

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

APPEAL CASE NO. 116 OF 2012

BETWEEN

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

AND

LOCAL AUTHORITIES PENSIONS FUNDRESPONDENT

DECISION

CORAM:

- | | |
|--------------------------------|---------------|
| 1. Hon. A.G. Bubeshi, J. (rtd) | - Chairperson |
| 2. Mr. H.S. Madoffe | - Member |
| 3. Mr. K.M. Msita | - Member |
| 4. Ms. E.J. Manyesha | - Member |
| 5. Ms. B.G. Malambugi | - Secretary |

SECRETARIAT:

Ms. E.V.A. Nyagawa - Principal Legal Officer

FOR THE APPELLANT:

Eng. Andrew Mwaisemba – Managing Director

FOR THE RESPONDENT

1. Mr. Ehad E. Mndeme – Principal Legal Officer
2. Mr. Emmanuel Mayage – Principal Procurement Officer
3. Mr. Steven T. Biku – Legal Officer.

This decision was scheduled for delivery today 16th February, 2012, and we proceed to deliver it.

The appeal at hand was lodged by **M/s COOL CARE SERVICES LTD** (hereinafter to be referred to as "**the Appellant**") against **LOCAL AUTHORITIES PENSIONS FUND** commonly known by its acronym LAPF (hereinafter to be referred to as "**the Respondent**").

The said Appeal is in respect of Tender No. PA095/2008/09/W/24 for Installation of Air Conditioning & Ventilation Systems for the Proposed Construction of Office Accommodation Building at Plot Nos. 11 & 12, Block "D" Makumbusho area, Dar es salaam (hereinafter to be referred to as "**the tender**").

According to the documents submitted to the Authority, as well as oral submissions during the hearing, the facts of the Appeal may be summarized as follows:

The Appellant was amongst nine tenderers who were invited by the Respondent to submit tenders for Installation of Air Conditioning & Ventilation Systems for the Proposed Construction of Office Accommodation Building at Plot Nos.11 & 12, Block "D" Makumbusho

area, Dar-Es-Salaam. The said tenderers were as listed herein below:

- M/s Derm Electrics (T) Ltd;
- M/s Daikin (T) Ltd;
- M/s Unicool (EA) Co. Ltd;
- M/s Dar Essentials Ltd;
- M/s Ashrea Air Conditioning;
- M/s Berkeley Electrical Ltd;
- M/s Mollel Electrical Contractors Ltd;
- M/s Remco International (T) Ltd; and
- M/s Cool Care Services Ltd.

On 13th October, 2011, the Respondent convened a Pre-bid meeting, which was also attended by the Appellant, whereby clarifications were made on a number of issues relating to the tender. Two days after the meeting, the Appellant reduced into writing all the issues they had raised during the Pre-bid meeting and submitted them to the Respondent for reference and further clarification.

On 20th October, 2011, the Respondent availed a copy of the Minutes of the Pre-bid Meeting to the Appellant.

However, the Appellant was not satisfied with the clarifications made. Hence, on 2nd November, 2011, vide letter referenced CCSL/TA/47/11, they submitted an Application for review to the Accounting Officer.

Having reviewed their application, on 6th December, 2011, vide letter referenced LAPF/T.53/08/23, the Accounting Officer informed the Appellant that their application was rejected for lack of merit.

Being dissatisfied with the decision of the Accounting Officer, on 8th December, 2011, the Appellant submitted an application for review to the Public Procurement Regulatory Authority (hereinafter referred to as "**PPRA**") vide letter referenced CCSL/TD/11/05. Their application was rejected by PPRA.

The Appellant was aggrieved by PPRA's decisions, hence lodged an appeal with the Public Procurement Appeals Authority (hereinafter to be referred to as "**the Authority**") on 16th January, 2012.

SUBMISSIONS BY THE APPELLANT

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

That, they were among the tenderers who attended the Pre-bid meeting on 13th October, 2011. During the said meeting, it was agreed that, written responses on all issues clarified should be sent to all prospective tenderers.

That, on 15th October, 2011, the Appellant through letter with Ref. No. CCSL/TA/46/11 submitted a further request for clarification to the Respondent in respect of the following:

- The tender document used by the Respondent was for **"Procurement of Medium and Large Works"** instead of the **"Standard Document for Supply and Installation of Plants and Equipment"**.

- The Instructions to Bidders (hereinafter referred to as "**ITB**") required Tenderers to have a minimum **Annual turnover Volume of Tshs. 10,000,000,000.00**. This was a contravention of Regulation 14(4) of the Public Procurement (Goods, Works, Non-Consultant Services and Disposal of public assets by Tender) Regulations (hereinafter to be referred to as "**GN 97 of 2005**").

- Clause 13(12)1 of the ITB required tenderers to provide evidence of adequate working capital for the contract (minimum cash flow) of Tshs. 1,600,000,000 in four months. This criterion was not proper.

- The wording of the Bill of Quantities (hereinafter to be referred to as "**BOQ**") discouraged some tenderers from participating in the tender which is contrary to Section 63(2) of the Public Procurement Act (hereinafter to be referred to as "**the Act**").

That, the Appellant received the Minutes of the Pre-bid Meeting from the Respondent on 20th October, 2011, which was a record of the responses to issues raised during the Pre-bid meeting.

That, being dissatisfied with the response of the Respondent on some of the issues raised, the Appellant applied for administrative review to the Accounting Officer which was rejected and their subsequent application for the same to PPRA was equally rejected. Hence their appeal to this Authority on the following grounds:

- The Respondent did not use the appropriate standard tender document contrary to Section 63(1) of the Act.
- The annual volume of construction works to be shown by the tenderers should have covered a period of five years instead of two years used by the Respondent; and

- The wording of the BOQ read together with Clause 45.4 of the General Conditions of Contract (hereinafter to be referred to as "**GCC**") indicated that payments to the successful tenderer would be made after completing the installation and setting the system to work. This was disadvantageous to tenderers with limited financial resources.

Accordingly, they requested Authority to grant the following reliefs:

- (i) Order the Respondent to re-tender;
- (ii) Prohibit the Respondent from making unlawful decisions by following unlawful procedures;
- (iii) Order the Respondent to compensate the Appellant a sum of **Tshs. 1,070,000/=** being costs for the following:
 - Appeal filing fees – **Tshs. 120,000/=**
 - Travelling expenses Dar - Dodoma to attend the hearing including subsistence allowance – **Tshs. 700,000/=**; and

- Purchase of the Tender Document- **Tshs. 250,000/=.**

(iv) Any other relief as the Authority may deem fit.

REPLIES BY THE RESPONDENT

During the hearing the Respondent adopted wholly PPRA's decision as their replies to the Appellant's grounds of appeal. In this case therefore, their replies as deduced from PPRA's decision, may be summarized as follows:

That, the Standard Bidding Document for procurement of works used by the Respondent was the proper tender document for that particular tender as the HVAC works installations form part of the main construction works of the main building.

That, in calculating the annual volume of construction works for two years, the Respondent was merely implementing PPRA's guidance to procuring entities by using the formula contained in the Pre-qualification Document which enables them to ascertain the minimum annual turnover.

That, the modality of payments to the successful tenderer is well stated under Clause 46.1 of the GCC that, it will be done after completion of each stage.

That, the Appellant's prayer on costs be struck off as it was neither contained in their application for review to PPRA nor in their Statement of Appeal.

They therefore prayed for dismissal of the Appeal with costs.

ANALYSIS BY THE AUTHORITY

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

- **Whether the Standard Tender Document used was appropriate for the tender under appeal;**

- **Whether the criterion of minimum annual construction works for a period of two years instead of five years was justified;**
- **Whether the wording of the BOQ and Clause 45.4 of the GCC on payment modality would have adversely affected the Appellant;** 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 Standard Tender Document used was appropriate for the tender under appeal

During the hearing it was astonishing on the part of the Respondent to adopt wholly PPRA's decision as their defense, by doing so, they did not respond to the Appellant's elaborate analysis on why the Standard Tender Document for Supply and Installation of Plants

and Equipment was more appropriate for the tender under Appeal as opposed to the Standard Tender Document for Works. The Authority had expected the Respondent to provide a reasoned justification for opting for the tender document which they had used but they instead refused to give any explanation. The Authority's analysis therefore, in so far as the Respondent's submissions are concerned, is based solely on PPRA's decision to the Appellant's application for review. That said, the Authority proceeded to resolve the issue before it, namely, whether the Standard Tender Document used was appropriate for the tender under appeal.

In resolving this issue the Authority revisited submissions by parties on this particular point, the tender documents and the applicable law. In their submissions the Appellant contended that:

- The Respondent erred in using the Standard Tender Document for Works as that document is suitable for building and civil works contracts only as per paragraph 6.0 on page 27 of the User Guide for

Procurement of Medium and Large Works Bidding Document issued by PPRA in July 2007. The Respondent's conduct therefore contravened Section 63(1) of the Act which, is in *pari materia* with Regulation 83(3) of GN. No. 97 of 2005 that requires procuring entities to use the appropriate standard model tender documents specified in the Regulations made under the Act.

- The appropriate tender document for the tender in dispute should have been the Standard Bidding Document for Supply and Installation of Plants and Equipment. This is because Item 4 of the Bid Data Sheet described the nature of the works to be performed as the "Supply, Installation, Test, Commission and set to work of HVAC Systems". The said systems consist of chiller and **VRF** air conditioning equipment. The description in the BOQ and specifications also proves that the above mentioned standard tender document was the appropriate one.

- The Respondent had not been consistent in deploying the standard tender document for similar projects. In its tender No. PA095/HQ/2010/2010/W/26 for the Proposed Construction of Mwanza City Ultra Modern Market; the Respondent issued bidding documents for Supply and Installation of Plants and Equipment.
- Had the Respondent used the Standard Tender Document for Supply and Installation of Plants and Equipment, as suggested by the Appellant, the problem pertaining to the modality of payments would not be there as the said document contains appendices where a tenderer would indicate the price for completion of each of the activities or stages as described in the BOQ.
- The identifiable differences between the two documents are on clauses relating to the following:
 - Terms of payment;
 - Procedure for completion of facilities

- Commissioning and operation acceptance
 - Transfer of ownership
 - Care of facilities; and
 - Functional guarantee.
-
- The document used does not spell out the obligations of the contractor during the defects liability period and training of personnel to operate those facilities.

 - The Respondent did not explain how the execution of the contract would be prejudiced had they used the Standard Tendering Document for Supply and Installation of Plants and Equipment.

In reply thereof, the Respondent submitted as follows:

- HVAC works installations are part of the main construction works of the building and the proper standard bidding document to be used is that for works. Moreover, the definition of '**works**' provided for under Section 3(1) of the Act covers installation of equipments as it provides as follows:

“works means any other civil works such as site preparations, excavation, erection, building, installation of equipment or materials, decoration and finishing”. (Emphasis added)

- The HVAC works installations are part of the main construction works and the value of the HVAC works to be done in this project cannot represent the major part of the estimated costs of the main construction works.
- Standard Bidding Document for Supply and Installation of Plants and Equipment is intended for use by procuring entities in the procurement of goods which is not for the case for the tender under Appeal.

Having summarized submissions by parties, the Authority analyzed the validity of the said submissions vis-à-vis the tender documents in dispute and the applicable law. To start with, the Authority deemed it necessary to ascertain the nature of the works that were to be performed in the

tender under Appeal. The Authority noted that, Clauses 1.1, 1.2, and 2.1 of the ITB refers to the scope of the bid to be **“the works as specified in the Bid Data Sheet”**. The nature of the works as specified under Item 4 of the Bid Data Sheet reads:

“The description of the works under contract:

Supply, Install, Test, Commission and Set to Work of Complete New Heating Ventilation and Air Conditioning Installation for the Proposed Office Accommodation Building on Plots Nos. 11 & 12, Block “D” – Makumbusho Area, Dar es salaam.”

In their decision, PPRA linked the choice of the appropriate standard tendering documents to be used with the definition of the term **‘works’** and concluded that, the nature of the works under the contract in dispute fell within that very definitions and therefore the tender document for works was the appropriate one. The Authority observes that, the PPRA started by quoting a definition from a Website whose content is quite different from the part of the definition under the Act that was

subsequently quoted in that decision. For purposes of clarity the Authority reproduces the two definitions as contained in PPRA's decision:

www.servicetax.gov.in/st-profiles/works-pdf

"works contracts has been defined to mean "a contract wherein such contract is for the purposes of carrying out erection, commissioning or installation of plant, machinery, equipment or structures whether fabricated or otherwise, installation of electrical and electronic devices, plumbing, drain laying or other installations for transport of fluids, heating, ventilation or air conditioning including related pipe work, duct work and sheet metal work ..."

Section 3(1) of the Act defines works as:

"any other civil works such as site preparations, excavation, erection, building, installations of equipment or materials, decoration and finishing." (Emphasis added)

Based on the above quotations, the Authority observes that, the definition obtained from the Website is quite

wide compared with that quoted under the Act, which is confined to '**civil works**'. Besides, the Authority does not comprehend what were the definitions intended to achieve as they do not, in anyway, guide a procuring entity in determining which standard tendering document is appropriate for the procurement in question. The Authority is of the view that, the contentious issue to be resolved by PPRA was not whether installation of equipment fell within the ambit of 'works' or not, rather, which of the two standard tendering documents both of which relates to 'works' was more appropriate under the circumstances. This is because PPRA has issued various Standard Bidding Documents as per Item 1.5 of both the User Guide for Medium and Large Works as well as User Guide for Supply and Installation of Plants and Equipment which provide as follows:

"All Standard Bidding Document (sic) are issued electronically by the PPRA on CD ROM. The CD ROM contains the following main directories:

- **Goods** with the following sub-directories
 - Goods

- Health Sector Goods
- Frame work contract
- **Supply and Installation of Plants and Equipments (sic)**
- **Works with the following sub-directories**
 - Smaller works
 - Medium and Large Works
- **Non Consultant Services**
- **Consultant Services”**

The Authority also noted that, the objective of using such documents is well stated under paragraph 1.1 of both the User Guide for Medium and Large Works as well as User Guide for Supply and Installation of Plants and Equipment, as follows:

“The purpose of the SBD is to provide Procuring Entities with one common standard draft containing basic contractual provisions and safeguards which are required by the Government of Tanzania in the execution of

public procurement and the use of public funds.” (Emphasis supplied)

The Authority is of the considered view that, for the above mentioned objective to be realized, procuring entities are expected to use Standard Bidding Documents which contain, amongst others, safeguards in order to ensure proper use of public funds. Having perused the standard bidding documents in dispute, the Authority concurs with the Appellant that the appropriate document for the tender under Appeal was the Standard Bidding Document for Supply and Installation of Plants and Equipment, for the following reasons:

- The User Guide for Procurement of Medium and Large Medium Works issued by PPRA July 2007 (hereinafter to be referred to as “**User Guide for Medium and Large Works**”) do not indicate that they are meant for tenders relating to supply, installation and commissioning, in that, they do not provide any guidance to that effect.

- The User Guide for Supply and Installation of Plants and Equipment issued by PPRA in July 2012 (hereinafter to be referred to as “**User Guide for Supply, Installation of Plants and Equipment**”) is so specific and has adequately addressed matters relating to the title thereof. A comparison made to the General Conditions of Contract contained in the two documents corroborated the Appellant’s statement that the Standard Bidding Document for Supply and Installation of Plants and Equipment has adequate safeguards for the tender, as indicated in the Table below:

S/ No	Standard Bidding Document for Supply and Installation of Plants and Equipment	Standard Bidding Document for Procurement of Medium and Large Medium Works
1	GCC Clause 22 (which covers 6 pages) provides for installation	There is no provision on installation
2	GCC Clause 23 (which covers 3 pages) provides for Test and Inspection	GCC Clause 37 contains a single general provision on tests
3	GCC Clause 25 (covers 3 pages) provides for	Not provided for

	Commissioning and Operational Acceptance	
4	GCC Clause 27 (covers 3 pages) provides for defect liability	GCC 36, 38 and 39 provide in general terms for 'identifying defects', 'correctional defects' and 'uncorrected defects'.

- Paragraph 6.2.3 of PPRA's decision supports the use of Standard Bidding Document for Supply and Installation of Plants and Equipment, because in this tender the quantum and period of work have been predetermined. The said paragraph is reproduced herein below:

"CRS's Review of the User Guide for the use of the standard bidding document (SBD) for supply and installation of plants and equipments (sic) **is suitable for any scope of intended contract where the services are predetermined and the period of the Services are fixed enabling a total lump sum amount to be calculated representing the total amount payable under the Contract...**"

(Emphasis supplied)

Furthermore, the Authority noted that, the bolded part in the above quotation cannot be taken as the justification that the document used by the Respondent was appropriate for that particular tender, because the same wording appears in both the User Guide for Medium and Large Works as well as User Guide for Supply and Installation of Plants and Equipment. In this case therefore, the said argument cannot help a procuring entity in identifying which standard bidding document is appropriate for their identified procurement.

- The Authority does not agree with PPRA's analysis on the same paragraph 6.2.3 where it is stated that:

“This document is the only SBD for Supply and Installation of Plants and Equipments (sic). Review of the preface of the standard bidding document for supply and installation of plants and equipments (sic) indicates that, this Standard Bidding Document (SBD) has been prepared by the PPRA for use by procuring entities in the procurement of goods

through National Competitive Bidding (NCB) and International Competitive Bidding (ICB).”

The Authority’s stand is derived from the fact that PPRA has issued specific Standard Bidding Document for Procurement of Goods which are applicable to both National Competitive Bidding and International Competitive Bidding.

- Paragraph 6.2.6 of PPRA’s Decision also supports the Appellant’s contention that, Standard Bidding Document for Supply and Installation of Plants and Equipment was the appropriate one to be used in this tender, as it reads as follows:

“This set of documents should be used when the value of the plant and equipment portion represents the major part of the estimated contract value **or the nature and complexity of the plant and equipment is such that the facilities cannot be taken over by the employer without elaborate testing, pre-commissioning, commissioning and**

acceptance procedures being followed.”

(Emphasis added)

The Authority observes that, the BOQ dictates that the facilities cannot be taken over without elaborate testing and commissioning procedures being followed as indicated in the Table below:

Item of the BOQ	The Tenderer’s Specified Obligation
1.0 – Water Cooled Chiller	Supply, installation, commissioning and set to work as per specification the following, complete with all necessary auxiliary materials
2.0 Air Treatment Units	Supply, install, test, commission and set to work as per specifications the following, complete with all necessary ancillary materials
3.0 Pumps	Supply, install, test, commission and set to work as per specifications the following, complete with all necessary ancillary materials
4.0 Expansion Tank and Water Treatment Equipment	Supply, install, test, and commission and set to work the following with all necessary ancillary
6.0 Valves and Strainers	Supply and install, test, commission and set to work as per specifications including all necessary ancillary
11.0 Kitchen Hood	Supply, install, construct, test, commission and set to work of the kitchen hood including associated fans, ducting, dampers, filters atuenattor (sic) mechanically powered makeup air

	and control as specified
12.0 Direct Expansion System	Supply, install, construct, test, commission and set to work of the condensing units, air cooled type, with scroll compressor, corrosion resistance heat exchanger and electronics expansion valve

Furthermore, paragraph 11 under SEC VII-3 cements the above position as it provides as follows:

“Installation and commissioning; The Contractor is deemed to have included in the Contract a sum for **the services of an Independent commissioning agent and specialist or manufacturer’s Engineer or Technician to assist in the installation commissioning of the Works** or any part thereof if the Contractor has not his (sic) own suitable and competent staff available at site to carry out such functions.” (Emphasis supplied)

- the standard bidding document should have been that reads as follows:

“As stated above the standard bidding document for supply and installation of plants and equipments

(sic) is intended for the use by procuring entities in the procurement of goods which is not the case for the tender in question”

In view of the foregoing, the Authority is of the view that, neither the applicable law nor the guidelines issued by PPRA provide specific guidance on the modality of identifying which standard bidding document is appropriate for which tender. It is the firm view of this Authority that, since PPRA as a regulator is convinced that the standard bidding document used by the Respondent was appropriate, the Respondent should not be held responsible for using the same. It goes without saying that, had they sought for guidance from PPRA on the matter they would have been directed to use the same documents. The Authority therefore, exonerates the Respondent as they were misguided due to lack of clarity in the guidelines.

Accordingly, the Authority’s conclusion on this issue is that, the Standard Tender Document used was not appropriate for the tender under appeal.

2.0 Whether the criterion of minimum annual construction works for a period of two years instead of five years is justified

In their oral submissions during the hearing the Appellant stated categorically that, they did not dispute the inclusion of this particular criterion in the Tender Document but their complaint centered on the period within which the said criterion was applicable, that is, two years instead of the five years provided for in the Particular Instructions to Applicants (hereinafter to be referred to as "**PITA**"). Expanding this point, the Appellant stated that, the calculated annual construction volume should have been spread over a period of five years and not two years as it was stated under Clause 13 of the Bid Data Sheet. In addition, the criterion is intended to assess the tenderer's experience and therefore has nothing to do with the duration of the contract. They further stated that, by distributing the annual volume of construction works over a period of two years, they did not meet this criterion and this was amongst their reasons for not tendering.

The Respondent's replies as deduced from PPRA's decision re-state the formula for calculating the minimum annual turnover, to wit, the estimated project cost divided by the contract duration, times a multiplier of 2 or 1.5.

Before analyzing the submissions by parties, the Authority deems it necessary to reproduce the particular clause in dispute, namely, Clause 13 of the Bid Data Sheet, as well as Item 4 on page 56 of PITA which was relied upon by the Appellant. The said provisions read as follows:

BDS 13 "The minimum required average annual turnover construction work for (HVAC installations) for the bidder **in any two (2) years** within the last five (5) years shall be: Tshs. 10,000,000,000 or equivalent freely convertible currencies in case of foreign Bidders."

PITA 4.1 “The Applicant’s general capabilities in managing construction contracts should be related to its record of recent experience and to the value of work undertaken. Experience requirements should be stipulated as a minimum annual value of general construction work carried out over a stated period, **normally five years**, calculated by applying an appropriate multiplier to the projected annual construction rate on the subject contract. The recommended multiplier is normally 2.0, but may be reduced to 1.5 for contracts over about Tshs. 200,000 million.” (Emphasis supplied)

The Authority is of the view that, much as it partly agrees with the Appellant that, the words ‘**normally five years**’ appearing in Item 4.1 quoted above, seems to be somewhat ambiguous, as it could be more or less than five years. But the ambiguity disappears when the said provision is read together with Clause 4.7(b) of the PITA which provides more clarity in the following words:

“Required Average annual turnover: Tshs _ equivalent

[The amount stated should normally not be less than twice the estimated annual turnover or cash flow in the proposed works contract (based on a straight – line projection of the procuring entity’s estimated cost, including contingencies, over the contract duration. The multiplier of two may be equivalent) but should not be less than 1.5].” (Emphasis supplied)

The above quotation indicates that, the duration which was supposed to apply was sixty weeks (about 1.15 years). Accordingly, the two years applied by the Respondent is more advantageous to the contractors than it would have been if this provision was strictly applied.

Furthermore, Clause 4.2 of the PITA at page 56 of the Pre-qualification Document, provides an example of how the annual volume of construction works should be calculated, whereby a period of four years is used. Had the Appellant read the above quoted clause and studied carefully the application of the formula as provided at

page 56 of the Pre-qualification Document, they would have realized that the period of two years (24 months) applied by the Respondent was proper as the contract period was about 1.15 years.

In view of the foregoing, the Authority is satisfied that the period of two years used by the Respondent to calculate the annual volume of construction works was justified.

3.0 Whether the wording of the BOQ and Clause 45.4 of the GCC on payment modality would have adversely affected the Appellant

In resolving this issue, the Authority revisited submissions by parties, the wording of the BOQ and the applicable law. The Appellant's submissions on this particular issue are as follows:

- The wording of the BOQ was discouraging and contravened Section 63(2) of the Act, Regulation

83(2) of GN. No. 97 of 2005 as well as Clause 45.4 of the General Conditions of Contract.

- Although Clause 46.1 of the GCC indicates that payments may be done per each certificate, the systems required in the BOQ are interlinked such that it would be impractical for each stage to be installed and set to work. For instance, Items 2.1 of the BOQ up to 2.5 are incomplete without the items specified on pages 10 to 26 of the BOQ. Had the payment been payable upon delivery on site of plants and equipment, the Appellant would not have complained.
- According to the wording of the BOQ, no money will be paid to the successful tenderer subject to delivery, installation, testing and commissioning of the system to a running condition. Since setting such a system into a running condition is the final stage of contract execution in a project which takes sixty weeks, the successful tenderer would be paid after completion of the contract.

- The successful tenderer would be obliged to spend their own finances in executing the contract for fifteen months which is not practical for local contractors with limited resources. In this case the modality of payment favours contractors with huge capital who can afford to keep such amounts of money tied up for more than a year.

- Clarifying concerns from tenderers during the pre-bid meeting, the Respondent promised that the payments would be made after completion of each stage. Legally, the Pre-bid Minutes do not form part of the Contract and therefore not binding. Furthermore, in the said Minutes no details were availed as to the proportions of payments or modality of effecting such payments without breaching the GCC.

- The Tender Document contains some contradictions regarding the status of the successful tenderer which would have made it difficult to effect payments. The

said contradictions relate to the definitions of **'contractor'**, **'sub-contractor'** and **'employer'** as per Clause 1.1 of the GCC vis-à-vis the Form of Bid. Clause 1.1 of the GCC defines a **'contractor'** as **"a person or corporate body whose bid to carry out the Works has been accepted by the Employer"** and the **'employer'** as **"the party who employs the contractor to carry out the works"**. The same clause defines a **'subcontractor'** as **"a person or corporate body who has a Contract with the Contractor to carry out a part of the work in the Contract, which includes work on the Site"**. However, the Form of Bid refers to a subcontractor which raises doubts as to the status of the successful tenderer in this tender since it is an independent tender.

The Respondent's replies as deduced from PPRA's decision are that, by virtue of Clause 46.1 of the GCC, the payments will be made for every completed stage of work as the nature of the works to be performed are for

supply, install, test, commission and set to work of complete new HVAC.

In order to resolve the conflicting submissions by parties, the Authority started by revisiting the provisions relied upon by the Appellant. S. 63(2) of the Act which is in *pari materia* with Regulation 83(2) of GN. No. 97 of 2005 provides as follows:

“The tender document shall be worded so as to permit and encourage competition and such documents shall set forth clearly and precisely all the information necessary for a prospective tenderer to prepare tender for the goods and works to be provided.” (Emphasis added)

The Appellant also cited Clause 45.4 of the GCC which states as follows:

“The value of work executed shall comprise the value of the quantities of the items in the Bill of Quantities completed.” (Emphasis supplied)

The Authority noted that, the Appellant's contention on this issue is caused by the phrase "value of the work executed" which is stipulated under sub-clauses (1), (3), (4) and (5) of Clause 45 of the GCC and the use of the words **"the items in the Bill of Quantities completed"**. For a contractor to receive payment under Clause 46.1 of the GCC, for items 1.0 Water Cooled Chiller, 2.0 Air Treatment Units, 3.0 Pumps, 4.0 Expansion Tank and Water Treatment Equipment, 6.0 Valves and Strainers, 8.0 Air Discharge Outlets And Inlets, 11.0 Kitchen Hood, and 12.0 Direct Expansion System, the Contractor will be required to supply the plants/equipment, install/construct, test and commission them. Authority equally agrees with the Appellant that, the situation is further complicated by the interlinkage, example, for the chiller plants, BOQ item 1.1 can't be tested and commissioned until BOQ Items 2.1, 2.2, 2.3, 2.4 and 2.5 are completed for the VRF System, BOQ Items 12.1(a) to (d) have linkage with BOQ Items 12.2(a) and (b) and 12.3. They are linkage together using copper pipes.

Furthermore, there some items of work which cannot be tested until electricity is installed the depends on outcome of the sub-contractor for electrical works. The payment arrangement pursuant to Clauses 45 and 46 of the GCC of the GCC is indeed very onerous to contractor who cannot afford accessibility to large capital outlays. Even to those who can afford that, definitely it will be quite costly to them, unfortunately, such cost is passed to the employer.

The Appellant further contended that, he would have no problem if plants and equipment were to be paid upon supply/delivery at site, an arrangement which is provided for under the standard Bidding Document for supply and Installation of Plants and Equipment.

Much as the Authority agrees with the Appellant that, the payment arrangement is very onerous to the contractors the Respondent, however, made changes to such an arrangement during the clarifications made during Pre-Bid meeting and as recorded in the minutes of the said

meeting. This is evident under Item 5 of the said minutes which reads;

“Given that, the nature of the project is the work and not that of supply and installation of plants and equipment like generator, **the Contractor is assured that the payment will be made for every completed stage of the work eg. Payments will be made upon delivery of the items on site and thereafter upon installation.**”

(Emphasis added)

With regard to the Appellant’s contention that, Minutes of the Pre-bid meeting do not form part of the contract and therefore not binding, the Authority disagrees with them, in that, the clarifications made by a procuring entity during pre-bid meeting are binding as they automatically amend the tender document. No wonder the Respondent availed the Minutes of the Pre-bid Meeting to the Appellant in recognition of the underlying objective as provided for under Regulation 85(6) and (7) of GN. No. 97 of 2005 which states as follows:

“(6) If the procuring entity convenes a meeting of suppliers, contractors, service providers or asset buyers, **it shall prepare minutes of the meeting containing the requests submitted at the meeting for clarification of the solicitation documents, and its responses to those requests**, without identifying the source of the requests”

“(7) The minutes shall be provided within three working days to all suppliers, contractors, service providers or asset buyers to which the procuring entity provided the solicitation documents **so as to enable those suppliers, contractors, service providers or asset buyers to take the minutes into account in preparing their tenders.** (Emphasis added)

In view of the foregoing, the Authority is of the considered view that, the clarification given by the Respondent on the modality of payments was well clarified during the Pre-bid meeting and a written assurance thereof was thereafter availed to the Appellant. Additionally, the Appellant should have taken

the minutes into account in preparing their tender pursuant to Regulation 85(7) as quoted above. That said, the Authority's conclusion on the third issue is that, the wording of the BOQ and Clause 45.4 of the GCC on payment modality would not have adversely affected the Appellant.

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

Having resolved the issues in dispute, and having upheld the Appellant's contention that, the Standard Bidding Document used was not appropriate for the tender, the Authority re-emphasize that the Respondent is not responsible. Furthermore, the Appellant's contentions on the modality of payments as well as the number of years applied in calculating the minimum annual turnover, were unfounded. In this case therefore, the Appeal is partly upheld and partly dismissed. Since the Respondent has been exonerated, the Authority orders each party to bear its own costs.

Having considered all facts and evidence, the Authority concludes that, the Respondent is not responsible for using un-appropriate tender document and the mode of payments as well as the calculation of the minimum annual turnover were proper at law.

On the basis of the aforesaid findings, the Authority partly upholds the Appeal and orders each party to bear its own costs.

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 16th February, 2012.



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JUDGE (rtd) A. BUBESHI
CHAIRPERSON

MEMBERS:

- 1. MR. H.S. MADOFFE.....
- 2. MR. K. M. MSITA
- 3. MS. E. J. MANYESHA.....