

**IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY**

AT DAR ES SALAAM

APPEAL NO. 4 OF 2013/14

BETWEEN

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

AND

BOARD OF TRUSTEES OF THE

PARASTATAL PENSIONS FUND.....RESPONDENT

DECISION

CORAM:

- | | |
|--------------------------------------|----------------|
| 1. Hon. Augusta G. Bubeshi, J. (rtd) | - Chairperson |
| 2. Mr. Kesogukewe M. Msita | - Member |
| 3. Mr. Haruni S. Madoffe | - Member |
| 4. Mrs. Nuru S.N Inyangete | - Member |
| 5. Ms. Florida R. Mapunda | - Ag.Secretary |

SECRETARIAT

- | | |
|---------------------------|-----------------|
| 1. Mr. Hamisi O. Tika | - Legal Officer |
| 2. Ms. Violet S. Limilabo | - Legal Officer |

FOR THE APPELLANT:

1. Eng. Andrew Mwaisemba- Managing Director- Cool Care Services Ltd
2. Mr. Frank A. Chundu- Advocate, (**name of the firm**)

FOR THE RESPONDENT:

1. Mr. Issa Sabuni – Secretary of the Tender Board
2. Mr. Suleimani Msangi - Senior Legal Counsel

This decision was scheduled for delivery today 23rd 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 **BOARD OF TRUSTEES OF THE PARASTATAL PENSIONS FUND** commonly known by its acronym **PPF** (hereinafter referred to as “**the Respondent**”).

The said Appeal is in respect of Tender **No. PA/038/HQ/2013/W/1A for Air Conditioning and Ventilation Installation for the Proposed Construction of PPF Plaza on Plot No. 15 Corridor Area in Arusha Municipality** (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 the parties during the hearing, the facts of the Appeal may be summarized as follows:

The Respondent vide the Guardian newspaper dated 11th February, 2013, invited tenders for the tender under Appeal.

The deadline for submission of tenders was initially set for 12th March, 2013, but was later on extended to 22nd March, 2013; whereby, twelve tenders were received from the following firms;

S/N O	Tenderers Name	Quoted price in Tshs
1.	M/s Electromechanical Agencies (EMA)	2,267,498,282.09
2.	M/s Daikin Tanzania Ltd.	2,564,659,564.62
3.	M/s China Railway Jianging	4,348,269,733/-
4.	M/s Derm Electrics (T) Ltd.	2,514,811,353/-
5.	M/s Cool Care Services Ltd	2,391,936,300/-
6.	M/s Ashrea Air Conditioning Co. Ltd	2,760,490,820/-
7.	M/s Remco (International) Ltd	2,706,706,892/-

8.	M/s M.A.K Engineering Co. Ltd	2,302,414,348/-
9.	M/s M/s Mollel Electrical Contractors Limited.	2,820,754,539.82
10.	M/s Berkeley Electrical	3,279,142,710/-
11.	M/s Dar Essentials	2,711,789,607.48
12.	M/s Tanpile Limited	3,308,377,800/-

The tenders were subjected to evaluation which was conducted in three stages namely; preliminary evaluation, detailed evaluation and post qualification.

At the preliminary evaluation stage, three tenders were found to be non responsive to the Tender Document. The tenders submitted by M/s Cool Care Services Ltd and M/s M.A.K Engineering Co. Ltd were disqualified on the ground that, they had submitted the Bid Security in form of an Insurance Bond instead of a Bankers' Cheque or a Bank Guarantee as per the requirements of the Tender Document. The tender by M/s China Railway Jianchang was disqualified for submitting an invalid Power of Attorney.

The remaining nine tenders were found to be substantially responsive and were then subjected to detailed evaluation; whereby, the tender submitted by M/s Electromechanical Agencies (EMA) was found to be the lowest evaluated tender.

M/s Electromechanical Agencies (EMA) was subjected to Post-qualification, whereby it was established that, they lacked the requisite experience as a prime contractor and essential equipment or tools for HVAC.

Having disqualified them, the Evaluation Committee proceeded to conduct post qualification to the 2nd ranked tenderer, namely, M/s Daikin Tanzania Limited who was found to be qualified and was recommended for an award of tender at a contract price of Tshs. 2,564,652,378.42.

The Respondent's Tender Board at its meeting held on 15th May, 2013, approved the recommendations of the Evaluation Committee.

On 2nd July, 2013, the Respondent vide a letter referenced PPF/AC.193/270/01C/26 communicated the award of tender to the Successful Tenderer.

Having learnt that the Bid Validity period for the disputed tender had already expired and they were yet to be informed about the tender results, the Appellant vide a letter referenced CCSL/TA/35/13 dated 27th June, 2013 which was received by the Respondent and 1st July, 2013, requested to be informed about the tender results.

On 3rd July, 2013 the Respondent vide a letter referenced PPF/CD/186/02/107 informed the Appellant that, their tender was unsuccessful on the reason that they had submitted an Insurance Bond as a bid security while the Tender Document required them to submit either a Banker's Cheque or a Bank Guarantee. The said letter was received by the Appellant on 8th July, 2013.

Upon being dissatisfied with the reason given for their disqualification, the Appellant on 12th July, 2013, lodged their Appeal to this Authority.

SUBMISSIONS BY THE APPELLANT

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

That, they were among the tenderers who participated in the tender under Appeal.

That, they were dissatisfied for being disqualified on the ground that, they submitted an Insurance Bond instead of a Banker's Cheque or a Bank Guarantee for the Bid Security.

That, the Insurance Bond was among the forms of bid securities stated under Clause 17.3 of the Instructions To Bidders (hereinafter referred to as "**the ITB**").

That, Regulation 88(3) of the Public Procurement (goods, works, non-consultant Services and disposal of public

assets by Tender, Government Notice No. 97 of 2005 (hereinafter referred to as **GN. No. 97/2005**), gives a tenderer the right to choose one of form of bid security stated therein, which include; a certified cheque, a letter of credit, a bank guarantee and an insurance bond.

That, they submitted a bid security in form of an insurance bond in accordance with Clause 17.3 (a) of the ITB.

That, according to the User Guidelines for Procurement of Medium and Large Works, issued in July 2007 by the Public Procurement Regulatory Authority (hereinafter referred to as "**the PPRA**"), modification of the ITB in the Bid Data Sheet has to be in accordance with the said guidelines. The user guidelines allow Clause 17.1 to be modified in the Bid Data Sheet by stating only the currency and the amount of bid security required. To the contrary, the Respondent specified the forms of bid security to be submitted.

That, the ground given for disqualification of their tender contravenes Sections 43 (b) of the Public Procurement Act No. 21 of 2004 (hereinafter referred to as the **Act**). The said provision requires the tender board and the procuring entities to treat all parties fairly. The Respondent's act of disqualifying them on the ground that they submitted an insurance bond contravenes the law as there was no equal treatment among the tenderers, since they submitted a security which is acceptable under Regulation 88(3) of the Act.

Finally, the Appellant prayed for the following orders;

- (a) The Respondent to Re-evaluate the tenders to reach a lawful decision
- (b) The Respondent to pay the Appellant a sum of Tshs 3,120,000/= as per the following breakdown;
 - i. Appeal filing fees Tshs.120,000/-
 - ii. Legal fees Tshs.3,000,000/-
- (c) To take any other orders deemed necessary.

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 ground given for the disqualification of the Appellant's tender was appropriate and was in accordance with the requirements of the Tender Document.

That, the provisions of the ITB must be read together with the provisions of the Bid Data Sheet. Whenever a conflict arises, the provisions of the Bid Data Sheet prevail over the ITB. The ITB provides for general forms of bid security while the BDS provides for specific forms of bid security depending on the value of the project. Therefore, the Tender Document must be considered as a whole and not in parts with isolation of other provisions as contended by the Appellant.

That, Clause 17.3 of the ITB was modified by Clause 13 of the BDS which required all tenderers to submit their bid security in form of either a bankers cheque or a bank guarantee and this condition applied to all tenderers.

That, out of 12 tenders that were submitted, 10 tenders were found to have complied with the requirement of bid security by submitting either banker's cheques or bank guarantees. Only two tenders did not comply with the said requirement; one being the Appellant's tender.

That, all tenderers were given equal opportunity to submit bid securities, thus, they observed the highest standards of equity by treating all tenderers fairly.

That, the Respondent being a procuring entity has been given discretionary powers under Section 53 (1) of the Act and Regulation 88(2) of GN. No. 97/2005 to specify any form of tender security required from tenderers. Thus, they specified banker's cheques or bank guarantees.

That, according to the Respondent's approved **project**, the value in relation to the tender under Appeal is more than two billion shillings; thus, bid securities in form of banker's cheques or bank guarantees were highly preferred than insurance bonds.

That, the Appellant misconceived the interpretation of Regulation 88 (3) of GN No. 97 of 2005 that it gives tenderers the right to choose the form of bid security to be submitted. According to their understanding, the said provision provides that where it happens that the tender security is to be issued at the tenderers option then the tenderer has to submit a bid security in a form stated therein.

That, Regulation 88(1) (b) of GN No. 97 of 2005, requires the form and terms of the bid security submitted by a tenderer to be acceptable to the procuring entity; the form of tender security acceptable to them were Banker's Cheques or Banker's Guarantees.

Finally, the Respondent prayed for the following orders:

- (a) To dismiss the Appeal in its entirety.
- (b) To declare that, the evaluation and the award made by the Respondent was transparent, fair, lawful and in the public interest.
- (c) To declare that the complaint submitted by the Appellant is nothing but fictitious and maliciously with intent to **robe** the Respondent's pensions funds.
- (d) To give direction to the Respondent to consider blacklisting the Appellant from bidding for tenders advertised by the Respondent.
- (e) To order the Appellant to pay the Respondent a sum of Tshs 0.1 % of the main contract per day from the time they received the Appeal which stopped the process until the date of the Authority's decision.

- (f) To order the Appellant to pay the costs of defending the Appeal amounting to Tshs. 5 Million.
- (g) Any other reliefs the Authority may deems just and fit grant.

ANALYSIS BY THE AUTHORITY

Having gone through the documents and having heard the oral arguments from parties, the Authority is of the view that, the Appeal is centred on the following issues, namely;

- **Whether the disqualification of the Appellant's tender for submitting an Insurance Bond instead of a Bank Guarantee or a Banker's Cheque was proper at law.**
- **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 disqualification of the Appellant's tender for submitting an Insurance Bond instead of a Bank Guarantee or a Banker's Cheque was proper at law.

In resolving this issue the Authority revisited parties oral and written submissions as already stated earlier on in order to ascertain their legal validity. In so doing, the Authority deemed it prudent to revisit Regulation 88(1)(b) and (2) of GN No. 97/2005 relied upon by the Respondent that was their basis when specifying the forms of security that were required in the tender under Appeal. For purposes of clarity the Authority reproduces the said provisions as follows;

Reg. 88(1) "When the procuring entity requires suppliers, contractors, service providers or asset buyers submitting tenders to provide a tender security:

(b) the solicitation document may stipulate that the issuer of the tender security and the confirmer, if any of the tender security as well as the form and terms of the tender security, must be acceptable to the procuring entity”.

(2) **“The procuring entity shall specify in the solicitation documents any requirements with respect to the issuer and the nature, form, amount and any other principal terms required for tender security....”** (Emphasis supplied)

Based on the above provisions the Authority observes that, Regulation 88(2) clearly stipulates that the procuring entities have mandate to specify nature and the form of bid security required for their tenders.

Furthermore, the Authority revisited Section 53(1) of the Act and noted that, it allows the procuring entities to specify the required form of bid security in their Tender Document. The said section provides as follows;

S.53(1) **Where the procuring entity requires** suppliers, contractors or consultants who are submitting tenders **to provide any form of the tender security** or any form of guarantee or bond against satisfactory performance of the contract, such requirement shall apply equally to all suppliers, contractors or consultants".
(Emphasis supplied)

Accordingly, the Authority is of the settled view that Regulation 88(2) of GN. No. 97/2005 and Section 53 (1) of the Act, empower procuring entities to specify in their Tender Documents the form of bid security which they require.

Furthermore, the Authority considered the Appellant's argument that, Regulation 88(3) of GN No. 97/2005 provides for an option to tenderers to submit bid securities in form of a certified cheque, a letter of credit, a bank guarantee or an insurance bond. The said provision reads as follows;

“The tender security at the tenderers option shall be in the form of a certified cheque, a letter of credit, a bank guarantee from a reputable bank, an insurance bond from a reputable insurance firm.”

The Authority is of the view that, and indeed as it was submitted by the Respondent, Regulation 88(3) is applicable in situations where tenderers are given option to choose the type or form of the bid security they are to submit.

In addition, the Authority considered the Appellant’s argument that, the Respondent’s act of specifying the form of bid security under Clause 13 of the Bid Data Sheet had contravened the PPRA’s User Guidelines which are made pursuant to Section 53(2) of the Act. According to the PPRA’s User Guidelines for Procurement of Medium and Large Works, Clause 17.1 of the ITB is supposed to be modified in the Bid Data Sheet by indicating the currency and amount of bid security required. To the contrary, the Respondent when modifying Clause 17.1

specified the forms of the bid security to be submitted by tenderers.

In order to substantiate the validity of the Appellant's argument, the Authority revisited PPRA's User Guidelines in order to ascertain the acceptable modifications which are allowed to be done in the Bid Data Sheet in relation to Clause 17.1 of the ITB. In so doing, the Authority noted that, PPRA's guidelines provides for the following;

BDS Clause 13 modifies Clause 17.1 of the ITB

"17.1 The amount of Bid Security shall be *[Insert the amount in local currency]* or an equivalent amount in a freely-convertible currency; OR

Specify whether bid securing declaration is acceptable in the place of bid security

17.3 Another form of bid security if required *[insert the form of security]*" (Emphasis added

Furthermore, the Authority revisited Clause 13 of the Respondent's Bid Data Sheet which modified Clause 17 of the ITB and noted that, it provided for the following;

Clause 13 (17.1) **"The amount of bid security, in a form of bank guarantee or banker's cheque shall be TZS 30,000,000.00 or an equivalent amount in a freely convertible currency"**.

(17.3) Another form of bid security: None".
(Emphasis added)

From the above quoted provisions the Authority observes that, rather than indicating only the amount of bid security and the currency required under Clause 17.1, the Respondent also specified two forms of bid securities, namely, banker's cheques or banker's guarantee.

The Authority observes further that, the Respondent modified Clause 17.3 of the ITB which had items (a) to (c) by indicating the word "none" in front of the phrase "Another form of bid security" which relates to Clause

17.3 (c) of the ITB. Thus, Clause 17.3 (a) and (b) remained and had to be complied with by tenderers.

For purposes of clarity the Authority reproduces Clause 17.3 (a) and (b) as follows;

“The bid security shall be denominated in the currency of the Bid or in other freely convertible currency and **shall be in one of the following forms:**

- a) **a bank guarantee, an irrevocable letter of credit issued by a reputable bank, or an insurance bond issued by a reputable insurance firm located in the United Republic of Tanzania or abroad, in the form provided in the Bidding Document or another form acceptable to the Procuring Entity....”** (Emphasis added)

- b) **a Cashier’s or certified check (sic)**

The Authority observes further that Clause 17.3 (b) of the ITB was not applicable because according to the Bank of Tanzania Regulations, a Banker's cheque is not allowed to exceed an amount of Tshs 10,000,000/- while the Respondent required securities for an amount of Tshs. 30,000,000/-. Thus it was not proper for the Respondent to specify banker's cheque to be among the required forms of bid security in the tender under Appeal.

Accordingly, tenderers had to only comply with Clause 17.3(a) of the ITB by submitting a Bank Guarantee, an irrevocable letter of credit or an insurance bond. This requirement is not alien as it is in conformity with the provisions of Regulation 88(3) already quoted in this decision.

Accordingly, the Authority's conclusion with respect to issue number one is that, the disqualification of the Appellant's tender for submitting an Insurance Bond instead of Bank Guarantee or Banker's Cheque was not proper at law.

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

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

(a) Prayers by the Appellant

The Authority considered the Appellant's first prayer that, the Respondent be ordered to re-evaluate the tenders in accordance with the law. The Authority grants the said prayer based on findings made under issue one above.

With regard to the second prayer that they be compensated the sum of Tshs. 3,120,000/- being, legal fees Tshs. 3,000,000/- and Appeal filing fees Tshs. 120,000/-. The Authority orders that the Appellant is entitled to be compensated the sum of Tshs. 1,120,000/- as per the following breakdown;

- i) Appeal filling fees Tshs. 120,000/-**
- ii) Legal fees Tshs. 1,000,000/-**

(b) Prayers by the Respondent:

With regard to the Respondent's prayer that the Appellant be blacklisted from participating in the tenders floated by them, the Authority observes that, it does not have such powers under the law.

In relation to the Respondent's prayer of compensation, the Authority observes that, they are not entitled to be compensated as per Section 82(4) of the Act.

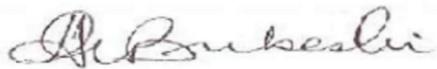
With regard to the Respondent's other prayers, the Authority rejects them since the Appeal has merit.

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

- **the Respondent to re-evaluate the tenders in observance of the law; and**
- **the Appellant be awarded costs to the tune of Tshs. 1,120,000/= only.**

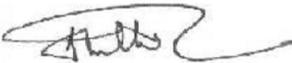
Right of Judicial Review as per Section 85 of the PPA/2004 explained to parties.

Decision delivered in the presence of the Appellant and the Respondent this 23rd August, 2013.



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JUDGE (rtd) A. BUBESHI
CHAIRPERSON

MEMBERS

1. MR. K.M. MSITA 

2. MRS. N.S. INYANGETE 