

**IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY
AT DAR ES SALAAM**

APPEAL CASE NO. 96 OF 2011

BETWEEN

**PANIC SYSTEM
GROUP CO. LTD.....APPELLANT**

AND

**TANZANIA BUREAU OF
STANDARDS.....RESPONDENT**

DECISION

CORAM:

- | | | |
|----|-----------------------------|---------------|
| 1. | Hon. A.G. Bubeshi, J. (rtd) | - Chairperson |
| 2. | Mr. F.T. Marmo | - Member |
| 3. | Mr. H.S. Madoffe | - Member |
| 4. | Mr. K.M. Msita | - Member |
| 5. | Mrs. R.A. Lulabuka | - Member |
| 6. | Mrs. N.S.N. Inyangete | - Member |
| 7. | Ms. E.J. Manyesha | - Member |
| 8. | Ms. B.G. Malambugi | - Secretary |

SECRETARIAT:

- | | | |
|----|---------------------|---------------------------|
| 1. | Ms. E. V.A. Nyagawa | - Principal Legal Officer |
| 2. | Mr. R. Chisumo | - Legal Officer |

FOR THE APPELLANT:

1. Mr. Edgar M. Ukwaya – Marketing Officer
2. Mr. Peter J. Mwasubila – Operations Manager

FOR THE RESPONDENT

1. Mr. Joseph B. Masikitiko – Director of Corporate Services
2. Mr. Dominic H. Mwakangale – Director of Testing Calibration & Packaging Services
3. Mr. Joshua Katabwa – Head Certification Section
4. Mr. Charles B. Challe – Head of PMU
5. Mr. Baptister M. Bitaho – Legal Officer
6. Ms. Pauline Munyera – Procurement Officer

INTERESTED PARTY – FROM NIGHT

WATCH SECURITY SERVICES CO-OPERATIVE LTD

1. Mr. Edward R. Mgassa – General Manager
2. Mr. Dotto Hussein – Deputy Chairman
3. Mr. Lucas D. Nkungu – Coordinator – Security
4. Ms. Prisca C. Mokiwa - Secretary

This decision was scheduled for delivery today 11th May, 2011 and we proceed to deliver it.

The appeal at hand was lodged by **PANIC SYSTEMS GROUP CO. LTD** (hereinafter to be referred to as "**the Appellant**") against **TANZANIA BUREAU OF STANDARDS** popularly known by its acronym **TBS** (hereinafter to be referred to as "**the Respondent**").

The said Appeal is in respect of Tender No. PA/044/2010/2011/s/01-LOT No. 3 for Provision of Security Services (hereinafter to be referred to as "**the tender**").

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

On 4th November, 2010, the Respondent's Procurement Management Unit (hereinafter to be referred to as "**PMU**") submitted to the Tender Board a paper which, among other things, proposed the use of quotations in the procurement of the service provider for security services. The PMU also submitted names of eight firms which are listed herein below:

- M/s Night Watch Security Services;
- M/s Esasi & Co. Ltd;
- M/s Panic System Group Co. Ltd;
- M/s Southern Security Services Limited;
- M/s Urgency Security Ltd;
- M/s Stemo Security System Co. Ltd;
- M/s Full Time Security Service (T) Ltd; and
- M/s NAS Security Service Ltd.

That, the list was approved by the Tender Board and on 9th November, 2010, Invitation for Quotations were issued to the following five out of the eight firms:

- M/s Night Watch Security Services;
- M/s Esasi & Co. Ltd;
- M/s Panic System Group Co. Ltd;
- M/s Southern Security Services Limited; and
- M/s Full Time Security Service (T) Ltd.

The tender opening took place on 16th November, 2010, whereby two firms submitted their quotations late and

the following two tenderers submitted quotations on time:

S/ No.	Name of a Tenderer	Price Quoted Tshs.
1.	M/s Night Watch Security Services Co-operative Ltd	69,120,000/= (VAT exclusive)
2.	M/s Panic System Group Co. Ltd	62,870,400/= (VAT inclusive)

The Evaluation Committee evaluated the two tenders whereby *vide* correction of errors the tender price quoted by the Appellant was increased by Tshs. 12,460,800/=, that is, from the read out price of Tshs. 62,870,400/= to Tshs. 75,331,200/=. The price increase resulted from the use of a loading factor whereby the number of guards stated in the Appellant's tender was increased from twenty to twenty four which was quoted by the Successful Tenderer so that the number of guards could be equal to the latter's. Having done that, they found the tender submitted by M/s Night Watch Security Services Co-operative Ltd to be the lowest evaluated and recommended award to them at a contract sum of Tshs. 69,120,000/=, (VAT inclusive). The Evaluation Report

was thereafter forwarded to the Procurement Management Unit (PMU) for further steps.

The PMU went through the Evaluation Report and made the following observations:

- (i)** The Appellant's read out tender price was Tshs. 62,870,400/= and not Tshs. 75,331,200/= allocated by the Evaluators after employing the loading factor which was wrong. The law prohibits change of the tenderer's quoted price if it does not arise from computational errors.
- (ii)** The Tender Document did not dictate the number of security guards to be provided as tenderers were at liberty to indicate the number thereof having made a site visit and also considering the availability of new technologies and facilities in the provision of such services.

The Evaluation Report together with the observations made by the PMU were tabled before the Tender Board whereby the latter instructed the same to be returned to the Evaluation Committee for re-evaluation.

Having considered PMU's observations, the Evaluation Committee reviewed their previous award recommendation and found the Appellant's tender to be the lowest evaluated and proposed them for award of the Tender at a contract sum of Tshs. 62,870,400/= (VAT inclusive).

On 31st December, 2010, the Re-evaluation Report was deliberated upon by the Tender Board whereby they considered the unit cost per guard, per month and found that M/s Night Watch Security Services Co-operative Ltd's tender was the lowest. This is because the cost was Tshs. 240,000/= per guard, per month as they had quoted for 24 guards compared to Tshs. 261,960/= of the Appellant's monthly cost per guard for 20 guards. The Tender Board therefore approved the award in favour of M/s Night Watch Security Services Co-operative Ltd at

a contract sum of Tshs. 69,120,000/= per annum; all taxes inclusive despite the fact that the said tenderer had quoted a price which was VAT exclusive.

On 31st December, 2010, the Respondent communicated their intent to award the contract to the successful tenderer, namely, M/s Night Watch Security Services Co-operative Ltd.

On 4th January, 2011, the Respondent received a letter from the Appellant referenced PSG/SEC/DSM/11/01 dated 3rd January, 2011, which was copied to the Public Procurement Regulatory Authority (hereinafter to be referred to as "**PPRA**") inquiring on the reasons for their disqualification.

On 5th January, 2011, the Respondent replied to the Appellant's queries whereby the following explanations were given:

- (i) The awarded contracts, including the award of the tender under Appeal, were advertised in

the newspapers on 5th January, 2011. However, the contract sum for the disputed tender erroneously read Tshs. 9,120,000/= instead of Tshs. 69,120,000/= per annum. Further that, the corrections thereof were to be made *vide* newspapers on 6th January, 2011.

- (ii) The Tender Board awarded the tender to the Successful Tenderer in consideration of their unit cost of Tshs. 240,000/= per guard, per month as compared to the Appellant's cost of Tshs. 261,960/= per guard, per month.

Being dissatisfied with the reasons for their disqualification, on 11th January, 2011, the Appellant appealed to the Public Procurement Appeals Authority (hereinafter to be referred to as "**the Authority**").

SUBMISSIONS BY THE APPELLANT

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

That, on 9th November, 2010, they received an invitation for quotation from the Respondent.

That, the tender opening took place on 16th November, 2010, two tenders were opened whereby the Appellant's read out tender price was Tshs. 62,870,400/= per annum VAT inclusive while the Successful Tenderer had offered Tshs. 69,120,000/= per annum VAT exclusive.

That, a month later, that is, on 30th December, 2010, the Appellant's Managing Director received an SMS from telephone number 0713-338840 from the Respondent's PMU staff instructing him to go to the Respondent's offices on 31st December, 2010, to sign a contract and commence work.

That, the Managing Director had travelled at that time so he asked Mr. Edgar Ukwya to go to the Respondent's offices on his behalf. Upon reaching there, he met one Ms. Paulina and informed her that he was there to sign a contract; the latter congratulated him. However, later the Appellant's representative and another tenderer named Ms. Kuche, who had won the tender for cleaning services, were instructed to wait for the Procurement Officer, one Mr. Charles so that they could sign the contracts. When Mr. Charles came, he directed Ms. Kuche to another office for signing the contract while the Appellant's representative was asked if he had come with their company's official stamp. Upon confirming that someone from the Appellant's office was on his way with the stamp, he was instructed to wait further. After half an hour, the said stamp was delivered and when he informed Mr. Charles on the development, he was requested to give him their telephone numbers so that he could call them later for contract signing.

That, the Appellant's representative thereafter briefed their Managing Director on what had transpired. The

latter received an SMS in the evening of that very day informing him that their tender was not successful.

That, having been informed that they had won the tender the Appellant incurred expenses, to wit, staff recruitment and purchase of uniforms and some equipment. However, the uniforms and equipment are currently being used in executing other on-going contracts.

That, when the disqualification was communicated to them, the Appellant had to dismiss the employees they had recruited for the job and asked them to collect their dues and disturbance allowance on 3rd January, 2011.

That, the Appellant believes that an injustice has been committed as they had met all the requirements provided for in the Tender Document.

That, the tenderers were required to inspect the premises to be guarded and provide a work plan as to how they would guard the said premises.

That, having inspected the respective premises they indicated that they would use 20 guards as well as electric shock devices, pepper spray and a gun. The number of security guards was not a requirement and that it was upon the tenderer to state the manner and equipment to be used in the provision of the said services.

That, it was unfair to award the tender to the Successful Tenderer as their tender lacked a VAT Certificate because the price they quoted was VAT exclusive. Moreover, their tender price was higher compared to the Appellant's.

That said, the Appellant requested the Authority to review the matter and order the Respondent to invite the Appellant for contract signing and thereafter execution of the contract. Furthermore, they requested for compensation of **Tshs. 2,270,000/=** as per the following breakdown:

- (a) Legal consultation fee – Tshs. 1,500,000/=;

- (b) Cost of taking fingerprints – Tshs. 2,500/= x 20 guards = Tshs. 50,000/=;
- (c) Purchase of belts, boots and batons - Tshs. 720,000/=.

THE RESPONDENT'S REPLIES

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

That, the Evaluation Committee convened from 22nd to 26th November, 2010 and submitted its Report to the PMU on 15th December, 2010.

That, the PMU having differed with the Evaluation Committee on the use of the loading factor, submitted the Evaluation Report to the Tender Board together with the former's observations thereof. The Tender Board instructed the Evaluation Committee to consider PMU's

comments before re-submitting the Report for further steps.

That, the Tender Board met on 31st December, 2010, to deliberate on the Re-evaluation Report whereby they considered a number of pertinent issues including unit cost per guard, per month. In so doing they found the cost quoted by M/s Night Watch Security Services Co-operative Ltd of Tshs. 240,000/= per guard, per month to be the lowest as compared to Tshs. 261,960/= quoted by the Appellant. They therefore approved award of the tender to M/s Night Watch Security Services Co-operative Ltd.

That, the Successful Tenderer is the current service provider and has been providing the said services for ten years without any problems.

That, the award was based on the Respondent's best interest, experience and cost per guard per month in consideration of future variations, if any. That is why under Clause 12 of the Instructions to Service Providers

(hereinafter to be referred to as "**ITSP**") it was provided that:

"The PE reserves the right at the time of contract award to increase or decrease up to fifteen percent (15%) of the quantity of services originally specified in the scope of services for each lot without any change in unit price or other terms of conditions and this shall be reflected in the form of contract."

That, the Respondent had the right to accept or reject any quotation pursuant to Clause 13 of the ITSP which states as follows:

"Notwithstanding the above, the PE reserves the right to accept any quotations and reject all quotations at any time prior to the award of contract."

The Respondent prayed for the Appeal to be dismissed in its entirety.

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, this Appeal is centred on the following issues:

- **Whether the Appellant was unfairly disqualified;**
- **Whether the award of the tender to the Successful Tenderer, namely, M/s Night Watch Security Services Co-operative Ltd was proper at law; and**
- **To what reliefs, if any, are the parties entitled to.**

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

1.0 Whether the Appellant was unfairly disqualified

In resolving this issue the Authority considered the Appellant's grounds of Appeal which are twofold. Firstly, the number of guards to be provided by a tenderer was not a criterion and therefore it was wrong for the Respondent to disqualify the Appellant on the basis of the unit cost per guard, per month. Secondly, during the tender opening, the read out price quoted by the Successful Tenderer was Tshs. 69,120,000/= (VAT exclusive), while that quoted by the Appellant was Tshs.62,870,400/= (VAT inclusive). Thus, the Successful Tenderer's price was higher than that of the Appellant.

The Authority noted that, the grounds of Appeal are based on the manner in which the evaluation process was carried out and the resultant effect of disqualifying the Appellant. The Authority therefore deemed it necessary to review the evaluation process in its entirety in order to ascertain whether it was conducted in accordance with the law.

According to the Evaluation Guidelines for Quotations Procurement of Goods, Works and Non-Consultant Services issued by PPRA on 4th June, 2008 (hereinafter to be referred to as "**PPRA Guidelines**"), during Preliminary Evaluation, tenders were supposed to be checked if they were substantially responsive. According to the Evaluation Report, Preliminary Evaluation was divided into two stages, namely, Commercial Responsiveness and Technical Responsiveness. The Authority noted that, what was checked under Commercial Responsiveness conforms to PPRA Guidelines while the Technical Responsiveness was not supposed to be checked at that particular stage but at detailed evaluation stage.

The Authority revisited the Evaluation Report in order to ascertain if the Preliminary Evaluation was conducted in accordance with the Tender Document, applicable law and PPRA Guidelines. To start with, the Authority revisited Table No. 4 on page 6 of the said Guidelines which provides for specific items to be checked during Preliminary Evaluation. The Authority noted that all the

items provided in the said Table were checked, except for the tender validity period. The Authority observes that, the Evaluation Committee should have checked the tender validity period at that stage as directed under PPRA Guidelines.

The Authority reviewed the other items which were checked under Commercial Responsiveness in order to satisfy itself if the exercise was properly conducted. In doing so, the Authority detected a number of anomalies as they will be analysed in the subsequent paragraphs.

The Authority noted that, Clause 4.3 of the ITSP read together with Item (x) of the Statement of Requirements and Schedule of Prices stated clearly that the rates quoted by the tenderers should include all taxes. The said provisions read as follows:

“Clause 4.3 all duties, taxes and other levies payable by the SP under the contract shall be included in the total price.”

Item (x) The contract's rates shall be inclusive of all taxes etc, and shall remain constant throughout the contract period except where minimum wages/rates are revised by the Government.” (Emphasis supplied)

However, the Quotation Submission Form submitted by the Successful Tenderer indicated that their price was VAT exclusive which means that they did not comply with Clause 4.3 of the ITSP. The Authority noted that, the Table appearing under Item 1 of the Statement of Requirements and Schedule of Prices indicate that a tenderer was required to indicate, among other things, the total amount for the services excluding VAT, VAT and the total amount for the services including VAT.

The Authority observes that, had the Evaluators been diligent this anomaly would have been detected when checking if the tender had been properly completed and signed in accordance with Clauses 5 and 9 of the ITSP which provide that:

“5. The SP shall complete the Quotation Submissions Form which is attached as Section VIII...”

“9. The quotation shall be completed and signed by an authorized representative of the SP...” (Emphasis added)

Thus, the Authority is of the considered view that, the said tenderer’s quotation should have been disqualified at that stage for non compliance.

Furthermore, the Authority noted that, Table 3 on page 6 of the Evaluation Report indicates that the Successful Tenderer, namely, **Night Watch Security Services Co-operative Limited** had complied with the requirements of submitting a Certificate of Registration, a valid Business License, VAT Certificate, Power of Attorney and Anti Bribery Policy. The Authority discovered that, the Evaluators’ assertion is not correct as the personalities to whom the said documents were issued to are not the same as evidenced in the Table below:

Document	The Name appearing in the document
The Tender	<ul style="list-style-type: none"> <li data-bbox="683 306 1435 506">▪ The cover page indicate the tenderer to be “Night Watch Security Services Co-operative Limited” <li data-bbox="683 562 1435 810">▪ The headed paper in which the Quotation Submission Form was typed reads “Night Watch Security Services Co. Limited” <li data-bbox="683 867 1435 1066">▪ The tenderer’s stamp on the Quotation Submission Form reads “Night Watch Security Force Coop Soci (T) Ltd”
Business License	Night Watch Security Force Co-op. Ltd
Certificate of Registration under the Cooperative Societies Act, No. 14 of 1982	Night Watch Security Force Co-operative Society Ltd
VAT	Night Watch Security Force Coop. Society (T) Ltd
Power of Attorney	Night Watch Security Force Coop. Society (T) Ltd
Anti Bribery Policy	Night Watch Security Services Co-op. Limited
A letter from their banker NBC	Night Watch Security Force Coop. Society (T) Ltd
Similar contracts	Night Watch Security Force

performed	Coop. Soc. (T) Ltd
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Based on the above Table, the Authority observes that, given the different names appearing in the documents submitted by the Successful Tenderer, it is important to identify who is the actual tenderer in the disputed tender. The Authority noted that, the Respondent's various documents availed to this Authority cites the said tenderer's name as "**Night Watch Security Services Co-operative Ltd**". The Authority observes that, this particular name appears on the said tenderer's Quotation Submission Form which is, legally speaking, '**the tender**' and also forms part of the Contract as per the Form of Contract Agreement contained in the Tender Document.

Having established the name of the Successful Tenderer, the Authority observes then that, most of the documents in their tender did not contain the said tenderer's name, to wit, Business License, Certificate of Registration, VAT Certificate, Power of Attorney and the previous contracts performed. It goes without saying therefore that, the said tenderer did not comply with the requirements of the

Tender Document and should have been disqualified at the preliminary stage for non compliance.

For the benefit of the Interested Party in this Appeal and the public at large, the Authority emphasizes that, in transacting their business it is imperative for tenderers to use the actual names appearing in their registration documents as they represent a legal personality. For instance, the Successful Tenderer's registered name under the Cooperative Societies Act of 1982, is "**Night Watch Security Force Co-operative Society Ltd**" which should have been used in their tender. Moreover, a business name should not be written anyhow as per a tenderer's desire, but the short-forms thereof should be legally recognized, for instance, '**Co.**' stands for '**a limited liability company**' while '**co-op.**' represents a '**co-operative**'. Furthermore, tenderers should refrain from using unrecognized short-forms such as '**Soc**' or '**Soci**' as used by the Successful Tenderer in place of '**society**'. The Authority also noted that, the Successful Tenderer's name has sometimes indicated it is a

'(Tanzania) Ltd', while their Certificate of Registration does not state so.

In addition, the Authority discovered that, the Power of Attorney submitted by the Successful Tenderer was defective in that, apart from the fact that it was issued by Night Watch Security Force Co-op Society (Tanzania) Ltd, who was not a tenderer in the disputed tender; it was not signed by a director of the company which transferred the said powers.

The Authority also noted that, at this stage the tenders were checked if they contained "a list of recent performed contracts of similar nature and complexity (**minimum of three contracts**) including the names and addresses of the Employers for verification". The Authority further noted that, the number of similar contracts performed, that is three contracts, was different from that stated under Clause 2.4 of the ITSP which reads:

“A list of **recent** performed contracts of similar nature **not less than FIVE** including the names and addresses of the Employers for verification”
(Emphasis supplied)

The Authority observes that the Evaluation Committee acted *ultra vires* in modifying the criterion provided for in the ITSP contrary to Regulation 90(4) of GN. No. 97 of 2005 which is reproduced herein below:

“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 supplied)

In view of the above, the Authority observes that, the shortfalls pertaining to the items which were checked as part of the Commercial Responsiveness indicate that, the Successful Tenderer’s tender did not meet the requirements contained in the Tender Document and should have been disqualified at that stage.

With regard to the Technical Responsiveness, the Authority noted that, the tenders were checked if they had complied with the General Requirements contained in the Statement of Requirements for Security Services. The Authority doubts the competence of the Evaluators, as the criteria employed at that stage, were mainly the tenderer's commitment to ensure satisfactory performance of the contract. For purposes of clarity some of the said criteria are reproduced in the Table herein below:

Item No.	CRITERION
4	The contractor shall ensure that his entire employees observe cleanliness and wear neat and clean uniforms with ID Cards duly displayed and that they are courteous, polite and prompt while rendering efficient services in their respective areas.
7	The contractor shall be solely responsible for all the claims of his employees and employees of the contractor shall not make any claims whatsoever against TBS.
8	In the event of a guard not reporting for duty, alternative arrangements shall be made by the contracting agency, immediately without

	jeopardizing the security of the TBS premises.
12	Main Entrance Doors/Gates:- These are entrances where people enter and exit and visitors are searched, recorded and ID cards checked.

The Authority noted further that, the Evaluators' comments on the above criteria were that, both tenderers had complied and therefore were subjected to Detailed Evaluation. The Authority observes that, technical responsiveness was supposed to be evaluated during Detailed Evaluation as per Clause 5.0 of PPRA Guidelines and not at the preliminary stage.

According to PPRA Guidelines, after Detailed Evaluation the Evaluators should have corrected errors, if any. However, in the disputed tender this was done during Detailed Evaluation. At that stage, the Evaluators adjusted the Appellant's quoted price by adding Tshs. 12,460,800/= to their original price of Tshs. 62,870,400/=. Hence, the Appellant's quoted price rose to Tshs. 75,331,200/=. The Evaluators' reason for doing so is well stated on page 10 of the Evaluation Report, which reads:

“Note: The evaluation team carried out loading factor procedure in order to compare their quotations (sic) price because service provider No 2 Ms. Panic System Group Co Ltd quoted for only 20 guards while service provider no 1 Ms. Night Watch Security Co-operative Ltd quoted for 24 guards, therefore the evaluation team added four manned guards to service provider no 2 so that the number of guards are the same for both service providers. For that reason quotation for service provider no 2 Ms. Panic System Group Co Ltd increased from Tshs. 62,870,400/= to Tshs. 75,331,200/= ... From the above analysis, Service Provider No 1 **M/s. Night Watch Security Services Co-operative Ltd** was found to be the lowest evaluated bidder.”

The Authority notes that, the PMU correctly detected this anomaly and observed that it was wrong for the Evaluators **to employ the loading factor as the Tender Document** did not specify the number of guards to be used. The Authority observes further that, what the

Evaluators did under the umbrella of **“correction of errors”** does not fall within the ambit of Regulation 90(11) of GN. No. 97/2005 which they purported to rely upon as evidenced under Item 5.6 on page 10 of the Evaluation Report. The said Regulation provides as follows:

“Reg. 90(11)(a) Notwithstanding sub-regulation (6), the procuring entity shall correct purely arithmetical errors that are discovered during the examination of tenders and the procuring entity shall give prompt notice of any such correction to the supplier, contractor, service provider or asset buyer that submitted the tender;
(Emphasis supplied)

The Authority noted further that Clauses 11.2 and 11.3 of the ITSP guide as to how correction of errors should be made in the following words:

“11.2 Quotations determined to be substantially responsive will be checked for any arithmetic errors. In case of any arithmetical discrepancy between the unit rate and amount quoted, then the unit rate shall prevail both for the evaluation of quotation and for subsequent contract agreement.

11.3 Comparison of quotations: in evaluating the quotations, the evaluation committee will determine for each quotation the evaluated quotation price by adjusting the quotation prices as follows:

11.3.1 making any correction for errors;

11.3.2 making appropriate adjustment for any other acceptable variations, deviations or omissions; and

11.3.3 making appropriate adjustments to reflect discounts for the award or other price modifications offered.”

(Emphasis supplied)

The Authority observes that, what the Evaluators did was not correction of errors as per Clauses 11.2 and 11.3 of the ITSP above quoted.

The Authority is of the considered view that, by applying the loading factor, the Evaluators introduced a new criterion altogether which was unknown to the tenderers contrary to Regulation 90(4) of GN. No.97/2005.

The Authority also considered the Appellant's second ground of Appeal, namely, the price quoted by the Successful Tenderer was VAT exclusive. In reply to this contention the Respondent submitted that, the price quoted by the said tenderer was VAT inclusive and that fact is reflected in the contract signed between the two of them. During the hearing, the Members of the Authority drew the attention of the Respondent to the tender document submitted by the said tenderer whose Quotation Submission Form clearly stated that the price was VAT exclusive while the Priced Activity Schedule indicated that the price was VAT inclusive.

In reply thereof, the Respondent stated that, their offer which was communicated in the letter of award was VAT inclusive and it was accepted by the Successful Tenderer. The Authority wishes to enlighten the Respondent that, in a tender process the offer is made by a tenderer and the communication of award made by a procuring entity amounts to an acceptance thereof. In this case therefore, **since the Form of Tender is the basis of the tender** the price quoted therein is the one to be relied upon. The Authority is therefore of the view that, the price quoted by the Successful Tenderer is VAT exclusive and had VAT been added thereto their price would have increased to a total of **Tshs 81,561,600 or Tshs 6,796,800 per month (Tshs 283,200/= per guard, per month)**. That said, the Evaluators should have added VAT in the said tenderer's quoted price or deducted VAT from the Appellant's price so that the two tenders could be comparable as per Regulation 90(3) of GN. No. 97/2005 of the Act which states as follows:

"The tender evaluation committee shall evaluate on a common basis tenders in order to

determine the cost or price to the procuring entity of each tender in a manner that permits a comparison to be made between the tenders on the basis of the evaluated costs or prices.”

(Emphasis supplied)

The Authority observes that, the Evaluators’ failure to add VAT to the price quoted by the Successful Tenderer and thereby comparing a VAT exclusive price *vis-a-vis* a VAT inclusive price, contravened Section 43(b) of the Act which emphasizes on the principle of fairness. For purposes of clarity, the said provision is reproduced hereunder:

“43. In the execution of their duties, tender boards and procuring entities shall strive to achieve the highest standards of equity, taking into account:-

(a) equality of opportunity to all prospective suppliers, contractors or consultants;

(b) fairness of treatment to all parties; and

(c) the need to obtain the best value for money in terms of price, quality and delivery having regard to set specifications and criteria.” (Emphasis added)

According to the documents submitted to the Authority as well as oral submissions during the hearing, the Tender Board correctly directed the Evaluation Committee to re-evaluate the tenders taking into account the observations of the PMU. The Authority noted that, the Evaluation Committee did the re-evaluation as it was directed by the Tender Board.

The Re-evaluation Report was tabled before the Tender Board for approval. However, the Tender Board did not approve the award to the Appellant as recommended by the Evaluation Committee; instead, they reviewed the report and erroneously disqualified the Appellant on the ground that their unit price per guard, per month was higher compared to the Successful Tenderer’s unit price.

The Authority wishes to enlighten the Respondent that, assuming the said criterion was contained in the Tender Document, the Successful Tenderer's unit price per guard per month would still be higher compared to the Appellant's as the former's quoted price was VAT exclusive.

The Authority is concerned with the conduct of the Tender Board as it usurped the powers of the Evaluation Committee by evaluating the tenders using a new criterion, to wit, **'unit cost per guard, per month'** and thereby disqualifying the Appellant. It was wrong for the Tender Board to do so as they neither had the mandate nor was the said award criterion provided for in the Tender Document.

According to Clause 11 of the ITSP the award of the contract was to be made to the lowest evaluated quotation. The Authority deems it necessary to revisit the provisions which guide as to how the lowest evaluated tender should be determined in order to ascertain whether the tender submitted by the Successful Tenderer

falls within the ambit of such provisions. To start with, the Authority revisited Regulation 90(18)(a) of GN. No. 97/2005 which reads as follows:

“Reg. 90(18)(a) A procuring entity shall evaluate and compare all tenders that have been accepted in order to ascertain the successful tender, in accordance with the procedures and criteria set forth in the solicitation documents.” (Emphasis added)

Based on the above quoted provision, the evaluation, comparison of the tenders and determination of the successful tender should be made in accordance with the procedures and criteria set in the Tender Document. In order to ascertain if in the determination of the successful tender the Respondent adhered to the above quoted provisions, the Authority revisited Regulation 90(18)(b) of GN. No. 97/2005 which provides as follows:

“90(18)(b) The successful tender shall be:

(i) the tender with the lowest evaluated tender price in case of goods, works or services, or the highest evaluated tender price in case of disposal of assets, but not necessarily the lowest or highest submitted price, subject to any margin of preference applied;" (Emphasis added)

It is the view of the Authority that, Clause 11 of the ITSP conforms to the above quoted provision as it states clearly the basis for award of the contract to be:

"The PE will award the contract to the SP whose quotation has been determined to be substantially responsive and who has quoted the lowest evaluated quotation price."

(Emphasis supplied)

The Authority observes that, Regulation 90(18)(a) of GN. No. 97/2005, already quoted, directs the award to be made in accordance with the provisions stated in the Tender Document. Clause 11 of the ITSP which was

prepared by the Respondent's themselves, states explicitly that **the award will be made to the lowest evaluated quotation price.** As it has been already analysed herein above, the lowest evaluated quotation was the one submitted by the Appellant as rightly recommended in the Re-evaluation Report. It goes without saying therefore that, the Tender Board was duty bound to award the tender to the Appellant in accordance with Clause 11 of the ITSP.

In view of the foregoing, the Authority is satisfied that by rejecting the award recommendation contained in the Re-evaluation Report, the Tender Board contravened the law.

For the benefit of the parties, the Authority is of the view that, the Tender Board after receiving the Re-evaluation Report whose award recommendation was made in observance of the law should have approved the award in favour of the lowest evaluated quotation pursuant to Section 68(a) of the Act which provides as follows:

“S. 68. The tender board shall review the evaluation and recommendation made by the procuring entity and may either:-

(a) approve the recommendation and, authorize the procuring entity to accept the tender and award a contract in the forms specified in the tender documents;” (Emphasis supplied)

It is the view of the Authority that, it was wrong for the Tender Board to turn itself into an evaluation committee, re-evaluate the tender and subsequently award the tender to the Successful Tenderer on the basis of their own evaluation. Hence, the purported award of the tender in favour of the Successful Tenderer is a nullity in the eyes of the law.

In view of the foregoing, the Authority observes that the Tender Board’s instructions to the Evaluation Committee for Re-evaluation were properly considered and the recommendations made by the latter were justified. That said, the Respondent is ordered to award the tender to

the Appellant, namely, Panic System Group Co. Ltd pursuant to Section 68(a) of the Act.

Accordingly, the Authority's conclusion in respect of the first issue is that, the Appellant was unfairly disqualified.

2.0 Whether the award of the tender to the Successful Tenderer, namely, M/s Night Watch Security Services Co-operative Ltd was proper at law

In view of the Authority's findings and conclusion in the first issue, the Authority's conclusion on the second issue is that, the award of the tender in favour M/s Night Watch Security Services Co-operative Ltd was not proper at law.

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

Having resolved the contentious issues, the Authority deems it prudent to review the prayers by parties as follows:

a) Appellant's prayer: Be compensated a sum of Tshs 2,270,000/=

Taking cognizance of the findings and conclusions on the first and second issues, the Authority observes that, the Appellant is entitled to compensation of **Tshs. 1,620,000/=** for the costs incurred only in pursuit of this Appeal, namely,

Tshs. 1,500,000/= for legal fees and
Tshs. 120,000/= being Appeal filing fees.

With regard to costs for purchase of uniforms and some other equipment, the Authority rejects them as the

Appellant conceded during the hearing that they are currently being used.

(b) Respondent's prayer:

During the hearing of the Appeal, the Respondent requested the Authority to dismiss the Appeal for lack of merit. The Authority rejects this prayer as the Appeal has merit.

Other matters that caught the Authority's attention

In the course of handling this Appeal the Authority discovered the following matters which are worth mentioning:

- a) The Tender Document issued by the Respondent did not provide adequate information, for instance, this being a tender for provision of security services one would have expected amongst the documents to be submitted as proof of eligibility

should have been a permit from the Ministry of Home Affairs which authorizes a service provider to render such services. As a result the Appellant had attached such a document while the Successful Tenderer only indicated that they had attached it while it was not there physically.

- b) Neither the Tender Board Minutes nor other documents availed to this Authority by the Respondent explain why eight firms were approved by the Tender Board and only five of them were invited to submit quotations.
- c) Personal Covenants signed by the Evaluators did not mention the tenderer's names as provided for in the sample Form contained in the Evaluation Guidelines for Quotations Procurement of Goods, Works and Non-Consultant Services issued by PPRA on 4th June, 2008; instead they mentioned the subject matter of the tender.

- d) The Evaluation Committee comprised of six persons contrary to Regulation 90(1) of GN No. 97/2005 which provides as follows:

“A procuring entity shall establish a tender evaluation committee comprising of not less than three and **not more than five members.**”

- e) The glaring anomalies detected in the evaluation process casts doubt on the competence of the Evaluators.
- f) The conduct of the Tender Board is equally questionable, in that, they are supposed to be conversant with their mandate and ensure adherence to the law.
- g) The minutes of the Tender Board were not detailed enough to show how the decisions were made and some of the key information was not reduced into writing as it was evident during the hearing.

- h) The Authority also noted that, the confusion relating to the Successful Tenderer's name was also detected in the contract signed between the Respondent and the said tenderer. Page 1 of the said contract refers to the tenderer as **"NIGHT WATCH SECURITY FORCE COOPERATIVE SOCIETY (TANZANIA) LIMITED"** while page 2 thereof names the other party as **"NIGHTWATCH SECURITY COOPERATIVE SOCIETY (TANZANIA LIMITED);** whereas the tenderer's stamp on page 6 of the Contract reads **"NIGHT WATCH SECURITY FORCE COOP SOCI (T) LTD"**. The names mentioned above are different from the name of the tenderer, namely, **"NIGHT WATCH SECURITY SERVICES COOP. LTD"**
- i) The Respondent's General Procurement Notice published on 8th June, 2010, indicated that tender for Provision of Various Services, which included the tender under Appeal, would be made by way of procurement of common use items (CUI).

However, the documents availed to this Authority shows that, that method was not employed.

The Authority commends the Respondent's Director General for informing this Authority in writing that, he had appointed the Director of Corporate Services to represent him at this Appeal. In addition to that, the presence of the Director of Testing Calibration & Packaging Services and other senior officers at the hearing of this Appeal, indicates seriousness on the part of the Procuring Entity as they were able to hear the shortfalls identified in the tender process as pointed out by the Members of the Authority and are therefore in a better position to take corrective measures to ensure that they do not recur in future.

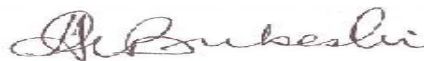
Having considered all facts and evidence, the Authority is satisfied that, the Appellant's disqualification was unjustified and the award of the tender to M/s Night Watch Security Services Co-operative Ltd was a nullity in the eyes of the law.

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

- **To award the tender to the Appellant, namely, Panic System Group Co. Ltd in accordance with Section 68(a) of the Act.**
- **To compensate the Appellant a sum of Tshs. 1,620,000/= for costs incurred in pursuit of this appeal.**






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

Decision delivered in the presence of the Appellant and the Respondent this 11th May, 2011.



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JUDGE (rtd) A. BUBESHI

CHAIRPERSON

1. ENG. K.M. MSITA.....
2. MRS. N.S.N. INYANGETE.....
3. MRS. R.A. LULABUKA.....
4. MS. E. J. MANYESHA.....
5. ENG. F. T. MARMO.....
6. MR. H. S. MADOFFE.....