

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

**APPEAL CASE NO. 79 OF 2010**

**BETWEEN**

**SUPREME INTERNATIONAL LTD..... APPELLANT**

**AND**

**BUNDA DESIGNATED DISTRICT  
HOSPITAL ..... 1<sup>ST</sup> RESPONDENT**

**MASS SECURITY LTD..... 2<sup>ND</sup> RESPONDENT**

**CORAM:**

- |                                |             |
|--------------------------------|-------------|
| 1. Hon. A. Bubeshi, J. (rtd) - | Chairperson |
| 2. Mrs. R. Mang'anya-          | Member      |
| 3. Mr. K.M. Msita -            | Member      |
| 4. Ms. E.J. Manyesha -         | Member      |
| 5. Ms. B. G. Malambugi -       | Secretary   |

**SECRETARIAT:**

- |   |           |       |
|---|-----------|-------|
| 1. Ms. Esthery V.A. Nyagawa -<br>Officer – PPAA | Principal | Legal |
| 2. Ms. Florida Mapunda – Legal Officer - PPAA   |           |       |

**FOR THE APPELLANT:**

Mr. Elias Biseko – Operations Manager

**FOR THE 1<sup>ST</sup> RESPONDENT:**

1. Dr. Baluhya Mathias – Medical Officer In-charge
2. Rev, Okully J. Mwanga – Hospital Chaplain
3. Mr. Billy Kinyaha – Hospital Secretary

**FOR THE 2<sup>ND</sup> RESPONDENT**

Mr. Norbertus N. Nyamoga – Executive Director

This decision was scheduled for delivery today 29<sup>th</sup> November, 2010, and we proceed to deliver it.

This appeal was lodged by **SUPREME INTERNATIONAL LTD**, (hereinafter to be referred to as “**the Appellant**”) against **BUNDA DESIGNATED DISTRICT HOSPITAL** (hereinafter to be referred to as “**the 1<sup>st</sup> Respondent**”). Following notification of the Appeal to tenderers who took part in this tender, the Successful tenderer, namely, **MASS SECURITY LTD** opted to join as a party to this Appeal (hereinafter to be referred to as “**the 2<sup>nd</sup> Respondent**”).

The said Appeal is in respect of the award in Tender No. BDDH/TEND/32/VOL.III/116 for the Provision of Security Services (hereinafter to be referred to as “**the Tender**”).

According to the documents availed to the Authority and oral submissions during the hearing, the facts of this Appeal may be summarized as follows:

On 8<sup>th</sup> July, 2010, the 1<sup>st</sup> Respondent posted a Notice on various Notice Boards inviting tenders for, amongst others, Provision of Security Services.

The deadline for submission of tenders was set for 2<sup>nd</sup> August, 2010, and the opening date was to be communicated to the prospective tenderers.

The said tenders were opened on 14<sup>th</sup> August, 2010, whereby the following four tenderers submitted their tenders as shown in the Table below:

<b>Name of the Tenderer</b>	<b>Quoted Price</b>
<b>West Security Guard Co. Ltd</b>	Unarmed guard – Tshs. 150,000/= for 12 hours per month (VAT Exclusive)
	One gun – Tshs. 130,000/= for 12 hours per month (VAT Exclusive)
	One dog – Tshs. 130,000/= for 12 hours per month (VAT Exclusive)
<b>Supreme International Ltd</b>	Tshs. 2,053,200/= per month (For 10 security Guards and 2 supervisors – VAT Inclusive)
<b>HIKA Group Security Services</b>	One Guard with baton (Kirungu) Tshs.

	350,000/= per month (12 hours per day)
	One guard with a gun Tshs. 600,000/= per month (12 hours per day)
	One Guard with a dog Tshs. 550,000/= (12 hours per day)
<b>Mass Security Ltd</b>	Tshs. 3,100,000/= [VAT Exclusive) per month for 20 guards with two guns [i.e. Tshs. 43,896,000/= per annum VAT Inclusive)

During the tender opening, the tenderers questions were answered by the 1<sup>st</sup> Respondent. The 1<sup>st</sup> Respondent elaborated, among other things, that the tenderers were required to inspect the area where the said services were to be provided and thereafter decide as to the number of guards capable of providing the said services.

As soon as the tenders were opened, the respective Committee that opened the tenders continued with

the meeting whereby the following decisions were made:

- They shortlisted two firms for the tender under Appeal, namely; Mass Security Ltd and Hika Group Security Services.
- They agreed that the shortlisted tenderers be invited for negotiation on 18<sup>th</sup> August, 2010.
- They observed that, Supreme International Ltd and West Security Guard Co. Ltd had previously provided security services to the 1<sup>st</sup> Respondent but their performance was not satisfactory due to theft incidents.
- Notification of award to all tenders be made within 14 days.
- Probation period should be 3 months whereby the tender will be re-advertised in case of underperformance.

On 18<sup>th</sup> August, 2010, the 1<sup>st</sup> Respondent's Executive Committee met to discuss the issue of price reduction with the two shortlisted tenderers, namely, Mass Security Ltd and Hika Group Security Services. During the said meeting, Hika Group Security Services was requested to reduce the price as the 1<sup>st</sup> Respondent had only Tshs. 1,750,000/= but eventually they settled for Tshs. 2,000,000/= per month for 12 Security Guards per month. After the negotiation, the said Committee resolved that, the said tenderer neither had a permit to work in Mara Region nor a business license. With regard to the issue of license, the said tenderer had told them that it was not among the requirements contained in the tender advertisement.

The Committee went on to negotiate with Mass Security Ltd whereby they were requested to reduce the number of Security Guards from 20 to 16. They eventually agreed to provide the said services for Tshs. 2,000,000/= as the 1<sup>st</sup> Respondent had only budgeted for Tshs. 2,053,000/= per month.

All the four tenders were subjected to evaluation whereby Hika Group Security Services was disqualified during Preliminary Evaluation for failure to attach a business license. The remaining three tenders qualified for Detailed Evaluation whereby their prices after inclusion of VAT were as follows:

<b>Name of the Tenderer</b>	<b>Price per month</b>
<b>West Security Guard Co. Ltd</b>	<b>Tshs. 7,929,600/=</b>
<b>Supreme International Ltd</b>	<b>Tshs. 2,053,200/=</b>
<b>Mass Security Ltd</b>	<b>Tshs. 3,658,000/=</b>

The Appellant was disqualified at this stage due to the following reasons:

- (i) Failure to show the work schedule.
- (ii) Failure to indicate the arms to be used in the provision of the said services.
- (iii) Failure to quote prices in respect of the arms to be used in providing the services.
- (iv) The number of Security Guards indicated by the Appellant did not correspond to the area to be guarded.



Two tenderers, namely, Mass Security Ltd and West Security Guard Co. Ltd qualified for price comparison. However, before embarking on that exercise the Evaluators made correction of arithmetic errors whereby West Security Guard Co. Ltd was disqualified for indicating the number of Security Guards which did not correspond to the area to be guarded and also for having a very high price compared to the area to be guarded. Therefore, Mass Security Ltd was recommended for award at a contract price of Tshs. 43,896,000/= per year for 18 guards and 2 guns.

The Evaluation Report was thereafter tabled before the Management Committee which awarded the tender to Mass Security Ltd at a contract price of Tshs. 2,478,000/= per month.

On 20<sup>th</sup> August, 2010, the 1<sup>st</sup> Respondent *vide* a letter referenced TEND-ULINZI/01/176 informed Mass Security Ltd that they had been awarded the tender and invited them to sign the contract thereof on 23<sup>rd</sup>

August, 2010, and commence execution of the contract on 5<sup>th</sup> September, 2010. The said letter was copied to the Appellant who was directed to handover security services to Mass Security Ltd.

On 23<sup>rd</sup> August, 2010, the 1<sup>st</sup> Respondent and Mass Security Ltd signed the contract pertaining to the tender under Appeal.

On 26<sup>th</sup> August, 2010, the Appellant lodged an Appeal to the Public Procurement Appeals Authority (hereinafter to be referred to as **“the Authority”**).

## **THE APPELLANT’S SUBMISSIONS**

According to the Appellant’s Statement of Appeal, their submissions may be summarized as follows:

That, on the tender opening day, four tenders were submitted and opened. The Successful tenderer, namely; Mass Security Ltd was not among the firms whose offers were read out during the tender opening.

That, the Appellant received a letter from the 1<sup>st</sup> Respondent dated 20<sup>th</sup> August, 2010, directing them to hand over the security services to Mass Security Limited.

That, the award of the tender was made in contravention of the law governing procurement or disposal proceedings as the said Mass Security Limited did not participate in the tender under Appeal. The Appellant therefore wonders as to whether the said tenderer possesses the requisite experience, professional and technical competence as well as financial and managerial capability.

That, during execution of their previous contract, the Appellant had provided security services without any complaint from the 1<sup>st</sup> Respondent.

That, according to Item 5 of the 1<sup>st</sup> Respondent's Replies they conceded that the tender was awarded to Mara Security Group who was not among the tenderers.

That, with regard to the reasons for disqualification given by the 1<sup>st</sup> Respondent, the Appellant refuted them on the following grounds:

- They had attached their Company's profile which had all the relevant information.
- Guarding the said area does not require guns as the Appellant had been providing the said services without guns.
- The Appellant had used the same number of Security Guards to provide the said services successfully without any complaint from the 1<sup>st</sup> Respondent.

The Appellant therefore requested the Authority to do the following:

- Investigate the matter and take remedial measures and grant compensation in the amount

of Tshs. 2,028,000/= for costs incurred in pursuit of this Appeal as hereunder:

<b>Expenditure</b>	<b>Tshs.</b>
<b>Legal fees</b>	<b>700,000/=</b>
<b>Return ticket Mwanza - Dar - Mwanza (to lodge the Appeal)</b>	<b>348,000/=</b>
<b>Accommodation &amp; meals</b>	<b>420,000/=</b>
<b>Appeal fees – PPAA</b>	<b>120,000/=</b>
<b>Car hire Mwanza – Musoma (to attend the hearing of the Appeal)</b>	<b>250,000/=</b>
<b>Accommodation and other expenses at Musoma</b>	<b>160,000/=</b>
<b>TOTAL TSHS.</b>	<b>2,028,000/=</b>

- Restrain the 1<sup>st</sup> Respondent from continuing with the execution of the tender in dispute for purposes of avoiding the Appeal being rendered nugatory or merely an academic exercise.

## REPLIES BY THE 1<sup>ST</sup> RESPONDENT

According to the 1<sup>st</sup> Respondent's Written Replies to the Statement of Appeal, their submissions may be summarized as follows:

To start with, the 1<sup>st</sup> Respondent raised a Preliminary Objection on the following points:

- The Authority has no jurisdiction to adjudicate on the matter as the Public Procurement Act, Cap. 410 (hereinafter to be referred to as "**the Act**") does not apply to institutions like the 1<sup>st</sup> Respondent.
- The Appeal is incompetent for non compliance with the Public Procurement Appeals, Rules (hereinafter to be referred to as "**GN. No. 205 of 2005**").

The 1<sup>st</sup> Respondent's summarized submissions on the merits of the Appeal are as follows:

That, the Appellant was the service provider for the year 2009 and upon expiry of their contract the tender was advertised whereby the Appellant tendered.

That, four companies, including the Appellant and Mass Security Ltd submitted tenders.

That, there is evidence to prove that the Successful tenderer was part of the tendering process.

That, the 1<sup>st</sup> Respondent evaluated the tenders equally and the Appellant was not successful as they did not meet the evaluation criteria.

That, Mara Security Ltd appeared on the 1<sup>st</sup> Respondent's Written Replies was a mere typographical error.

That, the award of the tender to Mass Security Ltd was fair and in accordance with the evaluation criteria set by the 1<sup>st</sup> Respondent.

## **REPLIES BY THE 2<sup>ND</sup> RESPONDENT**

The 2<sup>nd</sup> Respondent's submissions as per their Written Replies may be summarized as follows:

That, the 2<sup>nd</sup> Respondent is a duly registered company dealing with provision of security services in the country.

That, the award of the tender to them was done in accordance with the governing laws and the contract thereof was signed on 23<sup>rd</sup> August, 2010.

That, the Appellant's contention that the Successful tenderer does not possess the required expertise, experience and technical competence are not true as all the information relating to the same was provided for in their tender.

That, Mara Security Ltd who appears on the Appellant's list of witnesses is not a competent witness as they did not take part in the tender under Appeal.



Accordingly, the Appeal be dismissed with costs.

### **ANALYSIS BY THE AUTHORITY**

Prior to embarking on the merits of the Appeal, the Authority deemed it necessary to resolve the Preliminary Objections raised by the 1<sup>st</sup> Respondent as they centre on the Authority's jurisdiction to handle the Appeal at hand. The Authority revisited the said Preliminary Objections and resolved them as hereunder:

- (a) The Authority has no jurisdiction to adjudicate on the matter as the Public Procurement Act does not apply to institutions like the Respondent**

In resolving this point, the Authority revisited submissions by parties whereby for ease of reference the arguments by parties are summarized and thereafter analyzed.

The 1<sup>st</sup> Respondent contended that:

- They are a privately owned institution under the Evangelical Lutheran Church in Tanzania, Mara Diocese, hence the Act does not apply to them as it only applies to public institutions.
- On 12<sup>th</sup> October, 1991, they entered into an agreement with the Government of Tanzania, through the Ministry of Health (as it then was) whereby the owner of the Hospital, namely, the Mara Diocese consented to the said hospital to be utilized and operated as the District Hospital for Bunda District (hereinafter to be referred to as **“the Agreement”**). Under Clause 5 of the Agreement, the 1<sup>st</sup> Respondent is required to provide health services and fulfil other medical functions in respect of Bunda District.
- Clause 3 of the Agreement stipulates clearly that, **“The Government shall assume full responsibility for the recurrent expenditure and other related**

**services of the hospital.”** However, owing to the meagre and late disbursement of funds from the Government which affected, among others, payment for security services with effect from 2004, the Diocese opted to use funds from other sources, namely, cost-sharing and NGO funds to pay for security services.

- The 1<sup>st</sup> Respondent's budget is submitted to the ministry responsible for health every year but no feedback is received as to how much was approved and which items were deleted, approved or adjusted. For instance, in September 2010, they received Tshs. 20,000,000/= which upon inquiry as to its breakdown, they were told it was for the whole Financial Year 2010/2011 as against the requested Tshs. 180,000,000/=.
- The 1<sup>st</sup> Respondent operates a separate bank account for funds disbursed from the Government whose procurement needs are done using the Public Procurement Act, Cap. 410, although their

understanding and implementation of the said law is very minimal.

- The said bank account is subjected to audits by auditors approved by the Government.
- The Agreement has never been amended despite repeated concerns on the insufficiency of funds disbursed and the request for review of the Agreement. Since 2007, the Government has been promising to de-centralise such contractual arrangements to local authorities but the same has not materialized to date.

The Appellant's submissions on this point were that:

- The 1<sup>st</sup> Respondent invited competitive tenders, and therefore the Act which governs procurement through tenders should apply.
- The Authority is competent to adjudicate the Appeal as the dispute involves tenders which are within its jurisdiction.

Having reviewed submissions by parties, the Authority proceeded to analyse them hand in hand with the Agreement and the Act. To start with, the Authority dwelt on establishing whether the 1<sup>st</sup> Respondent is a public body or not.

According to the facts of this Appeal, it is not disputed that the 1<sup>st</sup> Respondent is a hospital established under Voluntary Agencies and owned by the Evangelical Lutheran Church in Tanzania which is registered under the Societies Act, Cap. 337. Moreover, Clause 6 of the Agreement indicates that despite being designated as a district hospital the ownership thereof is retained by the Diocese. The said Clause states as follows:

**“ The Diocese shall retain the ownership of the hospital, and it shall be the responsibility of the Diocese to provide staff, buildings, equipment and to administer the Hospital as the Employer.”**  
(Emphasis added)

In view of the foregoing, the Authority is of the settled view that, the 1<sup>st</sup> Respondent is not a public body.

Having satisfied itself that, the 1<sup>st</sup> Respondent is not a public body, the Authority revisited Section 2(1) of the Act which guides as to the application of the Act in order to ascertain whether the Act applies to private institutions like the 1<sup>st</sup> Respondent. The said Section provides as hereunder:

**“2(1) This Act shall apply:**

- (a) To all procurement and disposal by tender undertaken by a procuring entity except where it is provided otherwise in this Act;
- (b) **To entities, not of Government, for procurement financed from specific public finances.**”(Emphasis added)

The Authority went further to examine the term **‘public finances’** as defined under Section 3(1) of the Act, which reads:

**“means monetary resources appropriated to procuring entities through budgetary processes, including the Consolidated Fund, grants, loans and credits put at the disposal of the procuring entities by local or foreign donors and revenues generated by the procuring entities;”** (Emphasis supplied)

In view of the above quoted provisions, the Authority observes that its jurisdiction is confined to two situations, that is, **where procurement is made by a public body as defined under section 3(1) of the Act and where public finances are involved.** For purposes of clarity the Authority reproduces the said definition as follows:

**“public body or public authority means –**

- (i) Any ministry, department or agency of government;**
- (ii) Any corporate or statutory body or authority established for the purposes of the Government;**

- (iii) Any company registered in which the Government or an agency of Government, is in the position to influence the policy of the company;
- (iv) Any local government authority;
- (v) Any parastatal organization.” (Emphasis added)

Relating the above quoted provisions on the application of the Act and definitions of a public body and public finances, the Authority is of the view that **the Act applies to the 1<sup>st</sup> Respondent where the procurement is funded from public finances**. In addition to the Government's obligations under Clause 3 of the Agreement, Clause 15 of the same requires the Government to:

**“provide funds required for running the hospital and operating other approved services including funds for minor maintenance and repairs of equipment and buildings. The funds will be paid**



**quarterly in advance to the hospital.”** (Emphasis added)

Based on the Government's obligations under Clauses 3 and 15 of the Agreement, supported by the 1<sup>st</sup> Respondent's oral submissions, the Government is obliged to pay for recurrent expenditure and other related services of the hospital. This means, expenses arising from provision of security services fall within the ambit of Clause 3 of the Agreement. In that regard, the Act applies to the 1<sup>st</sup> Respondent.

The Authority however considered the 1<sup>st</sup> Respondent's submission that the Government has not been fulfilling fully their obligation under Clause 3 of the Agreement which caused difficulty on the part of the 1<sup>st</sup> Respondent. The Government's failure to make timely and sufficient disbursement of funds forced the 1<sup>st</sup> Respondent to use other sources to foot bills arising from provision of security services. The Authority shares this concern that triggered them to use other sources of funds to pay for expenses such as provision of security

services. In view of the foregoing, the Authority is of the considered view that, in so far as the 1<sup>st</sup> Respondent does not use public finances in the procurement of security services, the Act does not apply to them. However, the Authority cautions the 1<sup>st</sup> Respondent that, in any procurement involving public funds the procedures provided for under the Act should be strictly adhered to.

In view of the above findings, the Authority's conclusion on the first point of Preliminary Objection is that, the Act does not apply to the 1<sup>st</sup> Respondent. Accordingly, the Authority has no jurisdiction to entertain this Appeal.

(b) **The Appeal is incompetent for non compliance with the Public Procurement Appeals, Rules (hereinafter to be referred to as “GN. No. 205 of 2005”).**

With regard to the second point of Preliminary Objection, the Authority cannot dwell on it as the 1<sup>st</sup> Respondent conceded that it was construed by the

lawyer who modified the replies drafted by them. Hence they could not submit on that point as they did not understand what it actually meant.

The Authority's conclusion in respect of the Preliminary Objection raised by the 1<sup>st</sup> Respondent is that, the Authority has no jurisdiction to entertain this Appeal and hence the objection is sustained.

On the basis of the above conclusion, the grounds of Appeal advanced by the Appellant cannot be entertained for want of jurisdiction.

### **Other matters noted by the Authority**

In the course of handling this Appeal, the Authority came across some pertinent matters that need to be pointed out as follows:

- (a) During the hearing it was evident that, the 1<sup>st</sup> Respondent has no written rules or procedures to guide procurement where public finances

are not involved. The Authority advises the 1<sup>st</sup> Respondent to put into place standardized procurement guidelines which will ensure that there is, among other things, uniformity of procedure and transparency in the procurement process. Moreover, since the 1<sup>st</sup> Respondent stated that, their hospital is not the only one, among those owned by the Evangelical Lutheran Church in Tanzania, which are designated hospitals, promulgation of such guidelines to be used in their hospitals could add value to their procurement.

- (b) The Agreement between the Government and the 1<sup>st</sup> Respondent was made way back in 1991, that is, prior to the enactment of the Public Finance Act and the Public Procurement Act. It was expected that, the said Agreement would have been revised to accommodate, amongst others, the changes introduced by the aforementioned pieces of legislation. The

Authority urges parties to the said Agreement to do so.

- (c) Some clauses in the Agreement have been overtaken by events, for instance, Clause 10(2)(v) which provides for a representative from Chama Cha Mapinduzi at the hospital as a member of the Advisory Committee. This was relevant during the one party era.
- (d) Clause 7 of the Agreement requires the Government to appoint four members to the Hospital Board. The Authority is of the opinion that, such members are expected to be active in ensuring that relevant policies and laws are complied with.
- (e) The 1<sup>st</sup> Respondent conceded during the hearing that, they are not conversant with the Public Procurement Act, Cap. 410, despite the fact that they are required to observe it in the procurement of medicines and equipment. The Authority observes that:

- There is no institutional framework showing that the 1<sup>st</sup> Respondent complies with the law in the procurement of medicines and equipment which are funded by the Government as it does not even have an established tender board as required by the law.
- The designated hospitals as well as other privately owned bodies which receive funds from the Government need training on the application of the Act to ensure, among other things, principles of fairness, transparency and value for money are realised.

Having considered the 1<sup>st</sup> Respondent's Preliminary Objection *vis-a-vis* the facts and evidence adduced, the Authority concludes that, the Appeal is not properly before it for want of jurisdiction.

**On the basis of the aforesaid findings, the Authority rejects the Appeal and orders each party to bear their own costs.**



Right of Judicial Review as per Section 85 of the Public Procurement Act, of 2004, Cap. 410 explained to parties.

Decision delivered in the presence of the Appellant and the 1<sup>st</sup> Respondents this 29<sup>th</sup> November, 2010.



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

**MEMBERS:**

1. MRS. R. MANG'ENYA.....  

2. MR. K. M. MSITA .....  

3. MS. E. J. MANYESHA.....  
