

**IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY
AT DAR ES SALAAM
APPEAL NO 1 OF 2013/14**

BETWEEN

M/S COOL CARE SERVICES LIMITED..... APPELLANT

AND

SURFACE AND MARINE

TRANSPORT AUTHORITY.....RESPONDENT

DECISION

CORAM:

- | | |
|---------------------------------|----------------|
| 1. Hon. A. G. Bubeshi, J. (rtd) | - Chairperson |
| 2. Mr. K. M. Msita | - Member |
| 3. Mrs. R. Lulabuka | - Member |
| 4. Mrs. N. S. Inyangete | - Member |
| 5. Ms. F.R. Mapunda | - Ag.Secretary |

SECRETARIAT

- | | |
|----------------------|-----------------|
| 1. Mr. H.O. Tika | - Legal Officer |
| 2. Ms. V.S. Limilabo | - Legal Officer |

FOR THE APPELLANT:

Eng. Andrew Mwaisemba - Managing Director- Cool Care Services Ltd

FOR THE RESPONDENT:

1. Mrs. Leticia M. Mtaki – Senior Legal Officer- SUMATRA
2. Jumanne A. Swavila – Head PMU- SUMATRA
3. Dr. Moses Mkony- Consultant

This decision was scheduled for delivery today 16th August, 2013, and we proceed to deliver it.

The Appeal at hand was lodged by **M/S COOL CARE SERVICES LIMITED** (hereinafter referred to as "**the Appellant**") against the **SURFACE AND MARINE TRANSPORT AUTHORITY** commonly known by its acronym SUMATRA (hereinafter referred to as "**the Respondent**").

The said Appeal is in respect of Tender No. AE/025/2012-2013/HQ/W/01 for Construction of Sumatra House (hereinafter referred to as "**the tender**").

According to the documents submitted to the Public Procurement Appeals Authority (hereinafter referred to as "**the Authority**"), as well as oral submissions by parties during the hearing, the facts of the Appeal may be summarized as follows:

The Respondent vide the East Africa news paper of 23rd - 29th March 2013, the Guardian news paper of 27th March, 2013 and the Daily News paper of 22nd March, 2013 invited applications for the Pre-qualification.

The Appellant was among the Applicants who purchased the Pre-qualification document. Having read the said document the Appellant was dissatisfied with three clauses as listed herein under;

- a) Clause 4.7 of the General Instruction To Applicants (hereinafter referred to **as GITA**) which provided for average annual turnover in words twenty billion but in figures ten billion. The Appellant wanted to know exactly the average annual turnover stated in the prequalification document and if the said volume applies to Building, HVAC and other services.
- b) Clause 4.12 of GITA provided for the list of personnel, the Appellant wanted to know if it applies to building, HVAC and other services.
- c) Clause 4.13 of GITA provided for the list of equipment required for the building works. The Appellant wanted to know the equipment that were required for HVAC works.

Having been dissatisfied with the above listed clauses the Appellant, on 27th March, 2013, vide a letter referenced CCSL/TA/17/13 sought for clarification from the Secretary of the Tender Board.

On 3rd April, 2013, the Secretary of the Tender Board vide a letter referenced EB27/339/01 clarified on the issues raised by the Appellant as follows:

- a) That the correct average annual turnover is Tshs ten Billion (10,000,000,000) and that the said volume is applicable for main contractors.
- b) That the list of personnel stated therein is applicable to key personnel of the main contractor/ building contractors.
- c) That the equipment mentioned in the Pre-qualification document was for the building works and that the application for pre-qualification was applicable for main contractors only, the subcontractors will be tendered domestically.

Being dissatisfied with the clarification given by the Secretary of the Tender Board, the Appellant vide a letter referenced CCSL/TA/18/13 dated 3rd April, 2013, wrote another letter for clarification on the issue of the Sub contractors to be selected through domestic sub contracting method. They also wanted clarification on Clause 4.2 of GITA which provided that "the procuring entity intends to execute the specialized elements of the works by nominated Sub contractors." They wanted to know if the word "domestic" has the same meaning as "nominated".

On 8th April, 2013, the Secretary of the Tender Board vide a letter referenced EB27/339/01 clarified as follows;

- a) That the Bidding Document that would be issued to pre-qualified main contractors would consist of the requirements of all Sub contracting works such as Electrical Installations, Mechanical Installations (HVAC), Structural Glazing, Plumbing and Fire Fighting, Vertical Transportation, ICT and Security System

Installations. The main contractor would be required to submit a complete package of contracting sum including all sub contracting works. Thus, the employer would neither advertise nor nominate any sub contractors.

- b) With respect to Clause 4.2 of GITA, it was omitted because nominated sub contracting would not be applicable.

The Appellant being dissatisfied with the omission of Clause 4.2 of GITA, filed application for review to the Respondent vide a letter referenced CCSL/TA/22/13 dated 22nd April, 2013.

On 14th May, 2013, the Respondent vide a letter referenced EB27/339/01, rejected the Appellant's Application for review on the reason that, the correction made on the Pre-qualification document did not breach Sections 34 (a) **(sic)** and 58 (2) of the Public Procurement Act No. 21 of 2004 (hereinafter referred to as **the Act**).

The Appellant was dissatisfied with the Respondent's decision; thus, on 30th May, 2013, filed an application for administrative review to the Public Procurement Regulatory Authority (hereinafter referred to as **PPRA**).

On the 1st July, 2013, PPRA delivered its decision; whereby they upheld the Appellants complaints and ordered the restart of the Pre-qualification process to incorporate either of the following;

- a) To reinstate the original wording of Clause 4.2 of GITA, in order to accommodate nominated sub contactors whose selection shall be in accordance with Regulation 98 (2) of the Public Procurement (goods, works, non-consultant Services and Disposal of Public Assets by Tender) of the Government Notice No. 97/2005 (hereinafter referred to as "**G.N. No. 97/2005**"); or
- b) To amend the Pre- qualification Document to indicate that the main contractor is required to submit as part of its pre-qualification document

minimum qualification with regard to all domestic sub contractors.

Having not received PPRA's decision within thirty days, the Appellant, on 3rd July 2013, lodged their Appeal to the Authority.

SUBMISSIONS BY THE APPELLANT

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

That, the Appellant was among the Applicants who purchased the Pre-qualification Document for the tender under Appeal.

That, having purchased the Pre- qualification Document, they were dissatisfied with some provisions contained therein; hence they sought for clarification to the Secretary of the Tender Board.

That, they were dissatisfied with the Respondent's act of omitting Clause 4.2 of GITA, thus sought for administrative review to the Respondent who rejected their application. They later on filed an application for administrative review to PPRA who failed to issue its decision within 30 days as required by law.

That, they are appealing against the Respondent's act of curtailing the opportunity of HVAC contractors to participate in the tender under appeal, which is contrary to Sections 43 (a) **(c)** and 58 (2) of the Act.

That, Section 43 (a) of the Act, requires the Tender Board to strive to achieve the highest standards of equity and equality of all tenderers. The Respondent's act of indicating that the subcontractors would be procured using domestic sub contracting method had contravened the law since sub contractors would not participate in the disputed tender process unless they are attached to the main contractor. Thus, the opportunities of sub

contractors to participate in the Tender under Appeal would be restricted.

That, the domestic sub contracting method intended to be used by the Respondent is not governed by the Act.

That, the main contractor is evaluated separately from the subcontractor and the Pre-qualification document does not state that the main contractor must submit the names of particular sub contractors. The main contractor is free to submit any name of the sub contractor while others may be left out depending on the choice of the main contractor.

That, the Pre- qualification Document does not indicate the qualifications of the sub contractors. Hence, the evaluation would be based on the qualification of the main contractor and if the main contractor fails to qualify that would automatically affect the sub contractor.

That, the tender under Appeal is an international tender thus, open to all tenderers. The main contractor may

engage sub contractors from anywhere and omit local sub contractors.

That, Clause 4.2 which provided for nominated sub contracting was in the Pre- qualification document but the Respondent decided to omit it.

That, the procurement for sub contractor ought to have been advertised separately by following the procedures stipulated under Regulation 98 of GN No. 97/ 2005.

Finally, the Appellant prayed for the following orders:

- a) The Respondent to restart the Pre-qualification process in observance of the law.
- b) The Respondent to pay the Appellant a sum of Tshs 120,000/- being Appeal filing fees.

SUBMISSIONS BY THE RESPONDENT

The Respondent's documentary, oral submissions as well as responses from questions raised by the Members of

the Authority during the hearing may be summarized as follows:

That, the tender was advertised to reach all prospective tenderers while considering the need to obtain the best value for money.

That, the Appellant ought to have demonstrated how the one day's delay by PPRA in issuing their decision had prejudiced them.

That, the procedure to procure nominated sub contractors tends to delay many projects, that is why they opted to procure them through domestic sub contracting method whereby the main contractor was required to submit the names of the sub contractors whom they intended to work with.

That, Regulation 98 of GN No. 97/2005 stipulates clearly how sub contractors are selected. Thus, they found that there was no need to advertise separately for specialist

works instead the main contractor was allowed to submit tenders which include their own subcontractors.

That, Regulation 48 (1) of GN No. 97/2005 requires the procuring entity to maximize the economy and be efficient by inviting only one tender and not several tenders, provided they are of similar nature or they are related for purposes of minimizing costs on part of the Respondent. Furthermore, the act of allowing the main contractor to come with a sub contractor of their choice reduces management costs and the possibility of conflicts which may end up delaying the project.

That, Regulation 49 (1) of GN No. 97 of 2005, forbids the procuring entity from splitting tenders on the basis of encouraging international competition.

Finally, they prayed for the following orders;

- a) Dismissal of the Appeal in its entirety.
- b) Make any other orders deemed necessary.

ANALYSIS BY THE AUTHORITY

The Authority finds it prudent to note from the out set that, during the hearing of this Appeal, the Appellant submitted that their main contention lies on the ground that, the selection process of sub-contractors was to be done inconformity with Regulation 98 of GN. No.97/2005. They did not have any problem if the selection process would be conducted by the Respondent or the main contractor, but they wanted the sub contractors to be obtained through competitive means so as to maximize competition. The Appellant contended further that, the Respondent's act of omitting Clause 4.2 of GITA intended to unfairly eliminate other tenderers to participate in the disputed tender process. That noted, the Authority therefore is of the view that, the Appeal is centered on the following issues:

- **Whether the procedure adopted by the Respondent in the pre-qualification of sub contractors was in compliance with 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 procedure adopted by the Respondent in the pre-qualification of sub contractors was in compliance with the law.

In resolving this issue the Authority revisited the Appellant's submissions as listed herein under;

- a) They were dissatisfied with the Respondent's act of omitting Clause 4.2 of GITA which allowed nominated sub contractors to participate in the tender under appeal.
- b) That the Respondent's act of omitting Clause 4.2 infringed the opportunity of sub contractors to participate in the tender contrary to Sections 43 (a) (c) and 58 of

the Act. The said provisions require Tender Boards to strive to achieve highest standard of equity and equality of all tenderers.

- c) The Respondent's act of intending to obtain sub-contractors through domestic sub contracting prejudiced the opportunities of many sub contractors to participate in the disputed tender.
- d) That, the procurement of sub contractors was to be advertised separately following the procedures stipulated under Regulation 98 of GN No. 97/2005.

In reply to the Appellant's arguments the Respondent submitted that;

- a) The procurement of the sub contractors through nominated sub contracting method could delay the project that is why they opted to procure the

subcontractors using domestic sub contracting method.

- b) Regulation 98 of GN No. 97/2005 stipulates clearly how sub contractors were to be selected. Therefore, they found no need of separating the specialized works. They opted that the main contractor to come with their own sub contractors so as to avoid prolonging the procurement process.
- c) Regulation 48 (1) of GN No. 97/2005 requires the procuring entity to maximize the efficiency and economy by inviting only one tender and not several tenders provided that, they are of similar nature or they are related for purpose of minimizing costs. That method also reduces the possibility of conflicts and unnecessary delays.
- d) Regulation 49 (1) of GN No. 97 of 2005, forbids the procuring entity from splitting the tender on the basis of encouraging international competition.

In order to ascertain the validity of the parties' arguments, the Authority revisited the documents submitted to the Authority and noted that, the tender advertisement and the Pre-qualification Document issued by the Respondent contained different information on the method for selection of sub-contractors. Clause 5 of the tender advertisement states as follows;

Clause 5 "interested contractor must provide information which shows that they qualify to perform the work **and must submit a list of domestic sub contractor(s) in associate together with their qualification and their legal status**". (Emphasis supplied)

The above quoted provision clearly entails that, the sub contractors were to be obtained through domestic sub contracting method.

Furthermore, the Authority revisited Clause 4.2 of GITA which provides as follows;

Clause 4.2 “if so listed in the PITA, the Procuring Entity intends to execute sanitary, ICT, electrical and air condition specialized elements of works by Nominated Sub contractors in accordance with the GCC of the Bidding Documents, and for which provisional sums will be included in the BOQ for the subject works”. (Emphasis added)

The Authority revisited further Clause 4.2 of PITA and noted that it provided for the following;

“The Procuring Entity intends to execute the following **specialized elements of the works by nominated subcontractors:**

- Electrical Installations
- Mechanical Installations (HVAC)
- Structural Glazing
- Plumbing and Fire Fighting
- Vertical Transportation

The above quoted provisions clearly stipulate that, the Respondent had opted to select sub-contractors for specialized works through nominated sub contracting method. Based on that fact, the Authority is of the view that, the provisions of the Pre-qualification document supersede the contents of the tender advertisement. That means, as per Clause 4.2 of PITA sub contractors were to be obtained through nominated method.

Moreover, the Authority observed that, upon request for clarification by the Appellant, the Respondent omitted Clause 4.2 of PITA and issued an Addendum which contained the following words;

**“GITA 4.2 nominated subcontracting
Not applicable”** (Emphasis added)

Having received the said Addendum, the Appellant sought for further clarification if the Respondent had intended to procure sub contractors through domestic subcontracting. In reply to the clarification sought the Respondent insisted that, the subcontractors would be procured through domestic sub contracting method;

hence Clause 4.2 of PITA was not applicable. For purposes of clarity the Authority reproduces part of the said letter as hereunder;

“.....Therefore. Main contractor will be required to submit a complete package of contract sum including all sub contracting works upon the deadline for submission of bids. Hence, the Employer will neither advertise nor nominate any sub-contractors for sub contracting works”. (Emphasis supplied)

In order to ascertain if the omission of Clause 4.2 was proper in the eyes of the law, the Authority revisited Regulation 85(4) of GN. No. 97/2005 which provides as follows;

“At any time prior to the deadline for submission of tenders, the procuring entity may, for any reason whether on its own initiative or as a result of request for clarification by a supplier, service provider,

contractor or asset buyer, modify the solicitation documents by issuing an addendum". (Emphasis supplied)

Based on the above quoted provision the Authority is of the settled view that, the Respondent was right to amend the Pre-qualification document as the same is acceptable in eyes of the law.

In view of that finding, the Authority finds it proper to analyze further if the adoption of domestic sub-contracting in the pre qualification process was proper at law.

In so doing, the Authority revisited the Appellant's argument that, the Respondent's act of procuring sub contractors through domestic sub contracting minimizes competition, as the main contractor would pick specialists contractors of their own choice. Hence, the Respondent's ability to ensure quality is maintained and value for money is obtained would not be achieved. The Appellant contended further that, the domestic method for

procurement of subcontractors marginalizes qualified specialist contractors to participate in the tender independently, since main contractor may opt to work with their own specialist contractors taking into account it was an international tender. Hence, the Respondent's act had contravened the requirements of Sections 43(a) (b) and 58 of the Act.

In reply thereof, the Respondent submitted that, the Appellant's rights to participate in the disputed tender was not infringed as there was ample time for them to search for the main contractor whom they would associate with. Thus, it is not true that their right to participate in the tender under appeal was marginalized. The Respondent submitted further that, procurement of the sub-contractors through nominated subcontracting tends to delay the project, that is why they opted for sub contracting method. They contended further that, domestic sub-contracting reduces the possibility of conflicts.

In ascertaining the validity of parties' arguments the Authority deems it prudent to reproduce Sections 43 (a), (b) and 58 of the Act relied upon by the Appellant. The said sections provide as follows;

S.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".**

S.58(2) "subject to this Act all procurement and disposal shall be conducted in a manner to maximize competition and achieve economy, efficiency, transparency and value for money".

(Emphasis supplied)

Based on the above quoted provisions the Authority observes that, the Pre-qualification process conducted by the Respondent ought to have adhered to the above provisions.

The Authority further observes that, the domestic sub contracting method for procurement of sub contractors is not governed by the Act. The Authority observes further that, the domestic subcontracting arrangement is neither competitive nor does it accord equality of opportunity to sub contractors contrary to Sections 43 and 58(2) of the Act. Furthermore, the said process is not transparent as the basis of selection is left in the hands of the main contractor who would normally choose the ones he is used to associate with.

The Authority finds the Respondent's argument in this regard to have no basis, since a number of contractors delay projects even with sub-contractors of their own choices. Furthermore, the law has set the manner in which the procuring entities are to adhere to upon

procurement of various contractors or service providers. Thus, using an umbrella of domestic subcontracting, the Respondent wished to abrogate the law. That said, the Authority finds it difficult to agree with the Respondent that domestic sub contracting minimizes costs and delays.

In addition to the above findings, the Authority observes that, the Pre-qualification document did not provide for the qualification criteria of sub contractors save for a general statement with respect to specialized equipment for HVAC.

During the hearing the Respondent was asked to explain how the sub contractors were to be evaluated taking into account that the evaluation criteria were not provided for in the Pre-qualification document. In reply to the said question, the Respondent submitted that, the criteria for evaluating domestic sub contractors were not provided for at the Pre qualification stage since the main contractor was required to provide the list of sub contractors and their legal status only. They expected the

shortlisted main contractors to submit the qualification of their sub contractors during tendering stage. The Respondent submitted further that, the Evaluation Committee would have set out the criteria to be used to evaluate the domestic sub contractors.

From the facts of this Appeal and the Respondent's self admission the Authority observes that, the Prequalification document neither contained the qualification nor the evaluation criteria for sub contractors. Therefore, the Authority finds the Respondent's act in this regard to have contravened Regulation 15 (5) (d), (8) and (9) of GN No. 97 of 2005 which require an invitation to pre qualify to contain at a minimum the criteria to be used in the evaluation process. The said Regulation is reproduced herein under:

Reg 15 (5) "An invitation to pre- qualify shall contain at the minimum, the following information:

(d) the criteria and procedures to be used for evaluating the qualification of suppliers or contractors in conformity with Regulation 14”.

Reg.15(8) “The pre-qualification documents shall be approved by an appropriate tender board”.

Reg.15(9) “Invitations to pre-qualify which are issued without prior approval by a tender board and which do not satisfy these Regulations will not be considered valid”.
(Emphasis added)

Furthermore, the Authority revisited Regulation 14(1) of GN 97/2005 which sets the criteria for suppliers, contractors, service providers or buyers to qualify to participate in the procurement or disposal proceedings. The said regulation provides as follows;

Reg. 14(1) **“To qualify to participate in the 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;**
- (b) that they have legal capacity to enter into procurement or disposal contract;**
- (c) that they are not insolvent, in receivership, bankrupt or being wound up, their affairs are not being administered by a court or a judicial officers, their business activities have not been suspended and they are not**

the subject of legal proceedings for any of the foregoing

- (d) that they have fulfilled obligations to pay taxes and social security contributions and that they abide to employment, environment, health and safety requirements in Tanzania, where required**

- (e) that they have not, and their directors or officers have not been convicted of any criminal offences related to their professional conduct, or the making of false statement or misrepresentation as to their qualifications to enter into a procurement or disposal contract within a period of ten years.....". (Emphasis added)**

Based on the facts of this Appeal and the documents submitted, the Authority is of the settled view that, the Pre-qualification document issued by the Respondent was not in compliance with the law.

Furthermore, the Authority considered the Respondent's arguments based on Regulations 48 (1), 49 (1) and 98 (3) of GN No. 97 of 2005 and finds such arguments to be misconceived and accordingly not relevant to the matter at hand.

In view of the above findings, the Authority's conclusion with regard to the first issue is that, the procedure adopted by the Respondent in the Pre-qualification of sub contractors was not in compliance with the law.

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

Having resolved the issue in dispute the Authority proceeded to address prayers by parties. To start with, the Authority considered the Appellant's first prayer that, the Authority should order the Respondent to restart the Pre-qualification process in observance of the law. The Authority observes that, the Respondent should restart the Pre- qualification process in observance of the law

since the Pre-qualification document was not in accordance with the law.

With regard to the Appellant's second prayer for compensation of Tshs 120,000/-, being Appeal filing fees, the Authority finds that the Appellant deserves to be compensated the said amount as actual costs incurred for lodging this Appeal.

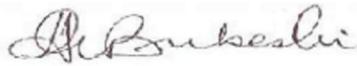
As regards to the Respondent's prayer that the Appeal be dismissed, the Authority rejects that prayer as the Appeal has merit.

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

- **re-start the Pre-qualification process afresh in observance of the law; and**
- **compensate the Appellant a sum of Tshs. 120,000/- only**

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

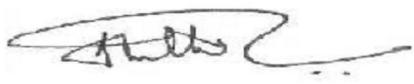
This Decision is delivered in the presence of the Appellant and the Respondent this 16th August, 2013.



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JUDGE (rtd) A. BUBESHI

CHAIRPERSON

MEMBERS:

1. MR. K. M. MSITA 

2. MRS. R. LULABUKA 

3. MRS. N. S. N. INYANGETE 