tender results to the unsuccessful tenderers as the contract pertaining to this tender has not yet been signed as it was submitted by the Respondent during the hearing. The Authority's stand emanates from Clauses 40 and 41 of the ITB which requires a contract to be signed by parties prior to the Successful Tenderer's furnishing a Performance Security. Assuming the Successful Tenderer had not yet furnished the said security, the Respondent was not supposed to communicate the tender results or return the Bid Securities thereof in accordance with Clause 39.3 of the ITB.

On 31st August, 2010, the 2nd Appellant inquired on the reasons for their disqualification and wrote again to the Respondent on 2nd September, 2010, requesting information on the name of the Successful tenderer and the contract price. The Authority noted that, the Respondent informed the 2nd Appellant on the reasons for their disqualification and returned their Tender Security but did not disclose the name of the Successful tenderer and the contract price. The Authority is of the

considered view that, the Respondent's conduct contravened Clause 39.3 of the ITB and by withholding such important information which was required to be availed to the tenderers it could be interpreted as lack of transparency.

During the hearing the 3rd Appellant contended that the reasons for their disqualification were not communicated to them. The Authority revisited Clause 39.4 of the ITB which provides guidance on the concern raised by the 3rd Appellant as it states that:

“If, after notification of award, a Bidder wishes to ascertain the grounds on which its’ Tender was not selected, it should address its request to the Secretary of the appropriate Tender Board that authorised the award of contract. The Secretary will promptly respond in writing to the unsuccessful Bidder citing grounds for rejection of its bid without disclosing information about other Bidders.” (Emphasis supplied)

In view of the above quoted Clause, it was the 3rd Appellant's duty to seek reasons for his disqualification. Had they done so they would have been duly informed as it was in the case for the 2nd Appellant.

Having reviewed the tender process the Authority finds that, the Tender Document was not explicit enough with respect to the determination of financial capability. The Authority further finds that the evaluation process in its totality was not properly conducted.

In view of the foregoing, the Authority's conclusion in respect of the fifth issue is that the 2nd and 3rd Appellants were unfairly disqualified.

6.0 Whether the award of the tender to M/s Mollel Electrical Contractors Ltd was justified

In resolving this issue the Authority takes cognizance of its findings and conclusions in **issue number five** that, the tender process in its totality was flawed and

contravened the law. However, since the award of the tender to M/s Mollel Electrical Contractors Ltd formed the basis of the 2nd and 3rd Appellants' contentions, the Authority deemed it necessary to review the basis under which the said tenderer was awarded the tender.

The Authority revisited the Evaluation Report and noted that, M/s Derm Electrics (T) Ltd and M/s Unicoool East Africa Ltd did not provide a list of all equipment stipulated under Clause 13(c) of the Bid Data Sheet. With regard to M/s Mollel Electrical Contractors Ltd the Evaluators noted that, they had submitted the said list, without items (iii) and (vii) which related to HVAC Business Software and Carbon Monoxide Detectors. The Authority noted that, the Evaluation Report does not show how the said shortfalls were treated by the Evaluation Committee and the Respondent could not provide any explanation thereof. Upon being asked as to why the PMU failed to detect the said shortfall in the Evaluation Report as they did for the Anti-bribery Form in the 2nd Appellant's tender, the Respondent replied that it was accidental. The Authority finds the Respondent's

reply to be unsatisfactory as the Evaluation Report contains only seven pages which would not be difficult for any serious reader to note such an important comment.

Furthermore, the Authority observes that it was mandatory for the tenderers to provide a complete list of equipment as per Clause 13(c) of the Bid Data Sheet which reads:

- “13. Other information or materials required to be completed by Bidder:
- (a)...
 - (b)...
 - (c) The essential equipment to be made available for the Contract by the successful Bidder (proposals for timely acquisition or own, lease, hire etc) **shall be: ...”**
(Emphasis added)

The Authority observes that, the Respondent should have treated the M/s Mollel Electrical Contractors Ltd in

the same way as the other tenderers who failed to comply with the mandatory requirements of the Tender Document as fairness and equal treatment of the tenderers are amongst the pillars of the Public Procurement Act, Cap. 410.

With regard to the tenderers experience, the Evaluation Committee noted that,

“All bidders mentioned several projects of similar nature which they have performed however they are not of the same magnitude and complexity as this project.”

The Authority noted that despite the shortfalls pointed out in the Successful Tenderer’s tender the Evaluators went ahead and ranked them as No. 1 and recommended them for award. As if that was not enough, the Evaluators did not Post-qualify the Successful Tenderer.

The Authority is of the considered view that, the tender submitted by M/s Mollel Electrical Contractors Ltd did not meet all the mandatory requirements and therefore should have been disqualified as well. Thus, the said tenderer did not qualify for award of the tender.

Accordingly, the Authority's conclusion in respect of the sixth issue is that, the award of the tender to M/s Mollel Electrical Contractors Ltd was not justified.

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

In resolving this issue the Authority took cognizance of its findings and conclusions in the 5th and 6th issues, that is, the disqualification of the 2nd and 3rd Appellants was not justified and that there was no award of the tender in the eyes of the law. The Authority therefore considered the prayers by parties as follows:

7.1 PRAYERS BY THE 2ND APPELLANT:

The 2nd Appellant requested the Authority to intervene and re-assess the evaluation. The Authority has reviewed the tender process in its entirety, including the evaluation thereof and came to the conclusions as indicated in the fifth and sixth issues. In this case therefore, the Authority having found that the 2nd and 3rd Appellants were unfairly disqualified and that there was no award in the tender under Appeal, orders the Respondent to restart the tender process afresh in observance of the law.

The Authority also considered the 2nd Appellant's second prayer for compensation totalling Tshs. 3,500,000/= as per the breakdown shown in the summarized submission contained in this decision. The Authority is of the view that, the 2nd Appellant is entitled to compensation for costs arising in pursuit of this Appeal amounting to **Tshs. 2,612,000/-** as per the following breakdown:

| Expenditure | Tshs. |
|---------------------------------------|------------------|
| Purchase of tender documents | 250,000/- |
| Preparation of tender documents which | 687,000/- |

| | |
|--|------------------|
| involved compilation of all necessary copies | |
| Cost involved in submitting the tender documents such as allowance for accommodation, transportation and meal allowance including man hours used to prepare the appeal | 400,000/- |
| Cost involved in lodging the Appeal and man hours used to argue the appeal and cost of attending the hearing staying in Dodoma for 4 days | 900,000/- |
| Cost of attending the delivery of the decision on 17 th September, 2010 at Dodoma and number of man hours including accommodation, transport and meal allowance | 255,000/- |

The Authority rejects the 2nd Appellant's request for compensation with regard to the time involved in communicating with various manufacturers of equipment for being too remote.

7.2 PRAYERS BY THE 3RD APPELLANT:

The 3rd Appellant prayed for re-evaluation of the tender under Appeal. The Authority observes that, re-evaluation is not the best option given the defects detected in the Tender Document and the tender process as a whole. Accordingly, that prayer is rejected.

7.3 PRAYERS BY THE RESPONDENT:

The Authority considered the Respondent's prayer that, the Appeals be dismissed with costs and accordingly rejects them as the Appeal has merit.

Other matters that caught the Authority's attention

In the course of handling these Appeals the Authority discovered the following flaw:

The Authority also noted that the evaluation was carried out from 21st July up to 24th July, 2010, while the Personal Covenants were signed on 24th July, 2010 i.e. at the end of the evaluation process instead of before the start of the evaluation process. The Authority further observes that the requirement to sign Personal Covenants before beginning the evaluation process is not

optional as it is intended to allow the members to confirm that they do not have any conflict of interest and also to allow them not to take part in the evaluation process where they find that they have a conflict of interest. The Authority observes that this act breached the requirements of Section 37(6) of the Act.

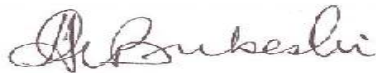
Having considered all facts and evidence, the Authority concludes that, the Appeals filed by the 1st, 2nd and 3rd Appellants are upheld.

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

- **Restart the tender process afresh in observance of the law.**
- **Compensate the 1st Appellant a sum of Tshs. 3,170,000/=.**
- **Compensate the 2nd Appellant a sum of Tshs. Tshs. 2,612,000/-.**

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

Decision delivered in the presence of the 1st, 2nd, 3rd Appellants and the Respondent this 17th September, 2010.



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

MEMBERS:

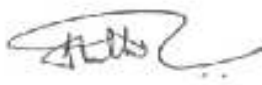
1. HON. V.K. MWAMBALASWA (MP).....



2. MR. M. R. NABURI



3. MR. K. M. MSITA



4. MRS. E. J. MANYESHA.....

